IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force, *Appellant.*	))))))))))	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM _____ 8 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

At Kirtland Air Force Base, New Mexico, a special court-martial convicted Appellant, Staff Sergeant (SSgt) Seth D. Norris, contrary to his plea, of violating one specification of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1, 2.]

On 13 March 2024, the military judge sentenced SSgt Norris. The entry of judgment reflects his approved sentence: reduction to the pay grade of E-4, forfeiture of $2,000 pay per month for two months, and a reprimand.

SSgt Norris has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. It appears the government has still not notified SSgt Norris of his right to appeal to this Court. Pursuant to Article 66(b)(1)(A), UCMJ, SSgt Norris respectfully files his notice of direct appeal and asserts his due process right to timely post-trial and appellate review.

[1] Undersigned counsel derived the information included in this filing from the Entry of Judgment, dated 23 April 2024, which was available on the Air Force Docket website on 8 August 2024. Undersigned counsel has not yet received a copy of SSgt Norris's record of trial.
[2] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4777
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 8 August 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Seth D. NORRIS	)	**DOCKETING**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

On 8 August 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 9th day of August, 2024,

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force, *Appellant.*	)	No. ACM 24045
	)	25 September 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Seth D. Norris, Appellant, hereby moves for an enlargement of time to file his assignments of error. SSgt Norris requests an enlargement for a period of 60 days, which will end on **7 December 2024**. SSgt Norris' case was docketed with this Court on 9 August 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 27 August 2024, this Court received his record of trial, beginning the time-period for SSgt Norris to file his assignments of error. From the date of docketing to the present date, 47 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, SSgt Norris respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 September 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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30 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24045 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 September 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Seth D. NORRIS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 27 November 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This case was docketed with the court on 9 August 2024.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. In so doing the court deems it necessary to correct a misunderstanding of law reflected in Appellant's motion. Appellant appears to confuse the "triggering date" for the appellate brief filing deadlines, insofar as his appellate counsel asserts that it is not docketing but rather this court's physical receipt of the record of trial which triggers Appellant's brief filing deadlines under our rules. Not so. Rule 23.3(m)(4) of this court's Rules of Practice and Procedure provides that the applicable triggering date is: "the number of days that will have elapsed since docketing on the date requested."*

Accordingly, it is by the court on this 6th day of December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **6 January 2025**.

Appellant's counsel is advised that any subsequent requests for enlargement of time will be considered individually on their merits.

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* While filings should be computed from date of docketing, *see* A.F. CT. CRIM. APP. R. 23.3(m)(4), this court is amendable to considering delays incurred in the actual receipt of the record of trial as potential "good cause shown" to justify an enlargement of time.

In this vein, any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was pro-vided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, ordinarily will not be granted absent *exceptional circumstances*.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force,	)	No. ACM 24045
Appellant.	)	27 November 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) Seth D. Norris, Appellant, hereby moves for a second enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(4). SSgt Norris requests an enlargement for a period of 30 days, which will end on **6 January 2025**. SSgt Norris' case was docketed with this Court on 9 August 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 12 August 2024, undersigned counsel received SSgt Norris's record of trial. Then on 27 August 2024, this Court received his record of trial, beginning the time-period for SSgt Norris to file his assignments of error. From the date of docketing to the present date, 92 days have elapsed. On the date requested, 132 days will have elapsed.

At Kirtland Air Force Base, New Mexico, a military judge sitting alone as a special court-martial convicted SSgt Norris, contrary to his plea, of violating one specification of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 320. On 13 March 2024, the military judge sentenced SSgt Norris to be reduced to the pay grade of E-4, forfeit $2,000 pay per month for two months, and a reprimand. R. at 357. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

SSgt Norris's record of trial consists of 6 prosecution exhibits, 12 defense exhibits, 29 appellate exhibits, and 1 court exhibit. The transcript is 359 pages. SSgt Norris is not confined.

Through no fault of SSgt Norris, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors.

WHEREFORE, SSgt Norris respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

3 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24045 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 December 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Seth D. NORRIS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 8 August 2024, Appellant filed with this court his notice of appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A). This court docketed Appellant's case on 9 August 2024. This court received the record of trial on 27 August 2024.

On 27 November 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposed the motion.

On 6 December 2024, this court issued an order granting Appellant's motion. The order stated, *inter alia*, that the due date for the filing of assignments of error "should be computed from date of docketing," citing A.F. CT. CRIM. APP. 23.3(m)(4).*

On 12 December 2024, Appellant filed a Consent Motion to Reconsider Interlocutory Order and Suggestion for *En Banc* Proceedings. Appellant contends the court's 6 December 2024 is in tension with Rule 18(d) of the Joint Rules of Appellate Procedure, as well as with other orders issued by this court. Appellant cites the version of Rule 18(d) that was in effect prior to 17 May 2024, which provided in part, "Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court."

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* Rule 23.3(m)(4) provides, in pertinent part,

> An Appellant's motion for enlargement requiring a showing of good cause shall contain the basis for the requested enlargement and the following information: the number of days that have elapsed since the case was first docketed with the Court; the number of days that will have elapsed since docketing on the date requested . . . .

A.F. CT. CRIM. APP. 23.3(m)(4).

Effective 17 May 2024, Rule 18(d)(2) of the Joint Rules of Appellate Procedure now provides with respect to non-automatic appeals pursuant to Article 66(b)(1)(A), UCMJ, "As soon as practicable after the filing of a Notice of Appeal, the [G]overnment shall provide the Court a complete record, including a verbatim transcript, and provide a copy to the defense. An appellant's brief shall be filed no later than 60 days thereafter." JT. CT. CRIM. APP. R. 18(d)(2).

In accordance with Rule 27(c) of the Joint Rules of Appellate Procedure, Appellant's motion was transmitted to each judge of the court in regular active service, and not disqualified from participation due to a conflict of interest. JT. CT. CRIM. APP. R. 27(c). No judge requested a vote regarding *en banc* proceedings.

The panel consisting of Chief Judge Johnson, Judge Gruen, and Judge Warren voted 3–0 in favor of reconsideration.

Accordingly, it is by the court on this 20th day of December, 2024,

ORDERED:

Appellant's Consent Motion to Reconsider Interlocutory Order is **GRANTED**. This court's order prior order dated 6 December 2024 granting Appellant's Motion for Enlargement of Time (Second) is **WITHDRAWN**.

Appellant's Motion for Enlargement of Time (Second) is hereby **GRANTED**. Appellant shall file any assignments of error not later than **6 January 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**CONSENT MOTION TO**
Appellee,	)	**RECONSIDER INTERLOCUTORY**
	)	**ORDER AND SUGGESTION FOR**
v.	)	***EN BANC* PROCEEDINGS**
	)	
	)	Before Panel No. 3
Staff Sergeant (E-5)	)	
SETH D. NORRIS,	)	No. ACM 24045
United States Air Force,	)	
Appellant.	)	12 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) Seth D. Norris, Appellant, hereby moves this Court, with the United States' consent, to reconsider *en banc* the interlocutory order that was ordered in his case on 6 December 2024. JT. CT. CRIM. APP. R. 27; A.F. CT. CRIM. APP. R. 23.1(b), 31.1, and 31.3.

The Court of Appeals for the Armed Forces (CAAF) has not obtained jurisdiction of this case because no petition or certificate has been filed at the CAAF. A.F. CT. CRIM. APP. R. 31.1. Therefore, this Court may reconsider the interlocutory order it rendered. *Id*. There is good cause to reconsider this Court's order because it conflicts with previous orders from this Court and is in tension with Rule 18(d) of the Joint Rules of Appellate Practice. SSgt Norris suggests reconsideration *en banc* to provide clarity to appellants by resolving the conflict now present in orders from the panels of this Court. JT. CT. CRIM. APP. R. 27(a)(1).

The question of uniformity at issue arises in the third paragraph of the order.[1] Order, *United States v. Norris*, No. ACM 24045, 6 December 2024. There, this Court explained that docketing triggers SSgt Norris's brief-filing deadlines, not this Court's physical receipt of the

[1] This issue is also reflected in this panel's order in *United States v. Bays*, No. ACM 24043, issued on the same day, 6 December 2024.

record of trial, expounding that, under Rule 23.3(m)(4) of this Court's Rules of Practice and Procedure, "the applicable triggering date" for filing a brief is "the number of days that will have elapsed since docketing on the date requested." *Id*.

Tension with Rule 18(d) of the Joint Rules of Appellate Practice

This order is in tension with Rule 18(d) of the Joint Rules of Appellate Practice, which provides that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." It is in tension with this rule because the date of docketing and the date that the Judge Advocate General has referred the record to the Court are not the same in many direct appeal cases, including SSgt Norris's case.

SSgt Norris's case was docketed before this Court not because the Judge Advocate General referred his record to the Court but because SSgt Norris requested that docketing. Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ, *United States v. Norris*, No. ACM 24045, 8 August 2024. Records qualifying for direct appeal are first provided only to the Appellate Defense Division (JAJA), where counsel "shall be detailed to review the case." 10 U.S.C. § 865(b)(2)(A)(i). The case is then docketed following request of the direct appellant. *See* 10 U.S.C. § 866(c)(1)(A). But sometimes, such as here, a direct appellant must provide their notice of direct appeal before their record has been provided to the JAJA. This is because the Judge Advocate General "shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1))." 10 U.S.C. § 865(b)(2)(A)(i). Once the Judge Advocate General provides this notice to the accused, the accused must file a notice of a direct appeal within 90 calendar days, regardless of whether their record has been completed and delivered to the JAJA. 10 U.S.C. § 866(c)(1)(A) ("An appeal under subsection (b)(1) is

timely if in the case of an appeal under subparagraph (A) of such subsection, it is filed before the later of the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title"). If the JAJA has not yet received the accused's record of trial, the accused may contact the JAJA to file a timely notice of a direct appeal.

For SSgt Norris to file a timely notice of direct appeal, he had to file his notice of appeal before the JAJA had received a copy of his record of trial. In his notice of direct appeal, SSgt Norris explained that undersigned counsel had not yet received a copy of the record of trial.[2] Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ, *United States v. Norris*, No. ACM 24045, 8 August 2024. And in this Court's Notice of Docketing, this Court confirmed it had also "not yet received a record of trial in [SSgt Norris's] case." Notice of Docketing, *United States v. Norris*, No. ACM 24045, 9 August 2024.

While SSgt Norris's record of trial was delivered to undersigned counsel on 12 August 2024 and to this Court on 27 August 2024, it is possible that it can take a significant amount of time before a record of trial is delivered to the JAJA or referred to this Court by the Judge Advocate General.[3] If an appellant must file a brief based on the date of docketing (where the timing of this docketing is primarily driven by the Judge Advocate General's notice regardless of whether the record has been completed) rather than the referral of the record of trial to the Court, that appellant may be forced to request an enlargement of time (while waiting for the

[2] Undersigned counsel explained within SSgt Norris's notice of direct appeal that she derived the information included in that filing from the Entry of Judgment which was available on the Air Force Trial Docket website, however, this is not a substitute for the record of trial because this website often includes only some documents from an accused's court-martial, not the complete record of trial, and those documents may not be accurate to what is in the record of trial.

[3] For example, the appellant in *United States v. Dawson*, No. ACM 24041, filed a notice of direct appeal on 25 September 2023 and his record of trial was not received until 9 August 2024. Notice of Docketing, *United States v. Dawson*, No. ACM 24041, 4 October 2023; Order, *United States v. Dawson*, No. ACM 24041, 1 October 2024.

Judge Advocate General to deliver the record of trial to the JAJA and this Court). Even if the delivery only takes a matter of days or weeks, that time should not count against the appellant's 60 days for filing a brief because it is not a matter in an appellant's control. Moreover, this Court should consider the practical impact of requiring an appellant to file enlargements of time before the record of trial has been referred to the Court: it will generate more required filings from both JAJA and Air Force Appellate Government Division (JAJG), which will consume valuable time that could otherwise be devoted to making progress on records that have been referred to the Court.

Conflict with Orders from this Panel and other Panels of this Court

This Court's order also conflicts with previous orders from this Court. In *United States v. Ching*, this Court relied on Rule 18 of the Joint Rules of Appellate Practice and explained that the time for filing a brief would begin to run once appellate counsel was notified that the Judge Advocate General had referred the record of trial to this Court. Order, *United States v. Ching*, No. ACM 40590, 19 October 2023. This order in *Ching* was from the judges that then constituted Panel 3. On the same date, Panel 3 also found the same in *United States v. Hoang*. Order, *United States v. Hoang*, No. ACM 22082, 19 October 2023. Panel 1, as it was then constituted, also found the same in *United States v. Dawson* and *United States v. Veasley*. Order, *United States v. Dawson*, No. ACM 24041, 20 October 2023; Order, *United States v. Veasley*, No. ACM 23009, 20 October 2023. Further, in *Ching*, *Dawson*, *Hoang*, and *Veasley*, the Government agreed that the appellant's timeline for filing a brief did not begin until the Judge Advocate General had referred the record to the Court."[4]

[4] Each of these filings were styled the same ("United States' Response to Appellant's Motion to Attach and Suspend Rule 18") and filed on 12 October 2023.

Following the orders in *Ching*, *Dawson*, *Hoang*, and *Veasley*, for example, many direct appellants (whose cases were docketed pursuant to Article 66(b)(1)(A), UCMJ) have filed enlargements of time based on the date that this Court received their record of trial (meaning at least 7 days prior to the date that is 60 days from the Court's receipt of the record, while separately noting the number of days that will have elapsed since docketing on the date requested), and these motions have been granted and were not required to be filed out of time.

Given the now present conflict with orders from this panel and other panels of this Court, this Court should reconsider the interlocutory order in SSgt Norris's case *en banc* because it is necessary to secure uniformity across the panels. JT. CT. CRIM. APP. R. 27(a)(1). SSgt Norris does not request that this Court reconsider whether his Motion for Enlargement of Time (Second) should be granted.

Undersigned counsel has consulted with the JAJG. The JAJG agrees to the request for motion for reconsideration *en banc* and agrees that this Court should set the trigger date for filing a brief as running from the date appellate counsel was notified that the Judge Advocate General had referred the record of trial to this Court.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Appellate Government Division on 12 December 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Seth D. NORRIS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 27 December 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, prior filings by the parties and rulings by this court, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 31st day of December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Third) is **GRANTED**. Appellant shall file any assignments of error not later than **5 February 2025**.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS**, United States Air Force *Appellant*	)	No. ACM 24045 Filed on: 27 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(m)(3) and 23.3(m)(4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on **5 February 2025**.

On 8 August 2024, Appellant filed a Notice of Direct Appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ). Appellant's case was docketed with this Court on 9 August 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 12 August 2024, the Air Force Appellate Defense Division received Appellant's record of trial. Then on 27 August 2024, this Court received his record of trial, beginning the time-period for Appellant to file his assignments of error. From the date the record of trial was delivered to this Court to the present date, 122 days have elapsed. On the date requested, 162 days will have elapsed from the date the record of trial was delivered to this Court. From the date Appellant's case was docketed to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed from the date of docketing.

At Kirtland Air Force Base, New Mexico, a military judge sitting alone as a special

court-martial convicted Appellant, contrary to his plea, of violating one specification of Article 128, UCMJ, 10 U.S.C. § 928. R. at 320. On 13 March 2024, the military judge sentenced Appellant to be reduced to the pay grade of E-4, forfeit $2,000 pay per month for two months, and a reprimand. R. at 357. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

Appellant's record of trial consists of 6 prosecution exhibits, 12 defense exhibits, 29 appellate exhibits, and 1 court exhibit. The transcript is 359 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has recently been detailed to Appellant's case and has yet to complete his review of Appellant's case. Further, undersigned counsel is a reservist who is not currently on orders. However, Appellant's case will have docket priority and undersigned counsel anticipates coming on orders in January 2025 to complete his review of Appellant's case. Accordingly, the requested enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellant Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 December 2024.

THOMAS R. GOVAN, JR., Capt, USAF
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30 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24045 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force, *Appellant.*	)	No. ACM 24045 3 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Undersigned counsel, Major (Maj) Samantha Golseth, moves to withdraw her appearance as appellate defense counsel in the above-captioned case. JT. CT. CRIM. APP. R. 12(b), 23; A.F. CT. CRIM. APP. R. 12.4, 23.3(h). Staff Sergeant (SSgt) Seth D. Norris, Appellant, consents to Maj Golseth's withdrawal as appellate defense counsel. Captain Thomas R. Govan, Jr., has been detailed to represent SSgt Norris and provided notice of his appearance in Appellant's Motion for Enlargement of Time (Second), filed on 27 December 2024. A thorough turnover of the record between counsel was completed prior to that filing. The reason for Maj Golseth's withdrawal is because Capt Govan is available to review SSgt Norris's record of trial sooner than Maj Golseth. Capt Govan anticipates reviewing SSgt Norris's record while he is on orders in January 2025. Appellant's Motion for Enlargement of Time (Second), 27 December 2024. A copy of this motion will be sent to SSgt Norris simultaneous to its filing.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Air Force Appellate Defense Division
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Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 January 2025.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS**, United States Air Force *Appellant*	)	No. ACM 24045 Filed on: 27 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(m)(3) and 23.3(m)(4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on **7 March 2025**.

On 8 August 2024, Appellant filed a Notice of Direct Appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ). Appellant's case was docketed with this Court on 9 August 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 12 August 2024, the Air Force Appellate Defense Division received Appellant's record of trial. Then on 27 August 2024, this Court received his record of trial, beginning the time-period for Appellant to file his assignments of error. From the date the record of trial was delivered to this Court to the present date, 153 days have elapsed. On the date requested, 193 days will have elapsed from the date the record of trial was delivered to this Court. From the date Appellant's case was docketed to the present date, 171 days have elapsed. On the date requested, 211 days will have elapsed from the date of docketing.

At Kirtland Air Force Base, New Mexico, a military judge sitting alone as a special

court-martial convicted Appellant, contrary to his plea, of violating one specification of Article 128, UCMJ, 10 U.S.C. § 928. R. at 320. On 13 March 2024, the military judge sentenced Appellant to be reduced to the pay grade of E-4, forfeit $2,000 pay per month for two months, and a reprimand. R. at 357. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

Appellant's record of trial consists of 6 prosecution exhibits, 12 defense exhibits, 29 appellate exhibits, and 1 court exhibit. The transcript is 359 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has recently been detailed to Appellant's case. Undersigned counsel has recently completed his initial review of the record of trial in Appellant's case. However, undersigned counsel will need additional time to brief the issues and review the issues with the Appellant. Further, undersigned counsel is a reservist who is not currently on orders. Due to undersigned counsel's civilian schedule, undersigned counsel will not have an ability to come on orders until mid-February. However, Appellant's case will have docket priority and undersigned counsel anticipates coming on orders in January 2025 to complete his review of Appellant's case. Moreover, barring unforeseen circumstances, undersigned counsel does not anticipate seeking another 30-day enlargement of time.

Undersigned counsel has discussed this specific request with the Appellant. Specifically, (1) undersigned counsel has advised the Appellant of his right to a timely appeal; (2) undersigned counsel provided the Appellant an update on the status of counsel's progress in the case, (3) undersigned counsel advised Appellant about this specific request for an enlargement of time, and (4) the Appellant agrees with the request for the enlargement of time.

Accordingly, the requested enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
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(240) 612-4770
Email: thomas.govan@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 January 2025.

THOMAS R. GOVAN, JR., Capt, USAF
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29 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24045 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 January 2025.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Seth D. NORRIS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 24 February 2025, counsel for Appellant submitted a Motion to Examine Sealed Material, requesting to be allowed to examine Appellate Exhibits XVI and XVII, which were reviewed by trial counsel and trial defense counsel at Appellant's court-martial. The Government does not oppose the motion so long as its counsel are also permitted to view the sealed material.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities . . . ." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 26th day of February, 2025,

ORDERED:

Appellant's Motion to Examine Sealed Materials dated 24 February 2025 is **GRANTED**.

Appellate defense counsel and appellate government counsel may view Appellate **Exhibits XVI and XVII**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, re

produce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS** United States Air Force *Appellant*	)	No. ACM 24045 24 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following exhibits included in Appellant's record of trial: Appellate Exhibit XVI (Defense Motion to Admit Evidence Pursuant to M.R.E. 412, dated 8 February 2024) and Appellate Exhibit XVII (Defense Supplemental Motion to Admit Evidence Pursuant to M.R.E. 412, dated 16 February 2024). This material was presented and reviewed by trial and defense counsel, included as part of the pretrial motions filed in this case, and sealed by the military judge. R. at 48-50.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced exhibits is necessary to conduct a complete review of the record of trial and advocate competently on behalf of Appellant. Undersigned counsel's review of these materials is necessary to fully evaluate Appellant's case.

Furthermore, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to affirm "only such findings as the Court finds correct in law" and, upon request of the accused,

findings that are "correct in fact." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine the entire record:

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion.

Respectfully Submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 February 2025.

Respectfully Submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
(240) 612-4770

25 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL No. ACM 24045 Before Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials. The United States does not object to Appellant's counsel reviewing the exhibits, which appear to have been reviewed by both parties at trial, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

[redacted]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 February 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS**, United States Air Force *Appellant*	)	No. ACM 24045 Filed on: 27 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(m)(3) and 23.3(m)(4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 21 days, which will end on **28 March 2025**.

On 8 August 2024, Appellant filed a Notice of Direct Appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ). Appellant's case was docketed with this Court on 9 August 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 12 August 2024, the Air Force Appellate Defense Division received Appellant's record of trial. Then on 27 August 2024, this Court received his record of trial, beginning the time-period for Appellant to file his assignments of error. From the date the record of trial was delivered to this Court to the present date, 184 days have elapsed. On the date requested, 213 days will have elapsed from the date the record of trial was delivered to this Court. From the date Appellant's case was docketed to the present date, 202 days have elapsed. On the date requested, 231 days will have elapsed from the date of docketing.

At Kirtland Air Force Base, New Mexico, a military judge sitting alone as a special

court-martial convicted Appellant, contrary to his plea, of violating one specification of Article 128, UCMJ, 10 U.S.C. § 928. R. at 320. On 13 March 2024, the military judge sentenced Appellant to be reduced to the pay grade of E-4, forfeit $2,000 pay per month for two months, and a reprimand. R. at 357. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

Appellant's record of trial consists of 6 prosecution exhibits, 12 defense exhibits, 29 appellate exhibits, and 1 court exhibit. The transcript is 359 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has recently been detailed to Appellant's case. Undersigned counsel has completed his initial review of the record of trial in Appellant's case and has begun the briefing process. However, on 24 February 2025, Appellant filed a Motion to Examine Sealed Materials. Within that motion, counsel requested permission to review two exhibits, Appellate Exhibits XVI and XVII, that were available to trial and defense counsel but were sealed at trial by the military judge. This Court granted the motion on 26 February 2025 and directed counsel to coordinate with the Court to view the sealed materials. Undersigned counsel will need additional time to schedule a review of this material with this Court, specifically because undersigned counsel is a reservist, who is not currently on orders. Undersigned counsel will be coming on orders on 17 March 2025 to complete review of the sealed materials and complete briefing of Appellant's case. Undersigned counsel anticipates that the review of the sealed materials will be one of the final aspects of undersigned counsel's review and briefing of this case. Appellant's case will have docket priority. Finally, undersigned counsel asserts that this requested enlargement of time likely will be the final enlargement of time that is necessary in this case.

Undersigned counsel has discussed this specific request with the Appellant. Specifically,

(1) undersigned counsel has advised the Appellant of his right to a timely appeal; (2) undersigned counsel provided the Appellant an update on the status of counsel's progress in the case, (3) undersigned counsel advised Appellant about this specific request for an enlargement of time, and (4) the Appellant agrees with the request for the enlargement of time.

Accordingly, the requested enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellant Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 February 2025.

THOMAS R. GOVAN, JR., Capt, USAF
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28 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) SETH D. NORRIS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24045 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignments of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 February 2025.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force *Appellant*	)	No. ACM 24045 28 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Assignments of Error

I.

WHETHER STAFF SERGEANT NORRIS'S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY SUFFICIENT?

II.

WHETHER THE ENTRY OF JUDGMENT SHOULD BE CORRECTED TO REFLECT THAT THE CONVENING AUTHORITY WITHDREW AND DISMISSED CHARGE I AND CHARGE III AFTER REFERRAL?

III.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE RECORD DOES NOT INDICATE WHETHER THE ORIGINAL CHARGE SHEET WAS INLCUDED?[1]

Statement of the Case

On 11-13 March 2024, Staff Sergeant (SSgt) Seth D. Norris was tried by a special court-martial composed of a military judge alone at Kirtland Air Force Base (AFB), New Mexico. R. at

[1] Staff Sergeant Norris raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

1. Contrary to SSgt Norris's plea, the military judge found him guilty of one charge and specification of assault consummated by battery (Charge II), in violation of Article 128, Uniform Code of Military Justice (UCMJ).[2] R. at 320.[3] Specifically, the military judge found that SSgt Norris did "unlawfully grab [C.F.] on the back of the neck with his hand." R. at 320; Vol. 1, Entry of Judgment, 23 April 2024. The military judge sentenced SSgt Norris to reduction to the grade of E-4, forfeiture of $2,000 pay per month for two months, and a reprimand. R. at 357. The convening authority took no action on the findings or sentence. Vol. 1, Convening Authority Decision on Action, 15 April 2024.

Statement of Facts

A. Background on SSgt Norris and C.F.'s interactions.

SSgt Norris and C.F. met in April 2022, when C.F. joined the Maintenance Squadron at Kirtland AFB after completing Tech School. R. at 110-12. SSgt Norris served as C.F.'s shift lead from April to December 2022. R. at 112. During work hours, C.F. would often "mess" with SSgt Norris's property to annoy him. R. at 190. C.F. admitted that she had taken or removed his property, such as wearing his sunglasses and taking the patches off the arm of his uniform. R. at 154-55. C.F. also kicked SSgt Norris's shoes and shins and poured pencil shavings on his head. R. at 191. In response to this behavior, C.F. admitted that SSgt Norris had to ask her to stop after

[2] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

[3] The government also preferred one charge and two specifications of dereliction of duty (Charge I), in violation of Article 92, UCMJ, and one charge and specification of sexual harassment (Charge III), in violation of Article 134, UCMJ, but the Convening Authority withdrew and dismissed those charges prior to trial on 29 February 2024. R. at 25; Volume (Vol.) 1, Charge Sheet.

she "messed" with his property and that he had to repeatedly ask C.F. to give back his property. R. at 153-54, 162.

C.F. became upset with SSgt Norris in November 2022 because she believed SSgt Norris had caused an argument between C.F.'s then-boyfriend and herself. R. at 138. C.F. discovered messages from another woman after going through her then-boyfriend's phone without his knowledge. R. at 136-37. C.F. subsequently told SSgt Norris the name of the woman. R. at 136-37. C.F.'s then-boyfriend discovered C.F. went through his phone after he had an unrelated conversation with SSgt Norris in which SSgt Norris mentioned the name of the woman C.F. had disclosed to him. R. at 136-37. C.F. admitted that she got upset with SSgt Norris for letting that information out. R. at 138.

B. *The 3 December 2022 incident.*

On 3 December 2022, SSgt Norris invited several Airmen, including C.F., to his house to watch a movie prior to their unit's holiday party. R. at 113-14. Notably, in the corner of his living room, SSgt Norris had numerous shoe boxes stacked to the ceiling. R. at 116. After the movie ended, another Airman who was present, Airman First Class (A1C) C.G., complimented SSgt Norris on the number of shoes that he had. R. at 173-74. SSgt Norris then offered to show A1C C.G. his shoe collection located in a closet past the kitchen. R. at 174. C.F. followed SSgt Norris and A1C C.G. to the closet, while the remaining Airmen remained in the kitchen. R. at 118, 120, 175. Direct evidence of what occurred in the closet was elicited from two witnesses: the sole independent eyewitness, A1C C.G. and the complainant, C.F.

1. *A1C C.G. testified that SSgt Norris nudged C.F. between the neck and shoulder after he asked her three times to stop touching his property.*

A1C C.G. testified that SSgt Norris opened the door to his closet, which was full of expensive, collectible shoes. R. at 175, 194, 197. The room was neatly organized, but was so full

of shoes that A1C C.G. could not walk into the room. R. at 175. A1C C.G., also a fan of collectible shoes, had bought and sold shoes in the past. R. at 193-94. He stated that SSgt Norris's shoes were "essentially brand-new" and that there were no signs of creases, cuts, or scratches on them. R. at 196-97. A1C C.G. stated that each pair of SSgt Norris's shoes would be valued between $400-$500, but that any damage to the shoes, such as getting a scuff or crease or having a tag removed, would lower the shoe's value. R. at 194-95, 197.

After looking at the shoe collection for about a minute and a half, A1C C.G. again complimented SSgt Norris and then left the closet. R. at 175. As he walked back to the kitchen, A1C C.G. heard "stuff kind of moving around" and chatter coming from C.F. and SSgt Norris, who were still in the closet. R. at 177. A1C C.G. could tell that C.F. was "messing" with SSgt Norris's shoes by these noises because she was the only one in the closet and SSgt Norris was still in the doorway. R. at 199. By the time A1C C.G. turned around to see what was occurring, he testified that he had heard SSgt Norris tell C.F. three times, in an escalating tone, to "stop touching my shoes." R. at 177, 199-200.

When he turned around, A1C C.G. could see the left half of SSgt Norris's body. R. at 177. A1C C.G. could not fully see C.F. because SSgt Norris was in the doorway, but he could see C.F.'s shoulder area. R. at 178, 201. A1C C.G. then saw SSgt Norris put his left hand on C.F. "between the neck and shoulder." R. at 178-79. A1C C.G. described the area where SSgt Norris made contact with C.F. as where "if you were going to wear a tank top, where the strap would be[.]" R. at 178. But A1C C.G. made clear that he saw SSgt Norris's hand the whole time and that he did not grab C.F. by the neck. R. at 184, 219.

A1C C.G. described the contact as a "nudge," in a manner "just to move something out of the way." R. at 202. A1C C.G. explained that SSgt Norris was "not using full force," that he

"could see no like tension," and that it was like someone turning someone else away from something. R. at 178, 204. In fact, C.F. felt it was something he might have done in a similar situation. R. at 202.

A1C C.G. then saw C.F. fall to the ground, but explicitly stated that SSgt Norris did not push C.F. to the ground. R. at 203. Rather, she just fell straight down like dead weight, landing into a sitting position with her legs crisscrossed, and she started to get upset. R. at 185, 203. After C.F. sat on the ground, A1C C.G. noted that "[e]verybody was just confused as to why she dropped to the ground like that," including SSgt Norris. R. at 205. A1C C.G. said that C.F. stayed sitting on the ground for one or two minutes, then got up and started yelling at SSgt Norris that "Oh, you're not allowed to touch me," and then C.F. tried to hit SSgt Norris multiple times. R. at 186, 205-06. According to A1C C.G., SSgt Norris tried to deescalate the situation by grabbing her arms and telling her stop. R. at 187, 207. C.F. then grabbed her belongings and left SSgt Norris's house. R. at 187.

Later that evening, A1C C.G. saw C.F. at the gas station and asked her if she was okay. R. at 207-09. C.F. then told A1C C.G., "[y]ou better not side with that motherfucker." R. at 211.

2. *C.F. testified that SSgt Norris grabbed her neck.*

C.F.'s version of events differed substantially from A1C C.G.'s testimony. C.F. said that after A1C C.G. looked at SSgt Norris's shoes and stepped out of the closet, she saw a pair of shoes that looked interesting and made a comment that those particular shoes looked ugly. R. at 120-21. C.F. stated that she bent down to pick up those shoes and then felt SSgt Norris's hand on the back of her neck. R. at 122-23. C.F. asserted that the grab was "pretty harsh." R. at 124. C.F. testified that SSgt Norris then left her in the closet on the ground and walked to the kitchen. R. at 126.

C.F. said that she was upset with SSgt Norris, and she went into the kitchen "to defend myself by slapping him." R. at 127.

On cross-examination, C.F. admitted that she did touch SSgt Norris's shoes. R. at 142. In contradiction to A1C C.G.'s testimony, C.F. denied that SSgt Norris told her not to touch his shoes. R. at 144. C.F. also stated that SSgt Norris only touched her with one hand, but admitted that after the incident, she made a post on Snapchat that he used both hands and that he threw her to the ground. R. at 146-47, 149. C.F. also conceded that in her interview with law enforcement in December 2022, she said the pressure of the grab was a six on a scale of one to ten, but later told trial counsel in June 2023 that the pressure was a nine out of ten. R. at 148.

C. *Multiple witnesses testified concerning C.F.'s character for untruthfulness, attention seeking, and exaggeration.*

Several witnesses testified during findings concerning C.F.'s untruthfulness and tendency to exaggerate. Senior Airman (SrA) K.S., who knew C.F. for over a year, testified that "I wouldn't say she's the most truthful person," and that C.F. had a character for untruthfulness. R. at 226, 228. SrA K.S. also described C.F. as having an "attention seeking" character. R. at 228. SSgt N.Y. echoed that he "believe[d] [C.F.] can be an untruthful person" and that C.F. had a reputation of someone who would seek attention. R. at 241-42. Finally, A1C E.R. testified that she worked with C.F. and that she was one of her close friends. R. at 248-49. But A1C E.R. admitted that she had observed C.F.'s character for exaggeration in the past. R. at 250.

Additional facts are incorporated in the argument section below.

Argument

I.

STAFF SERGEANT NORRIS'S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

The Court reviews a finding of guilty for legal sufficiency de novo. Article 66(d), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Upon asserting an assignment of error and a showing of specific deficiency in proof, this Court may review a finding of guilty for factual sufficiency de novo. Article 66(d), UCMJ; *United States v. Harvey*, 85 M.J. 127, 130-31 (C.A.A.F. 2024).

Law

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citing *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

For factual sufficiency, for offenses occurring after 1 January 2021, this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ.[4] Upon such a showing, this Court may conduct its own assessment of the evidence while giving "appropriate deference" to the factfinder's observations of witnesses and other evidence. Article 66(d)(1)(B)(ii). If after this review, "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding." Article 66(d)(1)(B)(iii).

[4] Manual for Courts-Martial, United States (2024 ed.)

Further, Article 66(d)(1)(B), UCMJ, "affords [this Court] discretion to determine what level of deference is appropriate." *Harvey*, 85 M.J. at 131. This Court "does not have to give complete deference to the court-martial," and may "weigh the evidence differently from how the court-martial weighed the evidence." *Id.*

Notably, the statutory change to Article 66(d)(1)(B), UCMJ, did not alter the burden of proof—beyond a reasonable doubt—which the evidence must support.[5] *Id.* at 132. Rather, to determine that a finding of guilt is factually insufficient, Article 66(d)(1)(B), UCMJ, requires only two things: "First, the CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision." *Id*. (emphasis in original).

Analysis

The finding of guilty against SSgt Norris for assault consummated by a battery was both legally and factually insufficient. To be found guilty of assault consummated by battery, the evidence had to establish beyond a reasonable doubt: (1) that SSgt Norris did bodily harm to C.F.; (2) that that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. 2019 MCM, ¶ 77.b.(2).

Here, the evidence presented failed to meet either the legal or factual sufficiency standards for several reasons. First, the government failed to prove the charged conduct that SSgt Norris grabbed the back of C.F.'s neck. The sole independent eyewitness to the incident explicitly stated that SSgt Norris did not grab C.F.'s neck. Despite C.F.'s testimony to the contrary, the

[5] It should be noted that some contours of this factual sufficiency review remain subject to further judicial determination, as the Court of Appeals for the Armed Forces has granted review on a case involving the application of Article 66(d)(1)(B), UCMJ. *See, e.g., United States v. Csiti*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024) (mem.).

inconsistencies in her story, her motive to fabricate, her pervasive character for untruthfulness, and her tendency to exaggerate created more than reasonable doubt as to the charge. Second, given these significant deficits in C.F.'s credibility, the government also failed to prove that any contact SSgt Norris may have made was an offensive touch. Finally, the government failed to prove that any contact SSgt Norris made with C.F. was unlawful, given that he reasonably believed some minimal application of force was necessary to defend his personal property. Each of these reasons, independently supports a clear and convincing reason for this Court to dismiss the charge and specification.

A. *The government failed to prove the charged conduct beyond a reasonable doubt.*

The government controls the charge sheet. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) ("It is the government's responsibility, by virtue of its control of the charge sheet, to place the accused on notice of the offense he must defend against."). Here, the government charged that SSgt Norris violated Article 128, UCMJ, by "unlawfully grab[bing] [C.F.] on the back of the neck with his hand." Vol. 1, Charge Sheet. Once the government made that charging decision, it was required to prove those facts beyond a reasonable doubt. *See United States v. Richard*, 82 M.J. 473, 474 (C.A.A.F. 2022) (holding that once the government chose to limit itself in charging an element of the offense, it was required to prove the element it decided to charge).

Here, the government's chosen charging scheme required it to prove that SSgt Norris grabbed C.F. on the back of the neck with his hand. It failed to do so. The evidence presented, even when viewed in a light most favorable to the government, demonstrates that it failed to prove every fact beyond a reasonable doubt that was necessary to constitute the crime it alleged occurred because it did not prove SSgt Norris grabbed C.F.'s neck. A1C C.G., the only eyewitness to the incident apart from the complainant, specifically testified that he saw SSgt Norris's hand the entire

time during the incident and that SSgt Norris never grabbed C.F.'s neck. R. at 201, 219. Instead, A1C C.G. stated that SSgt Norris gave C.F. a "nudge" in the area "between [C.F.'s] neck and her [] shoulder." R. at 201-02. A1C C.G. clarified that was the area "if you were going to wear a tank top, where the strap would be[.]" R. at 178.

A1C C.G.'s testimony alone established reasonable doubt. Specifically, it confirmed that the evidence did not establish that SSgt Norris caused bodily harm to C.F. in the manner the government had charged.

To be sure, the complainant, C.F., did claim that SSgt Norris grabbed her neck. R. at 123-24. But in contrast to A1C C.G., C.F.'s testimony exhibited critical inconsistencies with her prior statements, she had built-in bias against SSgt Norris, and substantial evidence of C.F.'s character for untruthfulness and exaggeration was presented—the sum of which cast serious doubt on C.F.'s credibility. Although this Court must give appropriate deference to the fact that the military judge heard C.F.'s testimony, it may "weigh the evidence differently from how the court-martial weighed the evidence," based "on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130-31. Here, as part of this Court's own weighing of the evidence, given the substantial credibility issues with her testimony, C.F.'s version of the events should not be credited.

First, C.F.'s testimony revealed several key inconsistencies. During trial, C.F. claimed that her hand was on SSgt Norris's shoes, but she did not lift them. R. at 142. But during the defense's case, the defense presented testimony from a paralegal who was present during a defense interview with C.F. the month before trial, who testified that C.F. stated that she did pick up one of SSgt Norris's shoes. R. at 255. Moreover, C.F. admitted that SSgt Norris was behind her when he allegedly grabbed her neck and that she could not see his face, R. at 145, but in a previous interview with the government in June 2023, C.F. claimed that SSgt Norris made a face and then grabbed

her neck. R. at 259-60. Further, the evidence indicated that C.F. posted on Snapchat and initially told investigators that SSgt Norris put his "hands" on her. R. at 146-47, 268. However, she testified at trial that SSgt Norris only used one hand to touch her. R. at 146-47, 268.

Second, C.F. had a motive to target SSgt Norris because of a prior incident between them. C.F. admitted she got upset with SSgt Norris, just one month before the 3 December 2022 incident, for the role she believed SSgt Norris had played in letting out information that caused an argument with C.F.'s then-boyfriend. R. at 138. Indeed, the appreciable effect of C.F.'s bias against SSgt Norris could be felt when trial defense counsel attempted to question C.F. about these circumstances. Specifically, when trial defense counsel asked C.F. about the fact that her then-boyfriend broke up with her after SSgt Norris let certain information out, C.F. crossed her arms and stated, "[n]o comment on that," requiring the military judge to instruct her to answer the question. R. at 136.

Third, the evidence established that C.F. exhibited a character to exaggerate. Three different Airmen testified that C.F. either exaggerated or had a character for untruthfulness. One witness asserted that she "wouldn't say [C.F. is] the most truthful person," and that C.F. had a character for untruthfulness and attention seeking. R. at 228. Another witness testified that C.F. "can be an untruthful person." R. at 241. Even one of C.F.'s close friends, A1C E.R., said that she observed C.F. exaggerate in the past. R. at 250.

Given the serious credibility issues evident in C.F.'s testimony, the "nature of the evidence at issue," *Harvey*, 85 M.J. at 130, substantiates the conclusion that any deference to the military judge's assessment of C.F.'s testimony should be low. Thus, when weighing C.F.'s lack of credibility concerning the incident with A1C C.G.'s eyewitness testimony that directly contradicted C.F.'s version of events, this Court should be clearly convinced that the government

failed to prove that SSgt Norris unlawfully grabbed C.F.'s neck with his hand beyond a reasonable doubt.

Whether under a legal or factual sufficiency review, this Court must find that the government proved every fact necessary to constitute the crime that it charged. *See In re Winship*, 397 U.S. 358, 364 (1970) (holding "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To prove a violation of Article 128, UCMJ, the government may not have been required to draft the specification alleging the means by which the alleged assault occurred with specificity. But the government chose to allege that SSgt Norris unlawfully grabbed C.F. on the back of the neck with his hand. "[O]nce that charging decision was made, it was bound to abide by it." *English*, 79 M.J. at 120 (noting that "when [the government] narrowed the scope of the charged offense by alleging the particular type of force, it was required to prove the facts as alleged."). Because the government failed to prove a fact it was required to prove, SSgt Norris's conviction is legally and factually insufficient.

B. *The government failed to prove beyond a reasonable doubt that SSgt Norris did bodily harm.*

To convict SSgt Norris, the government had to prove beyond a reasonable doubt that he did bodily harm to C.F. 2019 MCM, ¶ 77.b.(2). "Bodily harm" is defined as "an offensive touching of another, however slight." 2019 MCM, ¶ 77.c.(1)(a). But reasonable doubt permeated the government's attempt to prove this element of the offense, particularly when considering that physical contact marked C.F.'s relationship with SSgt Norris.

In contrast to C.F.'s generic, self-serving testimony that SSgt Norris's alleged grab was offensive and uninvited, R. at 123-24, A1C C.G. described SSgt Norris's actions as a "nudge…just to move something out of the way," after SSgt Norris had asked C.F. three times to stop touching

his shoes. R. at 202. A1C C.G. testified that no extra force was involved and that it was something he might have done in a similar situation. R. at 202. Moreover, A1C C.G. said that he never heard C.F. say that the touch hurt. R. at 203.

More importantly, the government failed to prove the alleged touch was offensive, given the evidence of C.F.'s past interactions with SSgt Norris in the workplace. C.F. "messed" with and annoyed SSgt Norris during work by instigating physical contact. R. at 153-54, 190-91. C.F. kicked SSgt Norris's shoes and shins. R. at 191. She poured pencil shavings on his head. R. at 191. She admitted she took patches off SSgt Norris's uniform. R. at 154. She would take his property and sometimes would not give it back until he asked repeatedly. R. at 162.

United States v. Johnson, 54 M.J. 67 (C.A.A.F. 2000), in which the Court of Appeals for the Armed Forces reversed the appellant's conviction for assault consummated by battery for giving the complainant a back rub, is instructive here. In *Johnson*, the C.A.A.F. noted that a backrub, under certain circumstances, could constitute an offensive touching. *Id*. at 69. But the court held that, based on the facts presented in that case, the backrub was not offensive because the appellant was not on notice that the complainant did not consent to the backrub. *Id*. at 70. A critical fact in the C.A.A.F.'s analysis was that "[n]umerous types of touches marked [the complainant's] relationship with appellant, none of which [the complainant] testified were offensive." *Id*. at 69. Although *Johnson* involved a different issue concerning whether the appellant had a mistaken belief as to whether the complainant consented to the backrubs, its reasoning concerning the significance of the nature of the physical contact involved in the relationship between the accused and the complainant applies in full force to SSgt Norris's case.

Similar here, under either a legal sufficiency review or as part of weighing this evidence in a factual sufficiency review, this Court should consider the critical nature of this background

between SSgt Norris and C.F. In short, physical contact between C.F. and SSgt Norris was not abnormal. C.F. routinely engaged in and initiated physical contact with SSgt Norris, as part of workplace banter. Often, such as when C.F. took SSgt Norris's property at work, SSgt Norris had to repeatedly ask for his property back—similar to how SSgt Norris repeatedly asked C.F. to stop messing with his shoes. This background created reasonable doubt as to whether SSgt Norris's alleged nudge of C.F. constituted an offensive touching. The evidence dictates that this incident not only failed to reasonably qualify as offensive, but was consistent with their relationship where physical contact frequently occurred, often after being instigated by C.F.

This evidence on the commonplace nature of physical contact between C.F. and SSgt Norris, coupled with the evidence of C.F.'s bias against SSgt Norris and her character for exaggeration, further confirms that strong reasonable doubt existed as to whether an offensive touching occurred. C.F.'s relationship with SSgt Norris exhibited a pattern: C.F. would become upset and embarrassed about an incident, exaggerate SSgt Norris's role in the incident, and then project blame on him. For instance, C.F.'s then-boyfriend broke up with her after he found out she had gone through his phone. R. at 135-36. But rather than recognizing how her own actions contributed to the breakdown of the relationship, C.F. got upset with SSgt Norris and blamed him for C.F.'s then-boyfriend being mad at her. R. at 137-38. Similarly, after SSgt Norris repeatedly told C.F. three times to stop messing with his shoes, the evidence shows that he merely nudged her to move her away from his property—an action not inconsistent with their relationship where C.F. annoyed and messed with him physically. After sitting on the floor for a minute or two, C.F. again became embarrassed, exaggerated SSgt Norris's role in what occurred in the closet, placed blame onto him without considering what she had done to instigate the incident, and began to

attempt to hit SSgt Norris in front of others. Given this evidence, reasonable doubt existed as to whether the government proved that an offensive touching occurred.

C. *Even if bodily harm was proven, the government failed to prove beyond a reasonable doubt that it was unlawful.*

To convict SSgt Norris, the government had to prove beyond a reasonable doubt that the bodily harm was done unlawfully. 2019 MCM, ¶ 77.b.(2)(b). Defense of property is "an affirmative defense to a charge of assault consummated by a battery, although it is more accurate to refer to defense of property as a 'special defense,' and that the prosecution continuously bears the burden of proving beyond a reasonable doubt that the defense did not exist." *United States v. Proctor*, No. ACM S32554, 2020 CCA LEXIS 196, at *24 (A.F. Ct. Crim. App. June 4, 2020) (citing *United States v. Davis*, 73 M.J. 268, 271 n.3 (C.A.A.F. 2014)) (quotation marks omitted).

There are multiple theories under which the special defense of defense of property may be applied. *Davis*, 73 M.J. at 271. Under the facts here, to apply the defense in the context of an imminent threat to the property, "the accused must have had a reasonable belief that his real or personal property was in immediate danger of trespass or theft; and the accused must have actually believed that the force used was necessary to prevent a trespass or theft of his real or personal property." *Id.* "The accused's subjective belief that the force was necessary must also be reasonable." *Id*. at 272. In determining the reasonableness of the accused's subjective belief as to the amount of force necessary, this Court "must look at the situation through the eyes of the accused and consider the circumstances known to the accused at the time." *Id*.

Even if the government proved beyond a reasonable doubt that bodily harm occurred, the government failed to prove such bodily harm was unlawful. When viewed through the lens of his past experience with C.F., SSgt Norris had a reasonable belief that his shoes were in immediate danger of being damaged by C.F. As an initial matter, it was reasonable for SSgt Norris to believe

his valuable shoe collection could be damaged, even by the slightest prank or misstep by C.F. SSgt Norris had numerous expensive, collectible shoes in his closet, with no defects, that could be valued between $400-$500 per pair. R. at 196-97. However, even small defects such as creases, scuffs, or the removal of a price tag could diminish a shoe's value. R. at 194-95.

The reasonableness of SSgt Norris's belief is also buttressed by the fact that C.F. routinely messed with and took his property at work—specifically by kicking his shoes. R. at 191. C.F. also admitted taking and wearing his sunglasses, taking his radio, and taking his patches off the arm of his uniform, despite SSgt Norris asking her to stop. R. at 153-54. Notably, trial counsel tried to rehabilitate C.F. on re-direct by questioning C.F. to show that while she had taken SSgt Norris's property at work, she had not destroyed anything, R. at 161, but this did nothing to weaken the reasonableness of SSgt Norris's belief. For the reasonableness of SSgt Norris's belief must be viewed "through the eyes of the accused and consider the circumstances known to the accused at the time." *Davis*, 73 M.J. at 272. SSgt Norris's past experiences with C.F. taught him that she could be flippant and non-serious with his property. Thus, given the fact that even the slightest defect in a shoe could damage its value, it was reasonable to believe that, if C.F. handled his shoes in a lax or joking manner—as she had treated his property in the past—and even if she ultimately did not intend to cause damage, nevertheless, she could diminish the value of his shoes.

Moreover, SSgt Norris's belief that the minimal force he did apply was necessary to prevent damage to his property was also reasonable, when viewed from his perspective and considering the circumstances he had experienced with C.F. at the time. For starters, SSgt Norris's past experiences with C.F. taught him that she would not respond to his initial requests to return his property and that he would sometimes have to ask multiple times for her to ultimately return his property at work. R. at 162-63. But with his personal property at home, SSgt Norris did not

have the luxury to wait for C.F. to finish playing games like she did at work. He could not simply ask her to stop touching his shoes and hope that she did not cause any damage while she ignored his multiple requests to stop. The property at issue here was not sunglasses, patches, or pencil shavings, but collectible, expensive shoes that could easily be damaged.

Given this background, SSgt Norris would have been reasonably justified in applying a necessary amount of force to defend his property without any warning. But SSgt Norris still asked C.F. to stop three times. Nevertheless, the reasonableness of SSgt Norris's belief that, in this particular situation, a reasonable application of force was necessary to prevent C.F. from damaging his property was established because C.F., in fact, refused his requests to stop touching his shoes. SSgt Norris asked C.F. to stop touching his shoes three times before making contact with her. R. at 199-200. A1C C.G. described SSgt Norris as practically begging her to stop, escalating in tone each time he asked, "like a father talking to a kid." R. at 199-200. For these reasons, A1C C.G. testified he would have done the same thing that SSgt Norris did if A1C C.G. had been in the same situation, which further solidifies the reasonableness of SSgt Norris's actions. R. at 202.

At the end of the day, given the uniqueness of the property at issue and his past experience with C.F., SSgt Norris acted reasonably. C.F. had a history of targeting SSgt Norris with physical behavior, including kicking his shoes. This ongoing pattern of physical provocation created a context in which SSgt Norris felt compelled to protect his belongings from ongoing harassment. Given this backdrop, SSgt Norris's decision to nudge C.F. was not an act of aggression but rather as a reasonable response to repeated instigation.

The reasonableness of SSgt Norris's conduct is further confirmed by the reasonable nature of the force that he actually applied. SSgt Norris did not strike, hit, slap, or punch her. Rather, he merely nudged C.F. between the neck and shoulder as if "to move something out of the way." R.

at 202. Taking all these facts and circumstances into account, and viewing the reasonableness of SSgt Norris's belief and actions through his perspective, SSgt Norris had a reasonable belief that his property would be damaged and that force was necessary to prevent the damage. At the very least, the government failed to prove beyond a reasonable doubt that this belief was unreasonable or that this defense did not exist.

* * *

As detailed above, the government failed to meet its burden of proof on several fronts. The government failed to prove the charged conduct, failed to prove an offensive touch occurred given C.F.'s serious credibility issues, and failed to prove any touch that did occur was unlawful.

Even considering this evidence in a light most favorable to the government, a reasonable factfinder could not have found all the elements of the offense of assault consummated by a battery beyond a reasonable doubt. Moreover, under a factual sufficiency review, the arguments above not only establish a specific showing of a deficiency in proof, but demonstrate that, after weighing all the evidence, this Court should be clearly convinced that evidence does not establish SSgt Norris's guilt beyond a reasonable doubt. Thus, SSgt Norris's conviction should not stand.

WHEREFORE, SSgt Norris respectfully requests that this Honorable Court dismiss the charge and specification.

II.

THE ENTRY OF JUDGMENT SHOULD BE CORRECTED TO REFLECT THAT THE CONVENING AUTHORITY WITHDREW AND DISMISSED CHARGE I AND CHARGE III AFTER REFERRAL.

Additional Facts

SSgt Norris was tried and found guilty of one charge and specification of assault consummated by battery (Charge II), in violation of Article 128, UCMJ. R. at 320. The government also referred one charge and two specifications of dereliction of duty (Charge I), in violation of Article 92, UCMJ, and one charge and specification of sexual harassment (Charge III), in violation of Article 134, UCMJ. Vol. 1, Charge Sheet.

The military judge conducted an arraignment on 11 December 2023. R. at 1. Prior to arraignment, trial counsel announced the general nature of the charges to include one charge and two specifications of dereliction of duty, in violation of Article 92, UCMJ, one charge and specification of assault consummated by battery, in violation of Article 128, UCMJ, and one charge and specification of sexual harassment in violation of Article 134, UCMJ. R. at 9-10. SSgt Norris decided to defer forum selection, motions and his plea at the time. R. at 11. However, the military judge stated to SSgt Norris that an arraignment had been conducted. R. at 11.

On 11 March 2024, the date of trial, trial counsel confirmed with the military judge that the convening authority had withdrawn and dismissed Charge I and its specifications, as well as Charge III and its specification. R. at 13, 25. The military judge then directed trial counsel to make pen and ink changes to the original charge sheet to reflect the withdrawal and dismissal of Charge I and III. R. at 25-28. The entry of judgment (EOJ), however, does not include a summary of the withdrawal and dismissal of Charge I and III. Vol. 1, Entry of Judgment.

Standard of Review

"Proper completion of post-trial processing is a question of law, which this court reviews de novo." *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (citations omitted).

Law

The military judge of a special court-martial shall enter into the record of trial the judgment of the court. R.C.M. 1111(a)(1). The judgment shall reflect the result of the court-martial, as modified by any post-trial actions, rulings, or orders. R.C.M. 1111(a)(2). The judgment shall consist of "a summary of each charge and specification" "[f]or each charge and specification referred to trial[.]" R.C.M. 1111(b)(1). The judgment may be modified by a Court of Criminal Appeals in the performance of its duties and responsibilities or, if remanded, consistent with the purposes of the remand. R.C.M. 1111(c). In cases where post-trial documents contain errors, this Court has directed publication of corrected EOJ and court-martial orders. *See, e.g., United States v. Maurer*, No. ACM 39737, 2020 CCA LEXIS 25, at *4 (A.F. Ct. Crim. App. 24 Jan. 2020) (unpub. op.) (directing corrected EOJ to reflect the deferment information required pursuant to R.C.M. 1111(b)(3)(A)).

Analysis

The EOJ does not reflect that Charge I and Charge III were withdrawn and dismissed by the convening authority. Those charges were referred to trial, but their disposition is not contained in the EOJ. Thus, in its current state, the EOJ inaccurately reflects the result of the court-martial.

This case is governed by R.C.M. 1111's plain language. R.C.M. 1111(b) requires an EOJ to include "[f]or each charge and specification referred to trial" the "findings or other disposition." Charge I and III were referred to trial. Ergo, the EOJ must provide their disposition.

It is unclear if this Court has squarely addressed the issue of the necessity of summarizing in the EOJ the withdrawal and dismissal of a charge that occurred both post-referral and post-arraignment. Notably, at least one sister service court, however, has held that a military judge properly included in the EOJ language from a specification that was dismissed post-referral, but even pre-arraignment. *United States v. Booker*, 83 M.J. 595, 598 (N-M. Ct. Crim. App. 2023). That court found that the language was "before the court," holding that "both the lined-through and added language in that specification were reasonably included pursuant to R.C.M. 1111(b)'s requirement that the entry of judgment include, for each charge referred to court-martial, a summary of each charge and specification, the pleas of the accused, and the disposition of each charge." *Id*.

Similarly, the EOJ must reflect that Charge I and Charge III were withdrawn and dismissed by the convening authority. In fact, SSgt Norris's case more strongly calls for the EOJ to be corrected than in *Booker*, as SSgt Norris was actually arraigned when the charges were still pending before the court. R. at 9-11. Moreover, including the disposition of the withdrawn and dismissed charges in the EOJ "will serve numerous benefits including signaling potential issues of statute of limitations, double jeopardy, and jurisdiction for reviewing authorities without in-depth resort to the record." *United States v. Wadaa*, 84 M.J. 652, 655 (N-M. Ct. Crim. App. 2024). Given the failure to include a proper summary of each charge that was referred to trial, this Court should order an amendment to the EOJ that accurately reflects that Charge I and its specifications and Charge III and its specification were withdrawn and dismissed.

WHEREFORE, SSgt Norris respectfully requests that this Court order the publication of a corrected EOJ.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 March 2025.

Respectfully submitted,

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Staff Sergeant (SSgt) Seth Norris, through appellate defense counsel, personally requests that this Honorable Court consider the following matters:

III.

THE RECORD OF TRIAL IS NOT COMPLETE BECAUSE THE RECORD DOES NOT ESTABLISH WHETHER THE ORIGINAL CHARGE SHEET WAS INCLUDED.

Additional Facts

The Record of Trial (ROT) contains multiple documents that purport to be the original charge sheet in this case. Volume 1 of the ROT contains one version of the charge sheet, with a preferral date of 14 September 2023 and a referral date of 18 September 2023. Vol. 1, Charge Sheet. That volume also contains a duplicate copy of that charge sheet with pen and ink changes reflecting, among other things, the withdrawal and dismissal of Charge I and Charge III. Vol. 1, Charge Sheet (Pen and Ink).

Notably, on each of the copies of this version of the charge sheet in Volume 1, Section 15 is blank. Section 15 relates to the section documenting the service of the referral paperwork on the accused. On each copy of the charge sheet, the name of trial counsel, Capt B.S., is typed in that section. Vol 1, Charge Sheet, Charge Sheet (Pen and Ink). But Capt B.S.'s signature is missing in Section 15. *Id.* Specifically, the date of service and the signature line certifying that the referral paperwork was served on the accused are blank. *Id.*

Separately, in Volume 3, another version of the charge sheet is included in the ROT. In the Pretrial section of the ROT, a different version of the Charge Sheet is included as an attachment

to the Selection of Court Members memorandum.[1] Vol. 3, Selection of Court of Members, 15 September 2023, Attachment 2. In this version of the charge sheet, Section 15 is signed, but by a different trial counsel. *Id*. Specifically, Section 15 is signed by Capt D.R. on 22 September 2023. *Id*. Unlike the version of the charge sheet in Vol. 1, Capt. B.S.'s name is not typed into Section 15. *Id*.

Standard of Review

"[W]hether the record of trial is incomplete [is] a question of law which [courts] will review *de novo*." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000) (emphasis in original). This Court "must approach the question of what constitutes a substantial omission on a case-by-case basis." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Law

A "special court-martial shall keep a separate record of the proceedings in each case brought before it." Article 54(a), UCMJ. Specifically, "the record shall contain such matters as the President may prescribe by regulation." Article 54(c)(1), UCMJ. Pursuant to the Rules for Courts-Martial (R.C.M.), the "record of trial in every general and special court-martial shall include" the "original charge sheet or a duplicate." R.C.M. 1112(b)(2).

"In assessing [] whether a record is complete . . . the threshold question is 'whether the omitted material was 'substantial,' either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citing *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Henry*, 53 M.J. at 111.

[1] It appears that this version of the charge sheet is included as an attachment to various pretrial motions filed by the parties. *See e.g.* App. Ex. X, Attachment 1.

Analysis

The ROT is not complete because the record does not indicate what document constitutes the original charge sheet and whether it was included in the record. There are at least two versions of the charge sheet contained in the ROT. One version is contained in Volume 1 and another version is contained in Volume 3. One version lists the name of one trial counsel in Section 15 (the section for the service of the referred charges) but with no signature, and the other version lists the name of a different trial counsel in Section 15 but does contain that counsel's signature.

These deficiencies in the record pertaining to the multiple versions of the charge sheet are substantial. Neither this Court, nor SSgt Norris can ascertain what the original, operative charge sheet is because there are multiple versions in the record. At a minimum, such uncertainty in the record will impact this Court's ability to undertake its required Article 66, UCMJ, review.

Further, the lack of clarity over the charge sheet hinders SSgt Norris's ability to properly review his case and determine whether there are viable claims to raise on appeal. Without knowing which is the original charge sheet, SSgt Norris is unable to assess what the operative charge sheet is that needs to be reviewed to determine whether there are any defects that need to be raised on appeal. For example, if the original, operative charge sheet is the version included in Volume 1, there would be a question as to whether a defect in the referral of the changes occurred pursuant to R.C.M. 602(a) because that version of the charge sheet does not contain a signature of trial counsel certifying that the charge sheet was served on SSgt Norris after referral. Vol. 1, Charge Sheet. But that determination cannot be made at this time because the record is not clear as to which document is the original charge sheet.

The government controls the charge sheet. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019). Here, the government failed in ensuring a complete record by apparently

maintaining multiple versions of the charge sheet and then failing to differentiate which version was the original controlling charge sheet. If the record cannot be clarified and completed, this Court should dismiss the charge and specification.

WHEREFORE, SSgt Norris respectfully requests that this Honorable Court direct that the record be completed or, if the record cannot be completed, dismiss the charge and specification.[2]

[2] While not raised as a separate assignment of error, SSgt Notes also notes that there are other missing components of the ROT: (1) the attachments to the Defense Motion to Dismiss for a Defective Preferral are not included, Vol. 3, App. Ex. XXI; (2) the attachments to the Victim's Counsel's Motion for Appropriate Relief are not included, Vol. 3, Appl Ex. XXII; and (3) a memo from the legal office dated 29 April 2024 in the Post-Trial section of the ROT appears to be missing an attachment, Vol. 3.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **SETH D. NORRIS**, USAF, *Appellant.*	)	No. ACM 24045 23 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ASSIGNMENTS OF ERROR

I.

WHETHER [APPELLANT'S] CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR SEXUAL ASSAULT.

II.

WHETHER THE ENTRY OF JUDGMENT SHOULD BE CORRECTED TO REFLECT THAT THE CONVENING AUTHORITY WITHDREW AND DISMISSED CHARGE I AND CHARGE III AFTER REFERRAL.

III.[1]

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE RECORD DOES NOT INDICATE WHETHER THE ORIGINAL CHARGE SHEET WAS INCLUDED.

STATEMENT OF CASE

The United States accepts Appellant's statement of the case.

[1] Appellant raises Issue III in his appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992).

STATEMENT OF FACTS

Victim A1C C.F. testified at Appellant's court-martial. (R. at 110-165.) She worked with Appellant in the maintenance squadron at Kirtland Air Force Base, which was her first duty station in the Air Force. (R. at 110-11.) Appellant was her shift lead in the fuel shop from April 2022 to the assault on 3 December 2022. (R. at 112.) A1C C.F. is 5'4" tall, and Appellant is more than six feet tall. (R. at 133.)

On 3 December 2022, Appellant had members of the squadron to his on-base residence to watch a movie prior to the squadron Christmas party. (R. at 113.) A1C C.F. arrived at Appellant's townhouse at the start of the party at 1500 hours. (R. at 114.) After the various attendees ate the cookies A1C C.F. brought to Appellant's home, the group watched the movie. (R. at 116.) In the corner of the living room, Appellant had boxes of shoes stacked to the ceiling. (Id.)

After the movie ended, Amn C.G. pointed out Appellant's shoe collection in the living room, and Appellant took them to see his collection in the closet past the kitchen. (R. at 117; 173-75.) Appellant's collectable sneakers in the closet were expensive, a minimum of $400 to $500 each pair. (R. at 197.) Amn C.G. looked at Appellant's shoes for "no more than about a minute and a half," and then went back to the kitchen, which was about 15 to 20 feet away from the closet. (R. at 121, 122, 175, 176.) After Amn C.G. went to the kitchen, A1C C.F. stepped into the closet to see the shoes. (R. at 119, 176.) A1C C.F. noticed a pair she thought were ugly. (R. at 119.) While bending over to pick them up, she said they were ugly. (R. at 120-21.) Appellant was right behind her. (R. at 121.) Although Amn C.G. was 15 to 20 feet away in the kitchen and in conversation with other airmen, he testified he heard "chatter" from Appellant and A1C C.F. and then he heard things moving around. (R. at 176-77.) Amn C.G. testified that it sounded to him like A1C C.F. was "messing with" Appellant's sneakers, but he was not looking in their direction

yet. (R. at 199--200.) Amn C.G. testified he heard Appellant tell A1C C.F. three times to stop touching his shoes, but A1C C.F. testified Appellant never told her not to touch the shoes. (R. at 144, 177, 199-200.) And Appellant never tried to grab the shoes out of A1C C.F.'s hands. (R. at 125.)

When A1C C.F. bent down to pick up the shoes and look at them, she felt Appellant's hand on the back of her neck. (R. at 122.) She had given no indication that she would do anything to the shoes. (Id.) A1C C.F. felt the pressure of Appellant's fingers. (R. at 123.) When Appellant grabbed her, it felt "pretty harsh, unexpected" and it lasted a couple of seconds. (R. at 124.) Appellant grabbed about halfway around A1C C.F.'s neck. (R. at 125.) A1C C.F. testified the grabbing of her neck was offensive and uninvited. (R. at 124, 125.) A1C C.F. moved forward to get Appellant to let go, which he did. (R. at 124.) Then, A1C C.F. fell to the ground. (R. at 124, 185. 203, 259.) After Appellant let go of A1C C.F.'s neck, he walked back into the kitchen with the other airmen, without saying anything to her, leaving her in the closet. (R. at 124-26.)

Amn C.G. testified that, he saw Appellant "initiate contact" between A1C C.F.'s neck and shoulder, where a strap on a tank top would be, but not where he would consider her neck. (R. at 178-79, 201.) Amn C.G. saw Appellant put his left hand in that location but without "tension." (R. at 178, 204.) During Amn C.G.'s testimony, the prosecution confronted him with his earlier statement to AFOSI, in which he said Appellant used his right hand, not his left hand. (R. at 181-83.) Also, despite Amn C.G.'s testimony of Appellant using no "tension," Amn C.G. admitted that Appellant pull A1C C.F. out of the closet and into the hallway, where she dropped down cross-legged. (R. at 217.) The military judge permitted Amn C.G. to provide his opinion that A1C C.F.

was prone to exaggeration. (R. at 211.)[2] However, Appellant was Amn C.G.'s supervisor and sponsor since Amn C.G. had arrived at Kirtland AFB. (R. at 168.)

During cross-examination, trial defense attempted to impeach A1C C.F. A1C C.F. admitted that she had dated one of the other attendees at the party, SrA L., but he had broken up with A1C C.F. in November 2022 after Appellant gave SrA L. information that led SrA L. to discover A1C C.F. had gone through SrA L.'s phone. (R. at 135-38.) The defense tried to make a distinction between A1C C.F.'s trial testimony -- that she touched but did not pick Appellant's shoes up – with prior statements in which she said she did not touch the shoes or said she had picked up one of them. (R. at 142-43, 255.) Although A1C C.F. testified she was facing away from Appellant during the assault, during an earlier interview with the government, she said Appellant made a face right before he grabbed her neck. (R. at 145, 259.) A1C C.F. testified Appellant put one hand on her, but she had posted a Snapchat story in which she wrote Appellant put his "hands" on her. (R. at 145-47.) During the defense case-in-chief, they called AFOSI Special Agent E.G. about the interview with A1C C.F., during which A1C C.F. had initially said Appellant put his "hands" on her, but she later clarified during the interview that Appellant only put one hand on her. (R. at 268.) During A1C C.F.'s testimony, she said she fell forward after Appellant grabbed her by the back of her neck, but in her Snapchat story, she said Appellant had thrown her to the ground. (R. at 149.) A1C C.F. admitted that she had "messed with" Appellant

[2] SrA K.E.S. testified for the defense that it was her opinion that A1C C.F. is "not the most truthful person" and that A1C C.F. is a person who seeks attention. (R. at 228.) However, SrA K.E.S. admitted that she had told the prosecution that she considered Appellant a "really good friend," and SrA K.E.S. did not know A1C C.F. well other than from workplace interactions. (R. at 229-31.) SSgt N.Y. testified for the defense that it was his opinion that A1C C.F. had a character for exaggeration, untruthfulness, and attention-seeking. (R. at 240-42.) The defense also called Mr. L.L., and A1C E.R., both of whom worked with A1C C.F. on active duty, and they testified that it was their opinion that A1C C.F. had a character for exaggeration. (R. at 246, 249.)

and moved his property, but she also testified that they had taken patches of each other's uniform. (R. at 153-54.) Amn C.G. testified that A1C C.F. moved Appellant's belongings, kicked him in the shin and the shoes, and poured pencil shavings on his head. (R. at 190-91.)

After the assault, A1C C.F. got back up and went to the kitchen to confront Appellant, because she felt she had been violated by his unnecessary actions. (R. at 126, 186.) Amn C.G. heard A1C C.F. say, "Nobody gets to touch me like that. You're a grown man touching me." (R. at 205.) A1C C.F. testified that she tried to slap Appellant, but she was unsuccessful. (R. at 127.) Amn C.G. testified that A1C C.F. tried to punch Appellant multiple times with a closed fist, but A1C C.F. testified that she tried to slap Appellant, not punch him. (R. at 155-56, 205-06.) Appellant told A1C C.F. she was overreacting, but there is no evidence that he argued he acted in defense of his property. (Id.) She tried to slap Appellant a second time, and he grabbed her arm. (R. at 127, 187.) Then, A1C C.F. and Appellant were cursing at each other. (R. at 128.) Appellant let go of A1C C.F.'s arm, so she went to leave. (R. at 129, 187.) As A1C C.F. was putting on her shoes, Appellant came over to her and again told her she was overreacting, but did not otherwise defend his actions. (Id.)

Additional relevant facts, if necessary, are included below.

ARGUMENT

I.

THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY.

Standard of Review

Issues of legal sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). And upon an appellant asserting an assignment of error and making a

showing of specific deficiency in proof, this Court may review a finding of guilty for factual sufficiency and would do so *de novo*. Article 66(d), UCMJ; *United States v. Harvey*, 85 M.J. 127, 130-31 (C.A.A.F. 2024).

Law

1. Elements of the Offense of Sexual Assault

To convict Appellant of sexual assault, the Government was required to prove beyond a reasonable doubt all elements as charged: (1) Appellant did bodily harm to A1C C.F.; (2) that bodily harm was done unlawfully; and (3) that bodily harm was done with force or violence. *MCM*, Pt. IV, ¶ 77.b.(2).

2. Legal Sufficiency

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted.) This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Bright, 66 M.J. 359, 365 (C.A.A.F. 2008). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (citation omitted). The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

3. Factual Sufficiency

The test of factual sufficiency is governed by the following amendment to the UCMJ:

> (B) Factual sufficiency review
>
> (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Article 66(d)(1), UCMJ (Supp. III 2019-2022). The factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (1 Jan. 2021).

The requirement of "appropriate deference" when this Court weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." Harvey, 85 M.J. at 130. This Court has discretion to determine what level of deference is appropriate, which CAAF reviews only for an abuse of discretion. Id. at 131. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at 132. "First, [this Court] must decide that the evidence, as [the Court] weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [this Court] must be clearly convinced of the correctness of this decision." Id.

Analysis

Appellant combines his legal and factual insufficiency claims in asserting the government failed to prove Appellant grabbed the back of A1C C.F.'s neck, failed to prove his contact with her was an "offensive touch," and failed to prove the contact was wrongful, because he "reasonably believed some minimal application of force was necessary to defend his personal property." (App. Br. at 8-9.) Appellant raised those arguments at trial (R. at 281-309), but the military judge considered and rejected them, as should this Court.

Appellant and A1C C.F. had a history of physicality between them, despite Appellant being her military superior and his being much larger in size than her. Appellant had demonstrated his willingness to hurt A1C C.F. emotionally in the past, by causing the breakup of her relationship with another airman. On the night of Appellant's assault of A1C C.F., she did nothing and said nothing to indicate she was going to damage his shoes. Appellant never saw it necessary to seek assistance from others at his party. Even after he assaulted her, he walked away, leaving her with the shoes. When A1C C.F. recovered from the shock of his offensive assault, she confronted him. Appellant merely said she was overreacting, but he never denied assaulting her or provided a defense for doing so, as one would expect an innocent person to do.

A. The Government Proved Appellant Grabbed A1C C.F. by the Back of Her Neck

Appellant argues the government failed to prove he "unlawfully grabbed [C.F.] on the back of the neck with his hand," citing Amn[3] C.G.'s testimony that Appellant gave A1C C.F. a "nudge" in the area "between her neck and her shoulder." (App. Br. at 9-10.) As a threshold matter, however, A1C C.F. testified clearly that Appellant grabbed her by the back of her neck.

[3] Appellant names Amn C.G. as an "A1C"; however, he testified that he was an Airman, not an Airman First Class. (R.at 167.)

Appellant's attempt to claim the charging language was insufficient to sustain the conviction is, thus, without merit. The military judge observed A1C C.F.'s posture, demeanor, facial expressions and other non-verbal aspects of her testimony; and he heard A1C C.F.'s voice and her volume, pitch, and tempo. And, after observing the cross-examination and considering the evidence, the military judge reasonably credited A1C C.F.'s testimony that Appellant grabbed her by the back of her neck. This Court should not reject the military judge's credibility determination, because Appellant merely re-argues the same points the defense attempted to make about A1C C.F. at trial.

Appellant focuses on factual disagreements about whether A1C C.F. picked up his shoes or just put her hands on the shoes, whether she could see his face or not during the assault, and her use in a Snapchat post of the expression "putting hands on her" instead of the singular "hand." (App. Br. at 10-11.) All those details were minor and failed to address the undisputed facts supporting each element of the offense. That is, Appellant pulled A1C C.F. away from his shoes when there was no reasonable claim he was defending his property, causing her to fall to the ground, and then he walked away. There is little to no distinction between her putting her hands on the shoes versus starting to lift the shoes while in a crouched position, especially at the moment of Appellant's assault. And whether A1C C.F. saw Appellant's face just before the assault when she turned to tell him his shoes were ugly (R. at 259), or did so during the assault, is insignificant, as the events in the closet involving A1C C.F. lasted only a few seconds. Similarly, since Appellant assaulted A1C C.F. from behind, it is of no significance that she initially used the colloquial term "put hands on her" for when Appellant put one hand on her. Within the interview with AFOSI, she clarified that Appellant had, in fact, used one hand. (R. at 268.) Therefore, there was no inconsistency between her description to AFOSI and her court-martial testimony, and when the defense raised the AFOSI interview, it reinforced her testimony.

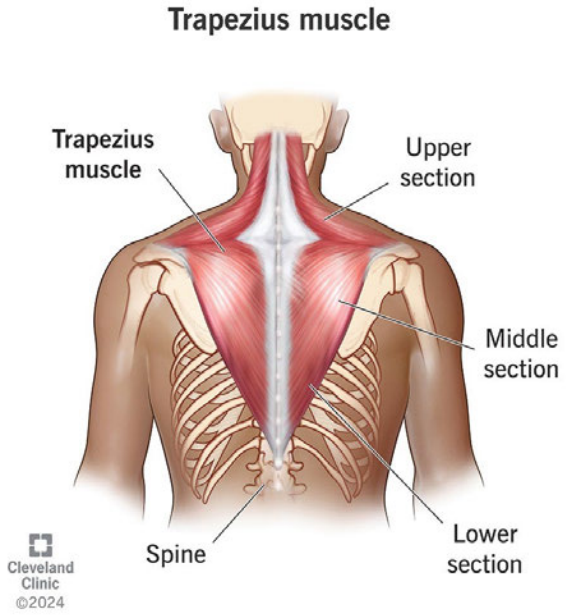
Appellant argues A1C C.F. had a "motive to target" Appellant because of a prior incident in which he caused A1C C.F.'s boyfriend to break up with her. (App. Br. at 11.) However, the military judge likely made the reasonable conclusion that the earlier event was part of a pattern of Appellant being mean to A1C C.F., with his assault of A1C C.F. being consistent with that pattern. It is unsurprising that A1C C.F. did not want to "comment" during testimony about the painful breakup that Appellant caused her. If she was trying to "target" Appellant for his causing the break-up, she would have been more than willing to recount the details. So, if there was any "targeting" during the assault, it was Appellant targeting his junior airman, A1C C.F., whose prior relationship he had targeted and destroyed.

Appellant argues A1C C.F. had a character for untruthfulness or exaggeration, because of three witnesses from the unit. (App. Br. at 11.) None of those defense witnesses were eyewitnesses to the assault. Moreover, such bad-character witnesses have little impact, where the only eyewitness who testified, Amn C.G., corroborated key points of A1C C.F.'s testimony. Amn C.G. testified about seeing Appellant's shoes in the living, looking at the shoes in the closet, seeing Appellant "initiat[ing] contact" between A1C C.F.'s between her neck and shoulder, watching Appellant "grab" her, and watching Appellant pull A1C C.F. down to the ground and then let her go. (R. at 176-78, 185.) The testimony of Amn C.G., which Appellant now touts, corroborates A1C C.F.'s testimony supporting the elements of the assault charge, so the defense testimony from non-eyewitnesses was insignificant.

Even though Amn C.G.'s testimony generally incriminated Appellant, Amn C.G. demonstrated bias in favor of Appellant, who was his supervisor and sponsor since Amn C.G. had arrived at Kirtland AFB. (R. at 168.) Amn C.G. claimed to have seen Appellant's hand throughout the assault. (R. at 184.) But Amn C.G. was more than 15-20 feet away from the location of the

assault and in a different room (R. at 176.) And it doesn't make sense that Amn C.G. could see Appellant's hand past Appellant's six-foot-plus body in the opening to the closet and into the closet to see the shoulder and neck area of 5'4" tall A1C C.F. (R. at 133.) Also, Amn C.G. changed his story about which hand Appellant used during the assault. That is, Amn C.G. told the AFOSI that Appellant used his right hand, but at the court-martial, Amn C.G. said Appellant used his left hand. (R. at 178-79, 183.) Amn C.G. defended this inconsistency by testifying, "It happened so quick; I don't remember if it was the left or right." (R. at 183.) Finally, Amn C.G. testified, oddly and in a manner that seemed designed to exculpate Appellant, that Appellant placed his hand on A1C C.F. but without "tension" and with "no extra force at all," despite seeing Appellant pull her out of the closet and to the ground. (R. at 178, 204, 217.)

Even if Amn C.G.'s testimony was designed to help Appellant, he still described the location of Appellant's assault on A1C C.F. as between her shoulder and neck, which is consistent with the assault having been on her "neck." The muscle between the shoulder and the neck is called the "trapezius." As depicted in the following image, the trapezius is part of the neck, starting at the base of the neck and extending across the shoulders and down to the middle of the back. (https://my.clevelandclinic.org/health/body/21563-trapezius-muscle)



The upper section of the trapezius connects to the skull and neck. (Id.) The trapezius forms the posterior border of the posterior triangle of the neck. (https://www.ncbi.nlm.nih.gov/books/NBK518994/#:~:text=The%20trapezius%20forms%20the%20posterior,posterior%20triangle%20of%20the%20neck.) Therefore, even if the Court credits Amn G.C.'s description, Appellant's assault was on the back of A1C C.F.'s neck. *See also*, United States v. Jackson, No. ACM 39955, 2022 CCA LEXIS 300, *18-21 (A.F. Ct. Crim. App. 23 May 2022) (affirming conviction for assault on "torso," where evidence indicated appellant grabbed victim's "shoulder").

B. Appellant Did Bodily Harm to A1C C.F.

Appellant acknowledges that A1C C.F. testified that Appellant grabbed her on the back of the neck and it was "pretty harsh." (App. Br. at 5 (citing R. at 122-24).) He also acknowledges that "bodily harm" is defined as "an offense touching of another, however slight." (App. Br. at 12.) In this case, Appellant did more than a "slight" offensive touch on A1C C.F. Appellant

emphasizes the testimony of Amn C.G. throughout his assignment of error. However, even Amn C.G. testified Appellant pull A1C C.F. so hard that it brought her out of the closet and into the hallway, where she dropped to the ground. (R. at 217.)

Appellant cites his past interactions with A1C C.F. in the workplace, including her having "messed" with him, instigated physical contact, dumping pencil shavings on him, and taking his property from work. (App. Br. at 13.) But those interactions further prove that Appellant was already quite annoyed at A1C C.F. when he decided to assault her at his party. Appellant's citation to United States v. Johnson, 54 M.J. 67 (C.A.A.F. 2000), is misplaced (App. Br. at 13), because Appellant's conduct was of a completely different and violent nature than the friendly but unwelcome "back rub" in Johnson. 54 M.J. at 69-70.

Appellant seems to claim A1C C.F.'s delayed response after his assault disproves her account. (App. Br. at 14.) To the contrary, that she sat on the floor for a minute or two before confronting Appellant shows that she needed to process what he had just done to her and was not simply baiting him into touching her.

C. Appellant's Assault of A1C C.F. Was Unlawful

Appellant's final sub-argument is that his assault was lawful in defense of his shoes. (App. Br. at 15-18.) Such an argument is without merit. Defense of property has been applied to a homeowner's right to eject a trespasser in their home. *See, e.g.*, United States v. Davis, 73 M.J. 268, 269-70 (C.A.A.F. 2014); United States v. Marbury, 56 M.J. 12, 14 n.3, 15 (C.A.A.F. 2001); United States v. Regalado, 13 U.S.C.M.A. 480, 481-82 (U.S. Ct. Mil. App. 1963); United States v. Proctor, No. ACM S32554, 2020 CCA LEXIS 196, *24-25 (A.F. Ct. Crim. App. 4 June 2020). It is described in the Military Judges' Benchbook as an affirmative defense for "ejecting someone from the premises." MJBB, para. 5-7 n.3.

Although the defense of property can apply to personal property, an appellant must have a reasonable belief that his personal property was "in immediate danger of trespass or theft; and the accused must have actually believed that the force used was necessary to prevent a trespass or theft…." Davis, 73 M.J. at 271 (citations omitted). A1C C.F. did not do or say anything about harming Appellant's shoes. All she was doing was touching or holding his shoes. And there is no evidence in the record about what Appellant believed A1C C.F. was going to do, let alone whether he believed A1C C.F. was going to commit theft of, or destroy, the shoes. To the contrary, after Appellant pulled A1C C.F. to the ground, he left her alone with his shoes and walked into the kitchen, demonstrating he did not believe she was going to harm them. And when A1C C.F. confronted Appellant after the assault, he did not claim to have acted in defense of his property, he just said she was overreacting. Even if there was a chance of theft or damage, Appellant's grabbing A1C C.F. and bringing her to the ground was not reasonable under the facts of this case. The evidence in this case cuts against any claim he was defending his shoes and, instead, proves Appellant simply acted in anger for her calling his shoes ugly.

Finally, even if Appellant had a reasonable belief that she might damage his shoes, he should not have resorted to violence. He should have asked for assistance from others at the party to dissuade her, or from law enforcement officials to stop her. He could have grabbed his shoes back from A1C C.F. Even if he had to touch her, he could have held her arm instead of taking her to the ground by her neck.

Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of Appellant's crime of assaulting A1C C.F. beyond a reasonable doubt. The military judge reasonably found the evidence proved beyond a reasonable doubt that Appellant forcefully and violently grabbed A1C C.F. by the back of her neck, pulled

her away from his shoes and towards the ground, unlawfully caused her bodily harm, and did not act in reasonable defense of his property. The military judge reasonably found any inconsistencies in A1C C.F.'s testimony and prior statements to be minor and common with the recounting of a stressful event. The defense's attempt to attack A1C C.F.'s character does not negate the two fact witnesses' testimony about Appellant grabbing the back of her neck. And any factual differences between the testimonies of A1C C.F. and Amn C.G. could be explained by Amn C.G.'s bias in favor of Appellant and Amn C.G.'s inability to see and hear what was happening between Appellant and A1C C.F. in Appellant's closet while Amn C.G. was in the middle of a conversation in the kitchen. In summary, the government's case meets the "very low threshold" of legal sufficiency on appellate review.

Regarding factual sufficiency, Appellant has failed to make a specific showing of a deficiency in proof in this case to merit further appellate review. Appellant simply disagrees with the military judge's conclusion of guilt. But because he has not made the required showing under Article 66(d)(1), this Court cannot – or if it has discretion to do so, should not -- exercise its power to review the factual sufficiency of Appellant's case. Article 66(d)(1)(B)(i), UCMJ. *See* United States v. Myers, ARMY 20230100, 2024 CCA LEXIS 535, *14 (A. Ct. Crim. App. 16 December 2024) (unpub. op.) (rejecting appellant's assignment of error where it found appellant failed to make specific showing of deficiency in proof as required by Harvey).

If this Court conducts a factual sufficiency review, it should not decide that the evidence "does not prove that the appellant is guilty beyond a reasonable doubt" and should not be "clearly convinced of the correctness of this decision." Because the nature of the evidence against Appellant was witnesses' testimony, this Court should provide a higher level of deference to the military judge's credibility determinations and findings. On appeal, there are no new factual

arguments raised that were not raised and considered by the military judge. Thus, the Court should affirm the finding of guilt and reject Appellant's assignment of error.

II.

THIS HONORABLE COURT SHOULD EXERCISE ITS AUTHORITY TO AMEND THE ENTRY OF JUDGMENT.

Additional Facts

During Appellant's court-martial, the parties discussed with the military judge the withdrawal and dismissal of Charges I and III and renaming/renumbering of "Charge II" to simply the sole "Charge" on the Charge Sheet. (R. at 21, 25, 27, 63-64; ROT, Vol. I, *Charge Sheet*.) After returning from a recess, trial counsel confirmed for the military judge that they had made the same edits to the original Charge Sheet that are in the original Charge Sheet contained in the ROT. (ROT Vol. 1, Charge Sheet; R. at 27.) The entry of judgment (EOJ) properly addresses the Charge brought to trial by court-martial, but it does not address Charges I and III, which were withdrawn and dismissed. (ROT, Vol. I, *EOJ*.)

Standard of Review

Proper completion of post-trial processing is a question of law this Court reviews *de novo*. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).

Law

R.C.M. 1111 requires an entry of judgment to contain, for each charge and specification referred to trial, a summary of each charge and specification, the plea of the accused, and the findings or other disposition of each charge and specification. R.C.M. 1111(b)(1). The judgment may be modified by, among other authorities, the CCA in the performance of their duties and responsibilities. R.C.M. 1111(c)(2).

Analysis

Appellant asserts the entry of judgment (EOJ) should be amended to reflect the withdrawal and dismissal of Charges I and III. (App. Br. at 19-21.) This Court can modify the EOJ, without remanding for amendment, and has done so in the past, especially where there are straightforward omissions rather than affirmative errors. United States v. Ericson, No. ACM 23045, 2024 CCA LEXIS 538, at *9-10 (A.F. Ct. Crim. App. 17 December 2024) (unpub. op.) (Court corrected EOJ errors regarding dismissed specification); United States v. Schneider, No. ACM 40403, 2024 CCA LEXIS 288, at *30 (A.F. Ct. Crim. App. 16 July 2024) (unpub. op.) (Court corrected erroneous "not guilty" finding where charge actually had been dismissed with prejudice pursuant to plea agreement); United States v. Mock, No. ACM 400072, 2022 CCA LEXIS 519, at *2-3 (A.F. Ct. Crim. App. 1 September 2022) (unpub. op.) (Court corrected EOJ that included wrong timeframe for count of conviction). *Compare* United States v. Graves, No. ACM 40340, 2023 CCA LEXIS 356, at *7-8 (A.F. Ct. Crim. App. 23 August 2023) (unpub. op.) (instead of Court amending EOJ, it remanded for amendment where EOJ contained several errors, including, among others, findings contrary to those announced by military judge).

In this case, Appellant's EOJ contains no errors regarding the charge and specification of conviction. Rather, it omits withdrawal and dismissal of two other charges, which would only become relevant in the unlikely event an authority attempted to bring those charges anew. And yet those withdrawals and dismissals are clear from the Charge Sheet and transcript in the record. The errors in Appellant's case are similar to, or even more minor, than those in Ericson and Schneider, where the Court corrected the error on its own authority.

Thus, for judicial economy, this Court can and should use its power to amend the EOJ as it has done in the past, rather than remanding for amendment by the military judge.

III.[4]

THE RECORD OF TRIAL IS COMPLETE, BECAUSE THE PORTION OF THE CHARGE SHEET INDICATING IT WAS SERVED ON APPELLANT IS NON-JURISDICTIONAL AND, THUS, APPELLANT WAIVED THE ISSUE AT COURT-MARTIAL AND WAS NOT PREJUDICED. AND APPELLANT DID, IN FACT, RECEIVE SERVICE OF THE CHARGE SHEET.

Additional Facts

During the 11 December 2023 arraignment proceedings, trial counsel announced, without objection by the defense, "The charges have been properly referred to this court for trial and were served on the accused on 22 September 2023. The three-day statutory waiting period has expired." (R. at 3.) During the 11 March 2024 re-arraignment, trial counsel made the same announcement, again without defense objection. (R. at 13.)

In combination with this Answer, we are filing a Motion to Attach that includes a copy of the receipt for the Charge Sheet, with Appellant's signature, and an authenticating affidavit of the paralegal who served it upon Appellant.

Standard of Review

Whether a record of trial is complete is a question of law that is reviewed *de novo*. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014). This Court determines what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999).

Law and Analysis

Appellant claims, "The ROT is not complete because the record does not indicate what document constitutes the original charge sheet and whether it was included in the record." (App.

[4] Appellant raises Issue III in his appendix pursuant to Grostefon.

Br., Appendix at 3.) However, during both of Appellant's two arraignments, trial counsel announced the Charge Sheet had been served on him on 22 September 2023, and neither time did Appellant or defense counsel object. (R. at 3, 13.) More importantly, Appellant did in fact receive the Charge Sheet.

In United States v. Desiderio, 31 M.J. 894, 895 (A.F.C.M.R. 1990), Block 15 of the appellant's charge sheet contained the signature block and signature of a non-commissioned officer (NCO), but it failed to show that trial counsel caused the NCO to serve referred charges. The Air Force Court of Military Review found that failure to be a non-jurisdictional defect subject to waiver under R.C.M. 905(b)(1) and (g). Id. at 895. Even absent waiver, the Air Force Court found no prejudice. Id.

More recently, in United States v. Williams, 54 M.J. 757 (C.G. Ct. Crim. App. 2001), the charge sheet failed to reflect its service on the accused as required by Article 35, UCMJ, and R.C.M. 602. Id. at 758. The Coast Guard CCA held that, like the other services, non-compliance with Art 35 or R.C.M. 602 is non-jurisdictional and therefore subject to waiver or tested for prejudice. Id. (citing United States v. Desiderio, 31 M.J. 894, 895 (A.F.C.M.R. 1990); United States v. Garcia, 10 M.J. 631, 633 (A.C.M.R. 1980); United States v. Callahan, 1990 CMR LEXIS 1216 (N.M.C.M.R. 1990)).

Because Appellant received the Charge Sheet, did not object to the announcement at his court-martial that the Charge Sheet had been served on him, he does not allege prejudice on appeal, and the issue is non-jurisdictional and subject to waiver, this Court should reject Appellant's assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and the Air Force Appellate Defense Division (Capt Thomas R. Govan, Jr.) on 23 April 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Staff Sergeant (E-5) **SETH D. NORRIS,** United States Air Force, *Appellant.*	**REPLY BRIEF** Before Panel No. 3 No. ACM 24045 Filed on: 30 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Appellant, Staff Sergeant (SSgt) Seth Norris, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 23 April 2025 [hereinafter Gov. Ans.]. SSgt Norris stands on the arguments in his initial brief, filed on 28 March 2025 [hereinafter App. Br.], and submits additional arguments for the issue listed below.

I.

STAFF SERGEANT NORRIS'S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT.

Even when applying appropriate deference to the military judge's findings, this Court should be clearly convinced that the findings of guilty was against the weight of evidence. The government's case was thin, resting solely on the self-serving testimony of the complainant, C.F. C.F.'s testimony on the key issue in the case—whether SSgt Norris grabbed her neck—was directly refuted by the only eyewitness, C.G. Moreover, in addition to the inconsistencies in her testimony and her bias against SSgt Norris, multiple witnesses (including one of her friends) testified that C.F. had a character for untruthfulness and exaggeration. As a result, the government

failed to prove the charged conduct that SSgt Norris grabbed C.F.'s neck and could not disprove that SSgt Norris's actions were lawful and reasonable under the special defense of defense of property.

The government's brief largely sidesteps these deficiencies in the evidence and attempts to minimize the holes in its case. It also injects facts that were not presented at trial, but the government's attempts to bolster its case fall flat. The government failed to prove SSgt Norris is guilty beyond a reasonable doubt and thus, his conviction is legally and factually insufficient.

A. The government failed to prove beyond a reasonable doubt that SSgt Norris grabbed C.F. on the back of the neck.

Once the government charged that SSgt Norris "did . . . unlawfully grab [C.F.] on the back of the neck with his hand," Vol. 1, Charge Sheet, "it was bound to abide by it," *United States v. Eng*lish, 79 M.J. 116, 120 (C.A.A.F. 2019), and thereby burdened itself with proving this particularized type of bodily harm. For the government's charging decision "narrowed the scope of the charged offense" by limiting the type of conduct SSgt Norris needed to defend against. *Id*. Indeed, it is evident that SSgt Norris relied on the government's narrowed scope, as "the fulcrum of the defense theory with respect to this offense was that the Government failed to prove the unlawful force alleged," *id*. at 121, specifically, that SSgt Norris's hand did not actually touch the back of her neck. *See* R. at 281, 297, 300-02.

Here, the government failed to prove what it alleged. C.G., the only eyewitness to the incident apart from the complainant, specifically testified that he saw SSgt Norris's hand the entire time during the incident and that SSgt Norris never grabbed C.F.'s neck. R. at 201, 219. Rather, C.G. stated that SSgt Norris gave C.F. a "nudge" in the area "between her neck and her shoulder," specifically "where the strap would be" if one were wearing a tank top. R. at 178, 201-02. C.G.'s

testimony was clear, and no evidence was presented that his view of SSgt Norris's hand was obstructed in any way. This testimony alone established reasonable doubt.

In an effort to minimize the impact of C.G.'s testimony, the government attempts to recast C.G.'s testimony in a manner that is not supported by the record. For example, the government incorrectly asserts that C.G.'s testimony "corroborated key points of []" C.F.'s testimony." Gov. Ans. at 10. To the contrary, C.G. directly refuted C.F.'s testimony on the one *essential* question in the case: whether SSgt Norris actually grabbed the back of her neck as alleged by the government. C.F. claimed SSgt Norris did. R. at 122-23. But C.G. testified that SSgt Norris did not and instead nudged her between the neck and shoulder after he asked her three times to stop touching his shoes. R. at 199-201, 219.

The government also mischaracterizes the record concerning C.G.'s testimony, contending that he "demonstrated bias in favor of Appellant." Gov. Ans. at 10. Notably, it is telling that the government did not argue that C.G. was biased during its findings argument. R. at 273-80, 309-16. Rather, trial counsel suggested that C.G. and C.F. "were both there, [and] both witnessed it happen[]," R. at 280, and that C.G.'s testimony supported the charge. R. at 309, 311. There is nothing in the record to support the government's change of course concerning C.G.'s testimony on appeal beyond pure speculation and convenience. It is true that, as part of the introductory, biographical portion of his testimony as a government witness, C.G. stated that he knew SSgt Norris because he was C.G.'s supervisor and sponsor when he arrived on base. R. at 168. But the government cannot point to any example of actual bias on C.G.'s part. Contrary to the government's view, the fact that C.G.'s testimony seemed to "exculpate" SSgt Norris does not

[1] Consistent with Rule 17.2(c)(1)(A) and (B), Appellant will continue to refer to the complainant by initials only, without reference to rank. *But see, e.g.*, Gov. Ans. at 10.

equate to bias. Gov. Ans. at 11. While it now contends that "it doesn't make sense" that C.G. could see SSgt Norris's hand in the opening of the closet, Gov. Ans. at 11, the government failed to introduce any evidence at trial that called into question C.G.'s ability to see clearly what occurred in the closet. Indeed, the government actually argued the opposite at trial, as trial counsel relied in findings argument on C.G.'s testimony that he had a "clear . . . vantage point" to the incident. R. at 276. Simply the fact that C.G.'s testimony contradicted C.F.'s testimony and established reasonable doubt does not mean that C.G. "demonstrated bias" in favor of SSgt Norris.

The government's attempt to remodel its endorsement of C.G. at trial into credibility-destroying bias on appeal rings hollow, particularly when weighed against the substantial deficits in C.F.'s credibility. For its part, the government tries to sidestep both C.F.'s significant inconsistencies in her testimony and the evidence of her lack of credibility, contending that these issues were "minor" and "insignificant," and thus, do not justify rejecting the military judge's credibility determinations concerning C.F.'s testimony. Gov. Ans. at 9-10. The government's arguments are misplaced and not supported by the evidence for several reasons.

First, C.F.'s inconsistencies in her testimony were not minor. For example, the fact that C.F. admitted at trial that SSgt Norris was behind her when he allegedly grabbed her and that she could not see his face, R. at 145, but previously stated he had made a face when he grabbed her neck, R. at 259-60, was extremely significant. Contrary to the government's flawed view, this inconsistency called into question the veracity of the entire basis of C.F.'s story. This inconsistency suggested that C.F. made up details about the incident early on and was consistent with the defense's theory of the case that C.F. had both exaggerated the incident and improperly blamed SSgt Norris.

Second, without an evidentiary basis, the government attempts to turn the evidence of C.F.'s bias against SSgt Norris on its head. C.F.'s own testimony at trial established that she got upset with SSgt Norris, just one month before the 3 December 2022 incident, for the role she believed SSgt Norris had played in letting out information that caused an argument with C.F.'s then-boyfriend. R. at 138. The government now suggests, without support in the record, that this incident was part of "a pattern of Appellant being mean to [] C.F," and that SSgt Norris "demonstrated his willingness to hurt [] C.F. emotionally in the past, by causing the breakup of her relationship with another airman." Gov. Ans. at 8, 10. The government does not cite to any evidence in the record to support this argument. There is no evidence that SSgt Norris willingly or knowingly caused C.F.'s breakup. Indeed, even C.F. did not attribute any intent to SSgt Norris on this subject, as she testified only that SSgt Norris simply "mentioned" the other woman's name to her then-boyfriend. R. at 136. Properly read in the context of the evidence presented at trial, this incident did not show a willingness to hurt C.F. but rather was consistent with C.F.'s pattern of ignoring her own role in contributing to her problems and blaming others for the issues she created.

Third, the government offers no meaningful rebuttal to the significant evidence presented that C.F. had a character for untruthfulness and exaggeration. Three different Airmen, including one of C.F.'s close friends, testified that C.F. had a character for untruthfulness, attention seeking, and exaggeration. R. at 228, 241-42, 250. The government's attempt to downplay this testimony as "insignificant" by noting that these defense witnesses were not eyewitnesses to the alleged crime, Gov. Ans. at 10, misses the point. Rule 608 of the Miliary Rules of Evidence does not require that a witness testifying about another witness's credibility must also be an eyewitness to an alleged crime, nor does the government cite any caselaw for its proposition. The character

evidence of C.F.'s untruthfulness was consistent, unrebutted, and alone constituted a basis to find reasonable doubt.

Finally, and most egregiously, the government attempts to add facts to the record that were not presented at trial. In its brief, the government includes a diagram and cites to various medical websites to argue that the area between the shoulder and the neck is called the "trapezius," arguing that the trapezius forms the border of the neck. Gov. Ans. at 11-12. But review for legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)). This evidence in the government's brief was not presented at trial and is "outside" the record of trial; thus, under long-standing precedent, this Court should not consider such evidence. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (affirming precedent "that a CCA cannot consider matters outside the 'entire record.'") Even if this Court could consider such outside-the-record evidence, it would not help the government. After all, the government has "control of the charge sheet[] to place the accused on notice of the offense he must defend against." *English*, 79 M.J. at 120. If the government wanted to allege that SSgt Norris grabbed C.F.'s trapezius, it could have chosen to do so. But it didn't. The government cannot now fix its problems in proof by adding facts into the record that were not presented at trial.[2]

[2] The government also cites *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, *18-21 (A.F. Ct. Crim. App. 23 May 2022), in support of its argument, Gov. Ans. at 12, but a closer inspection of *Jackson* demonstrates that it is of no benefit to the government here. In *Jackson*, the government alleged that the appellant unlawfully grabbed the victim's neck and torso. *Id*. At trial, the government produced evidence that the appellant grabbed her neck and shoulders. *Id*. This Court found that a reasonable factfinder could conclude that the appellant did grab the torso of the victim's body, which was understood to include the "trunk" of her body, or parts other than her head, neck, and limbs. Specifically, this Court noted that a "rational factfinder could reach these same conclusions without expert testimony of the meaning of 'torso' or special instruction from the military judge." *Id*. Thus, *Jackson* is a decision limited to the unique facts present in that case. But the facts are different in SSgt Norris's case. C.G. was clear that SSgt

B. The government failed to prove beyond a reasonable doubt that SSgt Norris did bodily harm.

As noted in the Appellant's initial brief, the government also failed to establish that SSgt Norris caused bodily harm. In contrast to C.F.'s generic, self-serving testimony that SSgt Norris's alleged grab was offensive and uninvited, R. at 123-24, C.G. described SSgt Norris's actions as a "nudge . . . just to move something out of the way," after SSgt Norris had asked C.F. three times to stop touching his shoes. R. at 202. This testimony established reasonable doubt, particularly when placed in proper context regarding the evidence presented at trial of the commonplace nature of physical contact between C.F. and SSgt Norris. C.F. often "messed" with and annoyed SSgt Norris during work by instigating physical contact, kicked SSgt Norris's shoes and shins, poured pencil shavings on his head, and took patches off the arm of his uniform. R. at 153-54, 190-91.

The government misapprehends the significance of this evidence, arguing that this evidence proved that SSgt Norris was already annoyed with C.F. during the incident. Gov. Ans. at 13. Similar to the government's arguments above, there was no testimony at trial that SSgt Norris was "already quite annoyed" with C.F. outside of pure speculation. Gov. Ans. at 13. Indeed, the government's conjecture is refuted by the fact that C.F. testified that SSgt Norris had invited herself and other airmen to his home to watch a movie and "hang out with the other Airmen" prior to the unit holiday party. R. at 112-14. Rather, this evidence demonstrated that physical contact between C.F. and SSgt Norris was not abnormal as part of workplace banter, and thus, created reasonable doubt as to whether SSgt Norris's alleged nudge of C.F. constituted an offensive touching.

Norris did not grab C.F.'s neck and there was no confusion over the terminology for body parts, such as what constituted a "torso" as in *Jackson*. Here, no dictionary definitions were needed to conclude that the area between the shoulder and neck that C.G. described was not the "back of the neck" as alleged by the government.

Further, the government's effort to distinguish *United States v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000), is misplaced. The government contends that *Johnson* is not applicable to this case because the incident with C.F. was different than the "back rub" that occurred in *Johnson*. Gov. Ans. at 13. While certainly the type of touching in an assault case will always vary based on the facts of each case, the reasoning of *Johnson* still stands true here, namely, that the type of relationship between a complainant and a defendant, particularly one which involved physical contact, is relevant to the determination of whether a touching is offensive. *See Johnson*, 54 M.J. at 69-70. The evidence presented at trial concerning the commonplace nature of physical contact between C.F. and SSgt Norris, coupled with the evidence of C.F.'s bias against him and her character for exaggeration, further confirms that a reasonable doubt exists as to whether an offensive touching occurred.

C. Even if bodily harm was proven, the government failed to prove beyond a reasonable doubt that the touching was unlawful because SSgt Norris had a reasonable belief that his property was in danger of being damaged.

Finally, the government failed to prove SSgt Norris's guilt beyond a reasonable doubt because it failed to prove any bodily harm was unlawful. Specifically, the government failed to prove that the special defense of defense of property did not apply. *See United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014) (noting that for the defense of property to apply in the context of an imminent threat to property, "the accused must have had a reasonable belief that his real or personal property was in immediate danger of trespass or theft; and the accused must have actually believed that the force used was necessary to prevent a trespass or theft of his real or personal property.").

When viewed "through the eyes of the accused and consider[ing] the circumstances known to the accused at the time," *id*. at 272, SSgt Norris had a reasonable belief that his shoes were in

immediate danger of being damaged by C.F. and that a reasonable amount of force was necessary to prevent the damage. Testimony at trial established that SSgt Norris's large collection of shoes could be valued between $400-$500 per pair, but that even small defects such as creases, scuffs, or the removal of a price tag could diminish a shoe's value. R. at 194-97. The reasonableness of SSgt Norris's belief was supported by the fact that C.F. routinely "messed" with his property at work, despite SSgt Norris asking her to stop. R. at 153-54, 191. Notably, the government does not appear to dispute that the special defense of defense of property can apply to the threat of damage to personal property. *See* Gov. Ans. at 14 (citing *Davis*, 73 M.J. at 271).

Instead, it argues that SSgt Norris did not have a reasonable belief that C.F. might damage his shoes. Gov. Ans. at 14. For instance, the government argues that SSgt Norris did not have a reasonable belief that his property was in danger because C.F. did not do or say anything about harming his shoes, Gov. Ans. at 14, but this argument misses the mark. This straw-man argument evades the extensive evidence in support of SSgt Norris's reasonable belief and response. The evidence established that SSgt Norris already had asked C.F. to stop touching his shoes three times, escalating in tone each time he asked, "like a father talking to a kid," before he made contact with her. R. at 199-200. Moreover, the evidence at trial demonstrated that C.F. had a history of messing with SSgt Norris's property at work, even after SSgt Norris had asked her to stop. Given these unique facts and the unique property at issue, SSgt Norris acted reasonably. And even if C.F. did not intend to cause damage to the shoes, SSgt Norris's past experiences with her showed that she could be flippant with his property. Thus, given the fact that even the slightest defect in a shoe could damage its value, SSgt Norris was reasonable to believe that, if C.F. handled his shoes in a lax or joking manner—as she had treated his property in the past—she could diminish the value of his shoes.

Finally, the government's brief continues to both ignore the evidence establishing SSgt Norris's reasonable belief that his property was in danger of being damaged and create red herrings, suggesting that he could "have asked for assistance from others at the party to dissuade [C.F.], or from law enforcement officials to stop her." Gov. Ans. at 14. The government does not offer any specifics on how asking others to help or contacting law enforcement officers was a reasonable alternative. The evidence established that the threat to SSgt Norris's property was immediate. C.G. testified that he heard "stuff kind of moving around" in the closet, and that C.F. had ignored SSgt Norris's request to stop touching his shoes three times. R. at 177, 199-200. Given that a slight scuff or crease could devalue the expensive shoes, R. at 194-95, 197, SSgt Norris was compelled to quickly apply a reasonable, moderate amount of force to protect his property. And the fact that SSgt Norris only applied a reasonable amount of force—a nudge "just to move something out of the way," R. at 202—confirms the reasonableness of his belief and actions.

For all these reasons, the government failed to prove SSgt Norris's conviction beyond a reasonable doubt, and thus, his conviction is legally and factually insufficient.

WHEREFORE, SSgt Norris respectfully requests that this Honorable Court dismiss the charge and specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 30 April 2025.

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(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS
v.	)	No. ACM 24045
Staff Sergeant (E-5) **SETH D. NORRIS**, USAF, *Appellant.*	)	Before Panel No. 3 23 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion to Attach Documents to address Appellant's claim in Issue III – which Appellant raises in the Appendix of his Assignments of Error (AOE) pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992) -- alleging there is no evidence in the record of his receipt of the Charge Sheet. The attachment to this Motion is a declaration from the Paralegal who served Appellant with the Charge Sheet and a receipt for the Charge Sheet signed by Appellant.

The Court of Appeals for the Armed Forces held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that, "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

In Issue III, Appellant asserts the ROT is missing evidence that he received the Charge Sheet as required by R.C.M. 1112(b)(2). (App. Br., Appendix at 3.) The issue is raised by materials currently in the record but is not "fully resolvable by those materials." Jessie, 79 M.J. at 445. That is, during the 11 December 2023 arraignment proceedings, trial counsel announced,

without objection by the defense, "The charges have been properly referred to this court for trial and were served on the accused on 22 September 2023. The three-day statutory waiting period has expired." (R. at 3.) During the 11 March 2024 re-arraignment, trial counsel made the same announcement, again without defense objection. (R. at 13.) The attached documents meet the standard in Jessie, because they resolve Issue III by proving Appellant did, in fact, receive the Charge Sheet on 22 September 2023.

WHEREFORE, the United States requests this Court grant this Motion to Attach documents.

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FOR [redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division (Capt Thomas R. Govan, Jr.) on 23 April 2025 via electronic filing.

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Seth D. NORRIS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to Panel 2 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24045**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Seth D. NORRIS	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 21st day of May, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to Panel 1.

This panel letter supersedes all previous panel assignments.

[redacted], SrA, USAF
Appellate Court Paralegal