

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,) ANSWER TO SHOW CAUSE
<i>Appellee</i>) ORDER
)
v.)
)
Senior Airman (E-4)) ACM S32762
DAMIEN M. WELLS, USAF,)
<i>Appellant.</i>) Panel No. 2
)
) 10 January 2024

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

This Honorable Court on 18 December 2023 ordered the Government to Show Good Cause as to why the Court should not remand the record for correction or other corrective action (hereinafter “the Order”). After review of the electronic record of trial (eROT) and discussions with the base legal office of the Staff Judge Advocate (SJA) that prosecuted the court-martial, the United States agrees that correction of the statement of trial results (STR) and entry of judgment (EOJ) is necessary. This Court has its own authority under R.C.M. 1111(c)(2) to correct these documents, but given that both expurgated and unexpurgated copies of each document need to be made and appropriately distributed, the base legal office is better situated to accomplish these corrections. Thus, the United States agrees that remand for correction of the STR and EOJ is appropriate.

The Order cites the EOJs, which state, “On 11 August 2023, the convening authority denied [Appellant’s] requests [for deferment and waiver],” and notes no such 11 August 2023 document exists in the record. As explained in the attached declaration from Capt Dylan Daugherty, Chief of Litigation, 86 AW/JA, Ramstein AB, Germany (hereinafter “the Capt Daugherty Declaration”), paragraph 2, the citation to the 11 August 2023 date was a

typographical error (eROT, page 15); the convening authority actually took said action on 5 September 2023, which was the only action the convening authority took in this case. *See* eROT, page 33. There is no missing Convening Authority Decision on Action Memorandum.

The Order notes no version of the STR or EOJ contains the phrase “corrected copy – destroy all others,” even though there appear to have been changes made between the September EOJ and the November EOJ. This Court’s Order also noted that the November STR and November EOJ had replaced a victim’s name with initials. The November STR and EOJ should have reflected all changes by striking through removed text and underlining added text, and should have included the aforementioned statement required by DAFI 51-201. In addition, assuming the November STR and EOJs were “corrected copies” of the STR and EOJ, there should have been an expurgated and unexpurgated copy of each in the ROT. *See* ARTICLE 65/66 REVIEW ROT AND ATTACHMENTS ASSEMBLY CHECKLIST. JAJM Virtual Military Justice Deskbook. The November STR and EOJ seem only to be the expurgated versions.

The Order further cites two additions to the more recent EOJ, dated 28 November 2023, and notes the lack of an STR dated 12 September 2023 “as referenced in the 13 September 2023 first indorsement to the EOJ.” As explained in the Capt Daugherty Declaration, paragraph 4, there was no 12 September 2023 STR; rather, the 12 September 2023 EOJ included a typographical error in titling the EOJ’s first indorsement as a first indorsement to the “statement of trial results,” when it was, in fact, an indorsement to the EOJ.

The Order correctly gleaned that corrections to the STR and EOJ mask the identity of the alleged sex-assault victim. The Capt Daugherty Declaration, paragraph 5, confirms those corrections.

To correct the above errors, the base legal office should generate a new, corrected (1) unexpurgated STR; (2) expurgated STR; (3) unexpurgated EOJ; and (4) expurgated EOJ. The following corrections should be made to these documents:

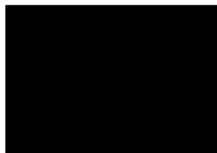
- The date of each new document should be updated.
- **The STRs:**
 - Both the expurgated and unexpurgated STR should say “corrected copy – destroy all others”
 - Any corrections to the expurgated and unexpurgated STR should be made in accordance with DAFI 51-201, para. 21.12 (i.e. lining out incorrect information and adding and underlining correct information).
 - the expurgated STR should (1) include three initials, instead of two initials, to replace the victim’s name, as the Charge Sheet includes the victim’s middle name; and (2) the distribution list should include an asterisk noting which agencies receive the unexpurgated version of the document and, below the distribution list, should add “*Recipients of unexpurgated STR,” per DAFI 51-202, para. 20.8.2.4.
- **The EOJs:**
 - Both the expurgated and unexpurgated EOJ should say “corrected copy – destroy all others”
 - Any corrections to the expurgated and unexpurgated EOJ should be made in accordance with DAFI 51-201, para. 21.12 (i.e. lining out incorrect information and adding and underlining correct information).
 - Both the expurgated and unexpurgated EOJ should state that the convening authority denied Appellant’s requests for deferment and waiver on 5 September 2023.
 - For both the expurgated and unexpurgated EOJ, the first indorsement signed by the SJA should refer to EOJ, not to the STR.
 - The unexpurgated EOJ’s corrections should (1) below the “Reprimand” language and above the Military Judge’s signature, state, “This judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders, if any, and is hereby entered into the record on [Date]”; (2) below the Military Judge’s signature, list as an attachment the applicable STR and its date; (3) update the distribution list to have correct recipients (that is, to add DAF/JAJI and DOD/AFPC and to remove DFAS/IN-JFLTBA) and include asterisks to note which agencies receive the unexpurgated version of the document (USARCF-E, HQ AFSFC/SFC, AFSFC/FCV, DAF/JAJM); and, below the distribution list, include the statement, “*Recipients of unexpurgated

STR,” per DAFI 51-202, para. 20.8.2.4.

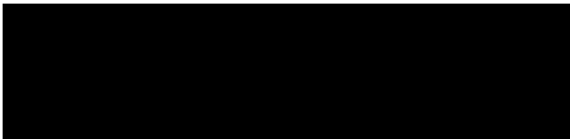
- The expurgated EOJ should (1) include the victim’s three initials, since the Charge Sheet includes the victim’s middle name; and (2) remove from the indorsement page an extra “e” in the word “Judgment” in two places.

WHEREFORE, the United States agrees the Court should remand the record for correction and corrective action pursuant to R.C.M. 1112. If this Court agrees with the proposed changes to the EOJ and STR listed above, the United States suggests that in any remand order, this Court specifically detail for the base legal office and the military judge the changes to be made. This will help ensure that further remands or corrections are unnecessary.

Respectfully submitted,



STEVEN R. KAUFMAN, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force



MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate
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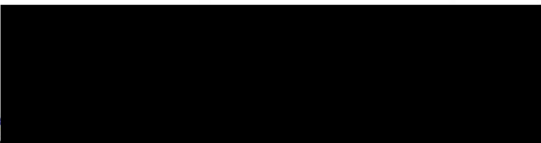
DECLARATION

I, Captain Dylan Daugherty, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Chief of Litigation, 86 AW/JA, Ramstein AB, Germany. I am licensed to practice law in the State of Ohio. I am providing this declaration in response to the 18 December 2023 show cause order in United States v. Damien Wells, ACM S32762 (hereinafter “the Order”).
2. The entry of judgment (EOJ) documents in this case incorrectly state the convening authority denied Appellant’s deferment and waiver requests on 11 August 2023. *See* electronic record of trial (eROT), page 15. Those were typographical errors. The convening authority, in fact, took those actions on 5 September 2023, which was the only action the convening authority took in this case. *See* eROT, page 33.
3. I understand that corrected versions of the statement of trial results (STR) and EOJ should have included the statement “corrected copy – destroy all others,” with all changes reflected by striking through removed text and underlining added text.
4. The Order cites the 12 September 2023 EOJ and notes the lack of a 12 September 2023 STR as referenced in that EOJ. The reference in the EOJ’s indorsement to a 12 September 2023 “statement of trial results” was a typographical error and, instead, should have stated it was an indorsement to the “entry of judgment.”
5. Corrections to the STR and EOJ made in the 28 November 2023 versions of those documents mask the identity of the alleged sex-assault victim.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 10th day of January 2024.


DYLAN J. DAUGHERTY, Captain, USAF
Chief of Litigation, 86 AW/JA
Ramstein AB, Germany

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 10 January 2024.



STEVEN R. KAUFMAN, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force



**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES)	No. ACM S32762
<i>Appellee</i>)	
)	
v.)	
)	ORDER
Damien M. WELLS)	
Senior Airman (E-4))	
U.S. Air Force)	
<i>Appellant</i>)	Panel 2

On 7 July 2023, in accordance with his pleas and pursuant to a plea agreement, Appellant was convicted by a special court-martial at Ramstein Air Base, Germany, of specifications and charges in violation of Articles 92, 115, 117a, 128b, 131b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 915, 917a, 928b, 931b, 934.¹ The military judge sentenced Appellant to a bad-conduct discharge, confinement for 345 days, reduction to the grade of E-1, and a reprimand. The record of trial (ROT) was docketed with this court on 7 December 2023.

The ROT in this case includes two Statements of Trial Results (STR), one Convening Authority Decision on Action memorandum (CA Memo), and two entries of judgment (EOJ):

STR and staff judge advocate’s first indorsement to the STR, both dated 2 August 2023;

CA Memo dated 5 September 2023;

EOJ dated 12 September 2023, with staff judge advocate’s first indorsement to the “[STR] . . . dated 12 September 2023” dated 13 September 2023; and

EOJ, STR, and staff judge advocate’s first indorsement to each, all dated 28 November 2023.

In the CA Memo dated 5 September 2023, the convening authority states Appellant’s 17 July 2023 requests for deferment of reduction in rank and automatic forfeitures “[are] hereby denied.” The convening authority also “hereby waived” automatic forfeitures, granting Appellant’s 17 July 2023 request.

¹ References in this order to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

In both EOJs, the military judge noted Appellant’s 17 July 2023 requests for deferment and waiver. As to the deferments, the EOJs state, “On 11 August 2023, the convening authority denied [Appellant’s] requests.”² We do not see a document dated 11 August 2023 in which the convening authority acted on Appellant’s deferment requests.

No versions of the STR or EOJ reflect any corrections or the phrase “corrected copy – destroy all others.” See Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 21.11–21.12 (14 Apr. 2022) (“Incorrect information should remain on the form but be struck through. The correct information should follow and be underlined.”). However, we were able to notice the same change to the STR and EOJ: the name of a victim was replaced with initials. Additionally, we noticed the later EOJ had two additions: (1) a statement that the judgment reflects the result of the court-martial and any modifications, “and is hereby entered into the record on 28 November 2023,” and (2) attachment of the STR dated 28 November 2023. We do not see an STR dated 12 September 2023, as referenced in the 13 September 2023 first indorsement to the EOJ.

The record of trial in every special court-martial shall include the STR and the EOJ. Rule for Courts-Martial (R.C.M.) 1112(b)(7) and (9). Any deferment request and the action taken on it are to be attached to the record of trial before it is forwarded for appellate review. R.C.M. 1112(f)(4); see also R.C.M. 1103(d)(2) (“The action of the authority acting on the deferment request shall be in writing. A copy of the action on the deferment request . . . shall be included in the record of trial.”).

Based on the foregoing, it appears likely that corrections were made to the STR and EOJ to mask the identity of the alleged sex-assault victim,³ and at least some previous erroneous versions are included in the ROT per the guidance in DAFI 51-201, ¶ 21.10 (“The original erroneous document and any prior corrected copies should be included in the ROT behind the corrected copies, before the audio recording.”). However, we cannot state with certainty that the older versions have been superseded, or what corrections were intended, as the changes were not made per the guidance in DAFI 51-201, ¶ 21.12.

We also cannot state with certainty that the ROT should contain only one memorandum reflecting the convening authority’s decision on action in this case. The convening authority denied Appellant’s deferment requests in his memorandum dated 5 September 2023, but both EOJs reference a convening

² The EOJs do not reflect the date the convening authority made his decision to waive forfeitures.

³ We note DAFI 51-201, ¶¶ 20.8.1 and 20.40.2, require expurgated copies of STRs and EOJs.

authority decision on those requests on 11 August 2023, and we do not see such a decision memo in the ROT. That decision memo could be a prior decision by the convening authority or it could be a separate document relating to Appellant's requests for deferment. Regardless of the type of document used to act on a deferment request, R.C.M. 1112(f)(4) and R.C.M. 1103(d)(2) require that decision to be attached to the ROT, and it is not.

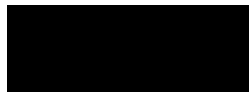
Accordingly, it is by the court on this 18th day of December, 2023,

ORDERED:

Not later than **12 January 2024**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record for correction or take other corrective action. In so doing, the Government may file motions to attach documents, including declarations or affidavits explaining the post-trial processing irregularities noted in this order.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court