

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

AIRMAN FIRST CLASS (E-3)
BRITTANY N. OLSON,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. S32034

USCA Dkt. No. 14-0166/AF

Appellant's Reply Brief

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21 November 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	APPELLANT'S REPLY BRIEF
Appellee)	
)	
v.)	Crim. App. No. S32034
)	
)	USCA Dkt. No. 14-0166/AF
AIRMAN FIRST CLASS(E-3))	
BRITTANY N. OLSON)	
United States Air Force,)	
Appellant.)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW Appellant, pursuant to Rule 19(a)(7)(B) of this
Honorable Court's Rules of Practice and Procedure, and replies
to the Government's brief, which was filed on 13 November 2014.

Argument

The issue as granted by this Court is whether the military
judge erred by denying defense's motion to suppress. Joint
Appendix page 46 is an envelope containing two DVDs which
consist of an approximately five hour video/audio recorded
interview of Appellant by the Air Force Office of Special
Investigations (AFOSI), after AFOSI completed the search of
Appellant's house. At trial, it was marked as Appellate Exhibit
X, and it was referenced as such in the table of contents to the
joint appendix. As noted in the table of contents, appellate
defense counsel did not believe the DVD interview was relevant

and only included it in the joint appendix at the specific request of the government.

In their brief, the government cites to JA 46/Appellate Exhibit X on numerous occasions and uses it as a basis for many of their arguments. Government Brief, p. 4, FN 2; pp. 8-9; pp. 16-20; and p. 25, FNs 5-6. It does not appear that Appellate Exhibit X/JA 46 was ever given to the military judge for his consideration on the motion to suppress. In fact, the one time it is mentioned in substance, during cross examination of Appellant during the motion hearing, the military judge indicated to trial counsel the AFOSI interview, after the search of the house, was irrelevant to the question of whether her consent was voluntarily given many hours earlier in the day. JA 235-42.

It would appear the military judge only reviewed approximately a 12-second clip of JA 46/Appellate Exhibit X, and the purpose was for an unrelated discovery motion. JA 326-28. It should be further noted that as best counsel can tell, in the entire trial, the government never even offered JA 46/Appellate Exhibit X to the members or the military judge. The government only offered Prosecution Exhibit 25 to the members (JA 17),

which was an edited version of the AFOSI interview that was approximately twenty minutes long.¹

It is improper for this Court to consider JA 46/Appellate Exhibit X in answering the granted issue because this evidence was not presented to the military judge for his consideration on the motion to suppress. *United States v. Lloyd*, 69 M.J. 95, 100-101 (C.A.A.F. 2010); see also *United States v. Datz*, 61 M.J. 37, 44, fn 1 (C.A.A.F. 2005). The government is seeking to support the military judge's decision by asking this Court to consider evidence the government did not put before the military judge for his consideration on the motion. This is improper and the Court should disregard JA 46/Appellate Exhibit X in its entirety.²

The government in their brief also cites to Appellant's enlisted performance reports and letters of reprimand (JA 47-68). Government Brief, p. 2, FN 1. These documents also do not appear to have been given to the military judge for his

¹Prosecution Exhibit 25 is not in the Joint Appendix, and it was not cited by defense or the government in the initial briefs. It is in the record of trial. It is a DVD that is the approximately twenty minute edited version of JA 46/Appellate Exhibit X that the government played for the members in findings. This can be found in the record at 900-901. Counsel does not believe it is necessary to supplement the joint appendix because both JA 46/Appellate Exhibit X and Prosecution Exhibit 25 are irrelevant and should not be reviewed or considered by the Court in answering the granted issue because neither were considered by the military judge during the motion hearing.

²If counsel is wrong and JA 46/Appellate Exhibit X was given to the military judge for his consideration of the motion to suppress, and he reviewed it in coming to his decision, then counsel concedes it is relevant and proper for the Court to consider.

consideration on the motion to suppress, and accordingly, they are not relevant either and should not be considered by this Court in answering the issue granted.

WHEREFORE, this Court should not consider JA 46/Appellate Exhibit X and JA 47-68 because they are not relevant to the proceedings because they were not evidence presented to the military judge during the motion hearing to suppress. Consequently, the government should not be permitted to argue from this evidence either.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 21 November 2014.



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