**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

| | | |
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| UNITED STATES,<br>Appellee | ) | BRIEF ON BEHALF OF<br>APPELLEE |
| v. | ) | |
| | ) | Crim. App. Dkt. No. |
| Sergeant (E-5)<br>**DAYTRON ABDULLAH**<br>United States Army,<br>Appellant | ) | ARMY 20230223<br><br>USCA Dkt. No. 25-0070/AR |


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| v. | ) | |
| SERGEANT (E-5)<br>**DAYTRON ABDULLAH,**<br>United States Army,<br>Appellant | ) | Crim. App. Dkt. No.<br>ARMY 20230223<br><br>USCA Dkt. No. 25-0070/AR |

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

## Issue Presented

**WHETHER A RETIRED APPELLATE JUDGE AND AN APPELLATE JUDGE ON TERMINAL LEAVE IMPERMISSIBLY PARTICIPATED IN AN EN BANC DECISION OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS.**

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2022) [UCMJ].[1] The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[1] All references to the UCMJ are to the versions in the manual for Courts-Martial, United States (2019 ed.) (2019 MCM) with the 2020 and 2021 National Defense Authorization Act Amendments.

## Statement of the Case

On April 20, 2023, a military judge sitting as a special-court martial convicted Appellant, Sergeant Dayton Abdullah, pursuant to his pleas, of one specification each of desertion, absence without leave, disobeying a superior commissioned officer, and wrongful use of marijuana, in violation of Articles 85, 86, 90, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 886, 890, and 912a [UCMJ].[2] (JA 22-23; JA 15-17). The military judge sentenced Appellant to be reduced to the grade of E-1, confined for a total of ninety days,[3] and discharged from the service with a bad-conduct discharge. (JA 24-5; JA 15-17). On July 13, 2023, the convening authority disapproved Appellant's request for deferment of reduction in grade, deferment of automatic forfeitures, and waiver of automatic forfeitures; the convening authority took no other action on

[2] In exchange for Appellant's pleas, the convening authority agreed to direct the trial counsel to dismiss one specification each of wrongful use of amphetamines, wrongful use of methamphetamines, and wrongful possession of marijuana, in violation of Article 112a, UCMJ. (App. Ex. I, p. 4; R. at 63; JA 15-17).

[3] The military judge sentenced Appellant to the minimum term of confinement permitted under his plea agreement, segmenting the confinement as follows:

| **Charge / Specification** | **Sentence** | **To be served…** |
|---|---|---|
| Charge I, The Specification | 51 days | Consecutively |
| Charge II, The Specification | 6 days | Consecutively |
| Charge III, The Specification | 22 days | Consecutively |
| Charge IV, Specification 1 | 11 days | Consecutively |
| **Total** | **90 days** | |

(JA 15; JA 24; JA 82). Appellant was further credited with 51 days of pretrial confinement credit. (JA 12; JA 99-100).

Appellant's case. (JA 28). On September 8, 2023, the military judge entered judgment. (JA 29).

The Army Court issued a memorandum opinion on April 30, 2024, affirming the findings of guilt and approving only so much of the sentence extending to ninety days confinement. *United States v. Abdullah*, ARMY 20230223, 2024 CCA LEXIS 100 (Army Ct. Crim. App. Apr. 30, 2024) (mem. op.).

Following the Government's filing of a "Suggestion for *En Banc* Reconsideration," in accordance with Joint Rules of Appellate Procedure for Courts of Criminal Appeals (the Joint Rules or J.R.A.P.) Rule (R.) 27, the Army Court adopted the Appellee's suggestion and issued an order to consider the case *en banc*. *United States v. Abdullah*, ARMY 20230223 (Army Ct. Crim. App. June 14, 2024) (order). On November 5, 2024, the Army Court issued its *en banc* Opinion of the Court on Reconsideration, which vacated the court's prior opinion and affirmed the original findings and sentence. *United States v. Abdullah*, 85 M.J. 501, 2024 LEXIS 479, *33 (Army Ct. Crim. App. Nov. 5, 2024).[4]

Appellant filed the Supplement to Petition for Grant of Review on January 22, 2025. On May 30, 2025, this Court granted review. (JA 1).

## Statement of Facts

[4] Although this case is published, Lexis has not updated the opinion with pin cites to the Military Justice Reporter; therefore, the Government refers to the pin cites using the Lexis formatting.

Appellant, a sergeant in the United States Army, repeatedly used illegal substances and demonstrated a disregard for military authority. (JA 85). Over the course of five months, he drove while intoxicated, deserted his unit to avoid a 100% urinalysis and remained absent for approximately 50 days, disobeyed orders, used illegal drugs, and was absent without leave. (JA 85-86).

Following preferral of charges, Appellant entered a plea agreement with the convening authority. (JA 79). In the plea agreement, Appellant agreed to plead guilty to the Specification of Charge I,[5] II,[6] and III,[7] and Specification 1[8] of Charge IV. (JA 80). The convening authority agreed and directed the Trial Counsel to dismiss Specifications 2–4 of Charge IV.[9] (JA 82). Additionally, the convening authority agreed to not prosecute Appellant for any uncharged misconduct known to the chain of command or military law enforcement at the time the convening authority approved the agreement. (JA 82).

In the plea agreement, Appellant agreed to certain sentence limitations. He agreed that a Bad Conduct Discharge would be adjudged in his case. (JA 81).

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[5] Desertion, in violation of Article 85, UCMJ. (JA 12).
[6] Absence without leave, in violation of Article 86, UCMJ. (JA 12).
[7] Willfully disobeying a Superior Commissioned Officer, in violation of Article 90, UCMJ. (JA 12).
[8] Wrongfully using tetrahydocannabinol, in violation of Article 112a, UCMJ. (JA 12).
[9] Wrongful use of amphetamines, wrongful use of methamphetamines, wrongfully possessing marijuana, in violation of Article 112a, UCMJ. (JA 12).

Confinement would be limited to 120 days. (JA 82). Appellant submitted this agreement on April 7, 2023, and the convening authority approved the agreement on April 13, 2023. (JA 83).

Appellant pled guilty in accordance with the agreement on April 20, 2023. (JA 15). The Army Court received the record 163 days later, on September 30, 2023. *Abdullah*, 2024 LEXIS 479, at *6.

The Office of the Staff Judge Advocate included a memorandum detailing the post-trial processing of the case, which explained that personnel changeover *may* have contributed to the lateness and added information on operational tempo. *Abdullah*, 2024 LEXIS 479, at *6-7.

The Army Court ultimately found the post-trial delay in this case did not violate the Due Process Clause of the Fifth Amendment. *Abdullah*, 2024 LEXIS 479, at *33. Further, the court did not grant relief under Article 66. *Id*. Senior Judge Walker wrote the opinion of the court; Chief Judge Smawley, Senior Judge Fleming, Judge Pond, and Judge Parker concurred. *Id*. at *22.

Judge Morris wrote a short concurrence, agreeing that the post-trial delay did not violate the Due Process Clause of the Fifth Amendment or Article 66(d)(2), but stating she would have found the 163-day post-trial delay weighed in favor of Appellant under the *Barker* analysis. *Abdullah*, 2024 LEXIS 479, at *35. (Morris,

J., concurring). Finally, Judge Arguelles[10] and Judge Penland filed dissenting opinions. *Abdullah*, 2024 LEXIS 479, at *36. The Army Court issued its *en banc* opinion on November 5, 2024. *Id*. at *1.

At the time this opinion was issued, Former-Senior Judge Walker was on terminal leave. (JA 34). Her terminal leave began on October 10, 2024 and continued until she retired on November 30, 2024. (JA 34).

Similarly, Former-Chief Judge Smawley began his transition leave September 1, 2024. (JA 34). He remained on transition leave until his retirement on October 31, 2024. (JA 34).

## Summary of Argument

The Army Court complied with all court rules and applicable precedent when they issued their *en banc* decision in this matter. The departure from the Court of two of its judges following their final action on the case did not prohibit their participation.

In order to participate in an opinion of the court, a judge must be in "regular active service" of the court. Both Circuit Appellate Courts, and the Criminal Courts of Appeals under the UCMJ are provided broad authority to manage their

[10] Judge Arguelles decided the case while on active duty. *Abdullah*, 2024 LEXIS 479, at *1.

dockets and create their own administrative rules and procedures. The Army Court does not define what it means to be "in regular active service."

Civilian judges are afforded latitude to continue to participate in cases once they have retired from the bench. This is done to promote the purpose of judicial efficiency and gives the court the benefit of the knowledge and judgment of all the judges who have worked on the case. The CCAs, over the past forty years, have published opinions by judges which post-date their departure from the court. This customary practice and course of conduct has established a rule that gives a more liberal definition of "regular active service" than is put forth by Appellant's brief.

The determinative factor as to whether a judge can participate in a decision following their departure is whether the justice retained the ability to remove themselves from the opinion of the court prior to its issuance. Provided both judges retained this ability, the Army Court did not error when they issued their opinion.

## Issue Presented

**WHETHER A RETIRED APPELLATE JUDGE AND AN APPELLATE JUDGE ON TERMINAL LEAVE IMPERMISSIBLY PARTICIPATED IN AN EN BANC DECISION OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS.**

## Standard of Review

Questions of law are reviewed *de novo*. *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023).

## Law

### A. Military Courts of Criminal Appeals have latitude in exercising its authority for En Banc Review.

Congress has afforded broad authority to Judge Advocates General and CCAs to formulate policies and procedures for how they operate. Article 66(a)(1), UCMJ, 10 U.S.C. § 866. For the purpose of reviewing courts-martial, the court may sit in panels or as a whole, in accordance with the uniform rules of procedure for CCAs that the Judge Advocates General prescribe. Articles 66(a)(1) and Article 66(h), UCMJ, 10 U.S.C. § 866.

The Joint Rules are promulgated in accordance with Article 66(h), UCMJ, and Courts of Criminal Appeals may choose to promulgate additional rules. *See* J.R.A.P. R. 2 and 3. Pursuant to these rules, a majority of judges who are in regular active service and not disqualified may, *sua sponte* or in response to a suggestion, order that the Court consider or reconsider an appeal or any other proceeding *en banc*. J.R.A.P. R. 27(a). Each Court of Appeals is vested with wide latitude of discretion to decide for itself just how its *en banc* power shall be exercised. *Western P.R. Corp. v. Western P.R. Co.*, 345 U.S. 247, 259 (1953); *see, e.g., Duncan v. Bonta*, 131 F. 4th 1019, 1024-1025 (9th Cir. 2025).

However, **"**[a] judge who is present for duty does not have the discretion to not participate in an assigned case, absent exceptional circumstances." *United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016) (judges who were present for duty when the first case was issued, but did not participate, were disqualified from later participation in the case).

**B. The Army Court has defined "active service" through customary practice.**

A case is decided once an opinion is issued from the court. *United States v. American-Foreign S.S. Corp*, 363 U.S. 685, 687 (1960). Any judge who participates in the opinion must be an active judge in accordance with applicable court rules and statutes. *Id*. at 690–91.

A judge is in regular active service if: (1) they are assigned to the court; and (2) they are in the active component of the armed forces, unless defined differently pursuant to J.R.A.P. R. 7(d). J.R.A.P. R. 7(c). "Each service may establish its own definition of "regular active service" in its service court rules even if inconsistent with Rule 7(c). J.R.A.P. R. 7(d). The Army Court's rules do not further define "regular active service." Retired judges of all branches of service of the armed forces who continue to receive pay are still a part of the land and naval forces and subject to the UCMJ. *See United States v. Begani*, 81 M.J. 273, 277 (C.A.A.F. 2021).

Both military and U.S. Federal Courts have provided appellate courts great deference in their ability to promulgate their own rules and administrative procedures. *See United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (holding this court has historically been reluctant to mandate procedures for CCAs).

There is no Army Court rule that prohibits a judge from voting on an opinion prior to their expiration of service. Additionally, the law provides different mechanisms to allow judges to continue to vote on a matter when their time in active service on the court has expired, often in the name of judicial efficiency. For example, in civilian federal courts, 28 U.S.C. § 46 states only judges in "regular active service" may sit *en banc*. "Except that any senior circuit judge of the circuit shall be eligible . . . (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c); *see also Bonta*, 131 F.4th 1019, 1028 (9th Cir. 2025) (finding original eleven member *en banc* could retain jurisdiction over matter when it returned to the 9th Circuit later and after five of the eleven original judges had taken senior status).

The reason for such an exception is to provide the benefit of the knowledge and judgment of all the judges who worked on the case, and to adequately value the time and experience of those who researched, deliberated, and initially decided to take the case in the first place. *See United States v. Hudspeth*, 42 F.3d 1013,

1015 (7th Cir. 1994); *see also Allen v. Johnson*, 391 F.2d 527, 529-30 (5th Cir. 1968) (*en banc*) (per curiam). Continued participation promotes the statute's obvious purpose of judicial efficiency and gives the *en banc* court the benefit of the knowledge and judgment of all the judges who have worked on the case. *Bonta*, 131 F.4th at 1028 (citing *Igartua de la Rosa v. United States*, 407 F.3d 30, 32 (1st Cir. 2005) (en banc) (per curiam) (memorandum and order)).

This Court has adopted a similar framework, both when encouraging judges to sit cases and in permitting judges to be part of the published opinion. Although there is a distinct difference between a judge appointed to the Court of Appeals for the Armed Forces [CAAF] verse one assigned to the Army Court, this Court has permitted a judge to vote on a matter prior to the expiration of their term of service even when the opinion was published after they were no longer on the bench. *See United States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F. 2015) (noting "former Chief Judge James E. Baker took final action in this case prior to the expiration of his term on July 31, 2015" when the opinion was issued on August 20, 2015)).[11]

Similarly, even though the Army Court does not define "regular active service" in their court rules, the CCA's historic practices give insight into how they

[11] This footnote was similarly used in four other cases by this Court in 2015. *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015); *United States v. Sullivan*, 74 M.J. 448, 449 (C.A.A.F. 2015); *United States v. Akbar*, 74 M.J. 364, 418 (C.A.A.F. 2015); *United States v. Quick*, 74 M.J. 332, 338 (C.A.A.F. 2015).

address the traditional churn of the military assignment cycles. A Lexis search for cases published by military courts of appeals shows over 200 cases in which an opinion post-dates a judge's departure from the court. Each of these cases utilizes a footnote that states words to the effect of: "the judge 'took final action in this case prior to retirement from active duty.'" *E.g.*, *United States v. Howard*, 9 M.J 873 (N.C.M.R. 1980) (noting the judge retired on June 30, 1980, but the opinion was not issued until July 24, 1980). The reasons listed for departure include retirement, reassignment, transfer, detaching from the court, and permanent change of duty station. Although not codified in the Joint Rules, this history indicates this has become a common practice amongst the CCAs across the services.

**C. A judge may not participate in a decision upon their death.**

Although it is customary for a judge to participate in a decision following their departure from the bench, this ability is not absolute. The Supreme Court has ruled a judge's vote is unable to be counted if they are deceased prior to publishing the opinion, even when they have fully participated in the case and authored the opinion. *Yovino v. Rizo*, 586 U.S. 181, 185 (2019). In coming to this conclusion, the Supreme Court highlighted there is no rule "that renders judges' votes and opinions immutable at some point in time prior to their public release." *Id*. at 184. It is generally understood that a judge may change his or her position up to the very moment when a decision is released. *Id*.

## Argument

The Army Court correctly followed the statute, the Joint Rules for Appellate Procedure, and its rules; the departure of two judges did not violate those rules.

### A. Senior Judge Walker and Chief Judge Smawley retained their ability to remove their vote up until the time the opinion was published.

Appellant alleges the retirement and permanent change of station of these two judges is "analogous to a federal circuit judge dying." (Appellant Br. p. 18). This ignores the determinative factor in *Rizo* that Judge Reinhardt's vote was not inalterably fixed prior to the issuance of the opinion. 586 U.S. 181, 183 (2019). Appellant does not allege Senior Judge Walker or Chief Judge Smawley were unable to remove their votes from the decision if they experienced a change of heart prior to the issuance of the opinion.

Appellant's assertion not only draws a false equivalency where one does not exist, it also ignores the customary practice within the service courts of appeals that permits opinions to be published following the retirement or reassignment of judges who participated in the decision. So long as either judge maintained the ability to remove their name from the opinion, *Rizo* does not control this court.

### B. The Army Court correctly followed the Joint Rules and their customary practices when they published the Court's opinion.

Appellant does not dispute that both Senior Judge Walker and Chief Judge Smawley were in regular active service when they voted to review this case *en*

*banc*, sat on the bench for oral argument, or even when they began their deliberative process. Instead, Appellant focuses on their specific status at the point in time the court's opinion was published. (Appellant Br. P. 16). This assertion is misplaced.

Appellant asks this Court to engage in an inflexible line drawing exercise that, not only ignores the historical practices of the service courts of appeals, but also fails to address the question of when exactly the judges were supposed to recuse themselves. In line with this Court's holding in *Witt*, if any of the judges were to disqualify themselves after participating in this case, Appellant would be materially prejudiced and the case and *en banc* proceedings would be required to begin anew.

Appellant further relies on *American S.S. Corp.*, citing to its holding "under existing legislation a retired circuit judge is without power to participate in an *en banc* Court of Appeals determination." (Appellant Br. p. 10) (citing *American S.S. Corp*, 363 U.S. at 688). This use of a case citation from 1960 ignores the fact that Congress, in 1963, amended this statute to prevent the exact result Appellant now argues for in the present case. *Bonta*, at 1035. This assertion further ignores that the Army Court's actions are consistent with how the CCAs have handled the summer transition process for the past 40 years, and how this honorable Court has conducted itself when a justice's fifteen-year term has run its course. *See United*

*States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F. 2015).

Additionally, the Supreme Court has repeatedly emphasized the differences between military and civilian societies and justice systems. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Weiss v. United States*, 510 U.S. 163, 174-175 (1994); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-20 (1955).

Due to the nature of military assignments, the Army Court's judges do not possess the same control of their dockets that a civilian appellate judge may possess. Military appellate judges must continue to draft opinions, attend oral argument, and discuss cases with other judges while knowing they serve for a finite period of time.[12] This Court should not align its practice with federal court rules where judges are appointed for life and often serve decades before retiring or even dying while they are still on the bench. Military appellate courts must retain the ability to vote on cases and author opinions that may be published after one or more judges' departure from the bench. Not only has this exception existed as a practice of the service courts, but a similar exception is codified for civilian appellate courts. 28 U.S.C. § 46(c).[13]

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[12] Judge Advocates "are assigned as appellate military judges for a minimum of three years, except under circumstances described in paragraph 12-15, AR 27-10." Judge Advocate Legal Services Publication 1-1 (Personnel Policies) – 21 January 2025.

[13] Both Judge Walker and Judge Smawley retired following their actions in this case. Both judges remained part of the armed forces due to the fact they continue to receive pay. *See United States v. Begani*, 81 M.J. 273, 277 (C.A.A.F. 2021).

At the time the Army Court issued its *en banc* opinion, former Senior Judge Walker was on transition leave but had not yet retired. She remained in the active component of the armed forces and assigned to ACCA until the date of her retirement on November 30, 2025. Senior Judge Walker remained in "regular active service" of the court and was therefore able to participate in the opinion issued by the Army Court.

Separately, following his departure from the court Chief Judge Smawley entered retirement. Because he continued to receive pay he was, and is still today, a part of the armed forces and subject to recall. *See United States v. Begani*, 81 M.J. 273, 277 (C.A.A.F. 2021). Chief Judge Smawley's retirement is not akin to the death of a judge in *Rizo*. So long as he retained the ability to remove his vote from the decision prior to its issuance, his participation in the opinion complied with applicable case law and was in accordance with the historic practices of the military courts of appeals.

**C. Prejudice.**

If this Court finds Chief Judge Smawley or Senior Judge Walker were disqualified from participation in this case, Appellant is unable to show material prejudice to his substantial rights. *See* Article 59(a), UCMJ.

Although Senior Judge Walker wrote the Opinion of the Court, she was joined by Chief Judge Smawley, Senior Judge Fleming, Judge Pond, and Judge

Parker. Judge Morris wrote a short concurrence; she concurred that there was no Due Process violation nor relief warrented under Article 66(d)(2), UCMJ only disagreeing with the majority on the first prong of the *Barker* analysis. *Abdullah*, 2024 LEXIS 479, at *35. (J. Morris, concurring).

Because Judge Morris concurred with the result, Appellant can point to no prejudice. Removing Chief Judge Smawley and Senior Judge Walker from the opinion does not change the result from the *en banc* court. *Cf. Rizo*, 586 U.S. at 183, 187 (remanding the case because the deceased judge's vote was decisive to create a majority). Appellant's claim that Judge Walker and Judge Smawley somehow influenced the independent judgment of the other appellate judges is without evidence and delves into the deliberative process of the Army Court.

This case is distinguishable from *Witt* in that neither judge was disqualified at the beginning of their participation in the proceeding. 75 M.J. at 384. Because both judges had a duty to sit on this case when it was originally heard, the court was properly composed. *Id*. at 383. Even if this court finds that these judges should have removed themselves from the case upon their departure from the court, the result would be 4-2 instead of 6-2 and the case would still be affirmed.

Additionally, this Court in *Witt* made a specific two part finding. First, the judges de facto disqualified themselves from participation during the original hearing. *Id*. at 384. Second, their subsequent involvement in the case, affirming a

capital sentence that had been previously reversed, produced a significant risk of undermining the public's confidence in the judicial process. *Id*. Similar facts do not exist in the present case. One key difference is Appellant does not contend the Army Court was not properly composed at its onset. Chief Judge Smawley took final action in this case prior to his retirement on October 31. (JA 34; JA 35). Similarly, Judge Walker took final action prior to her retirement on November 30, 2024. (JA 34; JA 35).

The Army Court's issuing of the opinion in this case five days after Chief Judge Smawley's retirement from active duty, along with Appellant's contention he was "brought in to just provide vote," does not provide an adequate factual basis to allege that this case undermined "the public's faith in the military justice process and the military justice system." (Appellant's Br. 20). The Army Court highlighted in their opinion, dated November 5, 2024, the status of all judges involved whose status had changed, including that Judge Arguelles decided the case while on active duty. This transparency ensures the public will understand and have faith in the military judicial process.

Lastly, in *Rizo*, the Court remanded the case, in part, because without the now deceased judge, the ruling would have been 5-5. 586 U.S. at 182 . That is not the case here, where a clear majority still exists. Because a majority of non-challenged judges signed onto the opinion, Appellant is unable to show prejudice.

## Conclusion

The United States respectfully request this Court affirm the Army Court's *en banc* decision.

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## CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **5,138** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 10th day of July, 2025.

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