IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**UNITED STATES'**
Appellant/Cross-Appellee,	)	**REPLY BRIEF**
	)	
v.	)	
	)	Crim. App. No. 40551
Senior Airmen (E-4),	)	
NATHANIEL A. CASILLAS,	)	USCA Dkt. No. 26-0096/AF
United States Air Force,	)	
Appellee/Cross-Appellant.	)	18 February 2026

UNITED STATES' REPLY BRIEF

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Senior Airman (E-4), **NATHANIEL A. CASILLAS,** United States Air Force, *Appellee/Cross-Appellant.*	)	USCA Dkt. No. 26-0096/AF
	)	8 April 2026

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

Pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issues (Gov. Br.) The United States maintains the facts and arguments submitted in its brief in support of the certified issues.

ARGUMENT

Appellee's double jeopardy claims fail and should have failed at the Air Force Court of Criminal Appeals (AFCCA) because they hinge on the flawed premise that the iPhone XR was the unit of prosecution for the child pornography offenses at both his courts-martial. This interpretation defies the specifications' plain language. Appellee's answer brief is further flawed because he fails to explain how he prevails under the onerous plain error standard. Given the

ambiguities in the existing law, Appellee can show neither plain and obvious error, nor that his trial defense counsel were ineffective for failing to file a double jeopardy motion. This Court should reverse AFCCA's decision to set aside the possession specification for double jeopardy, but affirm AFCCA's decision to uphold the viewing specification.

I.

APPELLEE WAS PROPERLY PROSECUTED FOR TWO SEPARATE AND DISTINCT CRIMES OF POSSESSION OF CHILD PORNOGRAPHY.

A. The specifications in Appellee's two courts-martial did not designate the iPhone XR as the unit of prosecution.

Appellee argues that the unit of prosecution in his first court-martial (Casillas I) was the iPhone XR because the specification contained the language "within an iPhone XR." (Ans. Br. at 10.) And because the images at issue in his second court-martial (Casillas II) were also "contained on the same iPhone XR" as Casillas I, Appellant maintains that the iPhone XR remained the unit of prosecution in his second court-martial. (Ans. Br. at 10-11.)

Appellee's interpretation of the specifications at issue does not comport with the definition of child pornography in the Manual for Courts-Martial. Child pornography is "material that contains . . . a visual depiction of a . . . minor engaging in sexually explicit conduct." Manual for Courts-Martial United States

part. IV, para. 95.c.(4) (2019 ed.) (MCM). The plain language of the Casillas I specification, which alleged that Appellee possessed the child pornography "within an iPhone XR," logically precluded the iPhone itself from being the "material" possessed. The material that comprises the child pornography cannot both be the iPhone and simultaneously be located *within* the iPhone XR. As a result, the png file or PDF files were the actual units of prosecution. (JA at 362-67.) This conclusion is bolstered by the Casillas II specification, which made no mention of the iPhone XR. Yet both AFCCA and Appellee overlook this sound conclusion.

Appellee's only rejoinder to this argument was that the specifications in United States v. Forrester, 76 M.J. 479 (C.A.A.F. 2017) had very similar language to the specifications here, and therefore Forrester dictated that the iPhone XR was the unit of prosecution. (Ans. Br. at 13.) The United States noted these similarities between the specifications in its initial brief. (Gov. Br. at 33.) Forrester's designation of the device as the unit of prosecution rested on an atextual reading of the specification that answered the discrete question in that case but does not work in practice when applied in other situations. Forrester's interpretation of the specification does not make logical sense for the same reason it does not make sense here. The alleged "material" cannot be both the electronic device *and* be located within that same electronic device. Accordingly, the holding in Forrester

should be narrowly construed, applying only to its very specific facts: cases where an accused possesses identical copies of the same files across multiple devices.

In Forrester, each set of *files* contained on each separate device could have equally been considered a separate "material" and a separate unit of prosecution. Each set of files containing visual depictions represented a discrete act of possession, because the appellant had purposely copied and transferred his child pornography files to multiple different devices "to make sure that I have all my stuff." Forrester, 76 M.J. at 483. Each time the appellant copied and transferred his files to a new device marked a separate act of possession. Id. at 484. This supports the conclusion that, in Forrester, it would not have mattered whether the device or the sets of files were considered to be the material – the outcome would have been the same. As this Court concluded, "where acts constitute separate criminal conduct under the applicable statute, as amplified here by the MCM, drafting separate charges and cumulative punishments for those acts are not unreasonable." Id. at 485. Since considering the files, rather than the devices, to be the "material" comports more aptly with the specifications charged in Forrester, this Court should adopt that interpretation of similar specifications going forward. Although the device listed in the specification may be helpful to orient the factfinder (and accused) to which files correspond to which specification, the device would not become the unit of prosecution unless it was described as being

the child pornography that the accused possessed – e.g., if the specification read that the accused possessed "child pornography: to wit, an iPhone XR containing visual depictions . . ."

Along the same lines as Forrester – where copying and transferring the same images constituted discrete acts of possession – discrete acts of possession could occur when an accused, on separate occasions, acquires different files or sets of files containing contraband images. Such circumstances are accounted for in the plain language of Article 134, UCMJ, which in no way excludes the possibility that computer files could be "material" that contains visual depictions of a minor. In any event, this Court's interpretation of the charging scheme in Forrester should not apply here, because it does not comport with a plain reading of the specifications at issue. This Court should decline to perpetuate an illogical reading of child pornography specifications, especially since that reading was not essential to Forrester's holding.

Appellee's brief fails to grapple with the plain language of the specifications which do not comport with the iPhone XR being the charged "material" or the unit of prosecution. As a result, he cannot show that the parties' and military judge's interpretation of the specifications during Casillas II was plain and obvious error.

Appellee also notes that none of the specifications listed specific file names, supporting his argument that the individual files cannot be the units of prosecution.

(Ans. Br. at 12.) But a specification need not list every visual depiction prosecuted. "The military is a notice pleading jurisdiction," and the purpose of the specification is to fairly inform an accused of the charge against him that he must defend. United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011). Rather than being seen as identifying the "unit of prosecution," the reference to the iPhone XR was merely orienting the factfinder to which images were at issue and where the images were located. The military judge's instructions in Casillas II prove telling. He explained to the members, "The depictions in this case, which the prosecution has alleged meet the definition of child pornography are those depictions *contained in files* with the following file names." (JA at 310, 433.) (emphasis added). This instruction, which drew no objection from the defense, reinforced all the trial participants' understanding that the individual PDF files were the "material" containing visual depictions of minors.

Even if each individual file in Forrester or each individual PDF file in Casillas II was a separate unit of prosecution and could have been charged in a separate specification, it was proper for the government in each case to consolidate multiple offenses in seven specifications in Forrester and one specification in Casillas II, by referring to "digital images"[1] and "visual depictions" respectively. In United States v. Poole, 26 M.J. 272, 274 (C.M.A. 1988), this Court approved of

[1] *See* Forrester, 76 M.J. at 481-82.

the government's decision "to plead numerous bad-check offenses in six separate specification." Although the government "could have elected to plead at least 87 specifications," this Court was "reluctant to criticize the Government for its decision to consolidate the numerous specifications, particularly since it was to the benefit of appellant to do so." Id.

Poole's reasoning establishes that the charging scheme used in Casillas II consolidated 13 separate offenses into one specification. This, in turn, supports that the separate image charged in Casillas I represented a different offense from those offenses consolidated in Casillas II. Theoretically, the government had the prosecutorial discretion to try all the offenses under one specification in accordance with Poole, as the government tried to do in Casillas I through a major change. But that did not change the fact that they were separate offenses that could have been properly tried separately at one court-martial or at different courts-martial.

This Court should find that individual files were the proper units of prosecution and, as a result, hold that Appellee's conviction did not result in a double jeopardy violation.

B. Appellee's reliance on federal case law is misplaced.

Appellee cites United States v. Bopp, 79 F.4th 567, 572 (5th Cir. 2023) and United States v. Thomas, No. 24-1183, 2025 U.S. App. LEXIS 463, at *4–5 (7th Cir. 7 January 2025) to argue that courts have found physical devices, rather than the images themselves, to be the units of prosecution. (Ans. Br. at 14.) But Bopp and Thomas are not analogous to this case. In Bopp, "the indictment specifically charged possession of 'one Motorola Moto G Stylus android cellular phone that contained . . ." the files at issue. 79 F.4th at 569. In contrast, here, Appellee was charged with possessing child pornography/visual depictions that were within an iPhone XR, not charged with possessing the iPhone XR itself.

In Thomas, it is unclear what the indictment identified as "the material," but the court seemed to find two distinct hard drives to be encompassed by the one count of possessing "material" mentioned in the indictment. Thomas, 2025 U.S. App. LEXIS 463 at *2-5. Because Bopp was charged differently than Appellee, and it is unclear how Thomas was charged, these cases are of limited value here. The United States does not dispute that Appellee could have been charged, like in Bopp, with the iPhone XR as the unit of prosecution. For example, the specification in Casillas I could have read that Appellee did "knowingly and wrongfully possess child pornography, to wit: an iPhone XR containing a visual depiction of minors, or what appear to be minors." But it did not, and without such

clearcut language, the specification did not plainly and obviously identify the iPhone XR as the unit of prosecution.

Appellee makes a "goose and gander" argument," contending that the "Government wants to reap the benefits of multiple interpretations, allowing its charging schemes to always be interpreted in a manner that prejudices the accused." (Ans. Br. at 14-15.) This argument falls flat for two reasons. First, the United States is asking this Court to depart from some of its confusing and atextual analysis in Forrester, not arguing that the Court should sometimes use that interpretation if it favors the government. This Court should always interpret specifications according to their plain language. Second, considering the sets of files rather than the devices to be the units of prosecution in Forrester – which is the same thing the United States is asking for here – would have led to the same result – no multiplicity. There is no inconsistency in the United States' argument.

Finally, Appellant claims that "[t]here is no consensus among civilian courts [regarding what consists of a unit of prosecution] that should be considered persuasive when applying the military-specific definition and precedent at issue here." (Ans. Br. at 14.) Appellee's point is crucial because there can be no plain and obvious error when there is no consensus in the law. *See* United States v. Schmidt, 82 M.J. 68, 74 (C.A.A.F. 2022) (Sparks, J., announcing judgement of the court) ("An 'error cannot be plain or obvious if the law is unsettled on the issue at

the time of trial and remains so on appeal") (internal citations omitted). Appellee offers no authority that forbids prosecuting individual files as separate units of prosecution, nor that compels this Court to find that the iPhone XR was the unit of prosecution here. As discussed in the United States' initial brief (Gov. Br. at 28-31), there are several civilian court opinions that support that the individual files – not the device – were the units of prosecution in this case. And if the individual files were the unit of prosecution, then Appellee was not prosecuted twice for the same conduct in Casillas I and Casillas II, since each trial involved different files. But in any event, the law is not so settled that this Court can find plain and obvious error. This Court should find no plain and obvious double jeopardy violation and reverse AFCAA's decision overturning Appellee's conviction in Casillas II for possessing child pornography (Specification 1).

II.

APPELLEE KNOWINGLY WAIVED HIS DOUBLE JEOPARDY CHALLENGE, AND AFCCA DID NOT ABUSE ITS DISCRETION IN APPLYING THAT WAIVER FOR THE VIEWING SPECIFICATION.

A. Appellee knowingly and intelligently waived his right to any double jeopardy claim.

Appellee asserts that "the record does not reflect waiver of the double jeopardy issue," (Ans. Br. at 16), specifically that the record fell "short of clearly establishing an intentional relinquishment of a known right." (Ans. Br. at 17.)

Appellee's argument is unpersuasive for several reasons. First, the military judge specifically invited the defense to raise double jeopardy by saying, "My understanding is if the parties have any concerns with any double jeopardy aspects of this court-martial they'll bring it to my attention via appropriate motion." (JA at 113.) This occurrence established that trial defense counsel knew of the right to make a double jeopardy claim. Yet the defense did not raise double jeopardy at any point during trial and even affirmed that the images in Casillas II were not admitted in Casillas I – a factual predicate undermining any double jeopardy claim. (JA at 111-13.) And as AFCCA noted, the declarations submitted by trial defense counsel regarding Appellee's ineffective assistance of counsel claims showed that they purposely declined to raise double jeopardy. (JA at 12.) The declarations confirm that not only did trial defense counsel know about the ability to raise a double jeopardy claim, but they intentionally relinquished that right. Thus, trial defense counsel's actions were not a mere failure to raise an objection warranting plain error review.

To attempt to circumvent trial defense counsel's declarations, Appellee appears to argue that waiver can only occur if counsel understands how the known right will affect a case. (Ans. Br. at 17.) The test Appellee suggests is undermined by this Court's recent decision in United States v. Malone, which articulated no requirement that counsel be aware of how a right impacts an accused's case to

constitute a knowing and intelligent waiver. 2026 CAAF LEXIS 62, at *13-14 (C.A.A.F. 20 January 2026). The Ninth Circuit Court of Appeals has likewise rejected the idea that waiver is not knowing and intelligent if the accused does not realize the strength of his claims. United States v. Nguyen, 235 F.3d 1179, 1184 (9th Cir. 2000). Such an interpretation would make waiver "essentially meaningless," since the waiver would be valid if the claims were meritless, but invalid if the claims were meritorious. Id. As the 9th Circuit reasoned, "[t]he whole point of a waiver . . . is the relinquishment of claims regardless of their merit." Id. Following that logic, AFCCA correctly found that trial defense counsel knowingly and intentionally waived his double jeopardy claim with respect to the viewing specification in Casillas II.

B. AFCCA did not abuse is discretion in enforcing Appellee's waiver with respect to viewing child pornography.

Contrary to Appellee's assertion, AFCCA did not abuse its discretion. (Ans. Br. at 19.) Appellee's arguments disregard a well-established principle that AFCCA was "well within its authority to determine the circumstances, if any, which it would apply waiver or forfeiture." United States v. Hardy, 77 M.J. 438, 443 (C.A.A.F. 2018). Appellee's only argument for why AFCCA's decision not to pierce waiver was "arbitrary, capricious, and unreasonable as a matter of law" appears to be that his double jeopardy claim for the viewing specification would have been meritorious. (Ans. Br. at 19.) But that cannot be the standard for

finding an abuse of discretion, because it would eviscerate the waiver doctrine. A Court of Criminal Appeals would essentially be required to pierce waiver if the waived issue had merit.

In any event, the waived double jeopardy issue had no merit. Appellee argues that because viewing and possession are subject to the same definition of child pornography, AFCCA should have pierced waiver and set aside the conviction just like it did for the possession offense. (Ans. Br. at 18-20.) But Appellee's argument requires interpreting Forrester to mean that any time the device is mentioned in any child pornography specification under Article 134, UCMJ, including viewing, receiving, or producing child pornography, the device is the "material." Such an interpretation would lead to absurd results. In that scenario, if an accused was convicted of a specification alleging he produced child pornography involving one victim on an iPhone XR, but then it was later discovered that he used the same iPhone to produce child pornography involving three other victims, the accused could not be prosecuted again for the newly discovered victims. Even more absurdly, if the iPhone was considered the "material" in the producing specification, technically, the government would have to prove that the accused produced the iPhone itself, since the government must prove that the accused "knowingly and wrongfully produced child pornography," meaning "material that contains . . . a visual depiction of a minor . . ." MCM, pt.

IV, para. 95.b.(4)(a), c.(4). Such absurdities weigh against extending Forrester's atextual reading of the child pornography specifications in that case past the four corners of that opinion.

Similar difficulties arise with treating the device as the unit of prosecution for viewing specifications, as AFCCA correctly recognized. (JA at 17.) If the device is the "material," a literal reading of Article 134, UCMJ, would mean that an accused is guilty of viewing child pornography any time he looked at the device, regardless of whether he viewed the contraband images contained on the device. (Id.) While someone could view an iPhone without necessarily viewing the contraband visual depictions contained within, it would be nearly impossible for someone to "view" a PDF or png file without viewing the contraband visual depictions contained within. This makes the individual files the more apt "material that contains a visual depiction" for child pornography viewing offenses under Article 134, UCMJ. The above absurdities once again counsel against extending Forrester's reasoning to apply to viewing offenses.

Considering Appellee's viewing crimes outside the context of Forrester, the evidence in the second court-martial was not "evidence of the same offense, rather than a different one," as Appellee claims. (Ans. Br. at 20.) The two viewing offenses here were separated by a two-week interval, requiring separate actus reuses and impulses that would have defeated any claim of double jeopardy. *See*

Blockburger v. United States, 284 U.S. 299, 301-02 (1932); Forrester, 76 M.J. at 497. The fact that two child pornography specifications may allege identical timeframes does not mean they address the same offense as a matter of fact. *See* United States v. Neblock, 45 M.J. 191, 196 (C.A.A.F. 1996). Even where identical timeframes are charged, if the evidence at trial establishes that the acts occurred "on different dates during the same period," then each violation of the law "alleged and proved . . . was for different acts and at different times," and the offenses are not the same for double jeopardy purposes. Id.

Appellee's double jeopardy claim regarding the viewing specifications was far from certain. Yet Appellee forgets that he would have been required to show plain and obvious error, a significant hurdle considering the dearth of authority applying Forrester to viewing offenses. The uncertainty in the law supported AFCCA's decision not to pierce waiver.

Appellee lastly claims that the government had other options, such as withdrawing the specifications from the first court-martial and referring new ones that accounted for the new evidence. (Ans. Br. at 22.) What the government might have done is irrelevant to whether AFCCA abused its discretion in deciding not to pierce waiver. At the same time, Appellee's claim undercuts his own argument. If the solution to the problem of the government's newly discovered evidence was to change the specifications and prefer and refer anew, that supports that the

government was prosecuting a *different* viewing offense and a *different* possession offense from the ones originally charged. If the newly discovered evidence was merely evidence of the same viewing and possession offenses already on the charge sheet, then the solution would have been giving the defense a continuance in Casillas I, without any changes to the charge sheet. Appellee's insistence, even on appeal, that the government should have withdrawn the specifications and modified them supports that the newly discovered evidence was, in fact, evidence of a different offense that could be properly charged at a separate court-martial.

Because Appellee waived his double jeopardy challenge – a waiver that AFCCA properly refused to pierce – this Court should affirm AFCCA's decision upholding Appellee's conviction for viewing child pornography (Specification 2).

III.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.

A. Trial defense counsel's rationale for forgoing a double jeopardy motion was legally sound.

As explained in the United States initial brief, trial defense counsel had reasonable explanations for they did not file a double jeopardy claim with respect to the viewing specification in Casillas II, which means Appellee cannot meet his burden of proving ineffective assistance of counsel. *See* United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011). First, trial defense counsel did not believe that

Forrester would apply to viewing specifications. (Gov. Br. at 50.) And second, trial defense counsel rightfully refused to file a double jeopardy claim because it would have required them to repudiate their own successful argument in Casillas I that the offenses were distinct. (Gov. Br. at 52-56.)

Appellee's assertion that even the military judge thought that "these circumstances reasonably raised double jeopardy concerns" oversells the record. (*See* Ans. Br. at 27.) After The military judge raised a double jeopardy concern during motions practice and the parties clarified that none of the images in Casillas II were introduced in Casillas I as evidence. (JA at 113.) The military judge then stated, "Okay, this is all the part of me just getting my facts straight and understanding what images we're looking at in charged and uncharged misconduct. Okay. So that answers that." (JA 113-115.) Thus, the record showed that the clarification made by counsel resolved the military judge's concern about double jeopardy.

Next, Appellee contends that the government's proposed change to the specification in Casillas I might have been a major change merely because "it added substantial new allegations as part of the same offense." (Ans. Br. at 26.) Appellee ignores that his trial defense counsel in Casillas I objected to the proposed change to the charge sheet because the change met "just about every one of the factors related to what's considered a major change." (JA at 54.) One of

those other factors was that the change "adds . . . an offense." R.C.M. 603(b)(1). And while Appellee claims that trial defense counsel would not have been judicially estopped from raising double jeopardy in Casillas II, his discussion of the topic is conclusory. He offers no response to the government's argument that he would have derived an unfair advantage from taking inconsistent positions at his two courts-martial on what constituted evidence of the offense charged in Casillas I. (Gov. Br. at 55-56.) Thus, it was rational for Appellee's trial defense counsel to be concerned about the ethics of advancing a new position in Casillas II after profiting from a different position in Casillas I.

In sum, Appellee fails to meet his burden of establishing that trial defense counsel did not have *reasonable* explanations for failing to make a double jeopardy claim.

B. Failing to file a double jeopardy motion did not fall measurably below performance standards, and a double jeopardy motion had no reasonable probability of success anyway.

Failing to file a double jeopardy motion for the viewing specification in Casillas II did not fall measurably below the performance ordinarily expected of fallible lawyers. *See* Gooch, 69 M.J. at 362. Forrester's reasoning regarding units of prosecution does not obviously apply to child pornography viewing offenses under Article 134, UCMJ. Appellee claims that it would "set an intolerably low bar for ineffective assistance of counsel" if "trial counsel's deficient advocacy can

be excused because a key case was not an identical match for [the] situation." (Ans. Br. at 28-29.) This assertion does not comport with the prevailing military and federal law on ineffective assistance of counsel, which establishes that an appellant alleging ineffective assistance "must surmount a very high hurdle." United States v. Saintaude, 61 M.J. 175, 179 (C.A.A.F. 2005) (internal citation omitted). The likelihood of a different result must be "substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86 (2011). And "the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized." United States v. Bustos de la Pava, 268 F.3d 157, 166 (2d Cir. 2001). Here, Forrester's reach regarding viewing offenses is "an unsettled proposition of law." Given the high standard for proving ineffective assistance, "even if many reasonable lawyers, at the pertinent time would not have interpreted [Forrester] as [Appellee's] counsel did, no relief can be granted unless it is shown that *no* reasonable lawyer, in the same circumstances would have interpreted [Forrester] as [Appellee's] counsel did." Smith v. Singletary, 170 F.3d 1051, 1055 (11th Cir. 1999) (emphasis in original). Considering that all three judges at AFCCA agreed that Forrester does not clearly apply to viewing specifications, Appellee cannot show that *no* reasonable lawyer would have interpreted Forrester in that manner. Thus, his trial defense counsel in Casillas II were not ineffective for failing to challenge the viewing specification for double jeopardy.

Appellee believes that there is "a strong possibility that, absent trial defense counsel's substandard performance, the Charge and its Specification would have been dismissed, a strikingly different result." (Ans. Br. at 29.) In assessing his likelihood of success, Appellee relies on the fact that the same definition of child pornography applies to both the viewing and possession offenses. (Id.) Yet Appellee fails to address the absurdities, discuss above, that would result from treating Appellee's iPhone XR as the "material" containing child pornography with respect to the viewing specification. Nor has Appellee explained how logically, viewing one image on one occasion and, two weeks later, viewing 13 different images can constitute the same criminal offense. These absurdities make it highly unlikely that Appellee would have prevailed on a motion to dismiss the viewing specification for double jeopardy.

Because there was no double jeopardy violation to begin with, Appellee has failed to meet his high burden of proving deficient performance. This Court should deny Appellee's claim of ineffective assistance of counsel and affirm AFCCA's decision upholding Appellee's conviction in Casillas II for viewing child pornography.

CONCLUSION

This Court should reverse AFCCA's decision to overturn Appellee's conviction for possessing child pornography and should uphold AFCCA's decision to affirm his conviction for viewing child pornography.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 8 April 2026.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because: This brief contains 4,751 words. This brief complies with the typeface and type style requirements of Rule 37.

/s/ Vanessa Bairos, Maj, USAF

Attorney for the United States (Appellant/Cross-Appellee)

Dated: 8 April 2026