IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JORDAN R. MULLER,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. 39323

USCA Dkt. No. 19-0230/AF

REPLY BRIEF

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil

YOLANDA D. MILLER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35149
Air Force Legal Operations Agency
Appellate Defense Division

1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
yolanda.d.miller3.mil@mail.mil

Counsel for Appellant

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Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Airman First Class Jordan R. Muller, the Appellant, hereby replies to the government's brief, filed on September 27, 2019.

ARGUMENT

I. The Air Force Court of Criminal Appeals' Rule 15.5 is Invalid, and the Court's Application of this Rule Denied A1C Muller of his Due Process Right to Raise Issues on Appeal.

A. *Relevance and ripeness are red herrings; the Air Force Court of Criminal Appeals denied A1C Muller's supplemental assignment of errors due to Rule 15.5.*

The crux of the government's response to Issues I and II is that the Air Force Court of Criminal Appeals (Air Force Court) denied A1C Muller's supplemental assignment of errors due to relevance and ripeness. This contention is unsupported in the record, as the Air Force Court declined to articulate its rationale. (JA at 96.) Accordingly, this Court is left to tread the same path as its predecessor in *United States v. Mitchell*, 20 M.J. 350 (C.M.A. 1985), and speculate as to the potential bases for a lower court's unexplained denial of a supplemental

pleading.[1] Although this is sure to be a "shoe [that] pinches [this Court's] toes," such an analysis will readily indicate Rule 15.5's culpability. *Id.* at 351.

As a predicate matter, however, it is important to note that neither the Joint Rules for Courts of Criminal Appeals (Joint Rules) nor the rules of the Courts of Criminal Appeals (CCAs) conditioned the consideration of assignments of error on relevance.[2] If they did, the CCAs would have doubtless declined to review countless pleadings filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). But even if a CCA was justified in declining to review an assignment of error it found irrelevant, the threshold for relevance would be low. *See United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010). And contrary to the government's answer, wherein much of the analysis is misguidedly focused on A1C Muller's motions to attach (Gov't Br. at 14-18), the relevancy of an assignment of error would rest not on the underlying merits of the error itself, but on whether the raised error was relevant to the case at hand and, potentially, the court's authority

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[1] In A1C Muller's initial brief, undersigned counsel erroneously cited *Mitchell* as 250 U.S. 350 (C.M.A. 1985).

[2] The current rules similarly contain no such conditions.

to address that error. Here, A1C Muller's assigned errors were unlawful command influence (UCI) and post-trial delay. (JA at 58-85.) Both of these issues directly related to A1C Muller's appeal – in fact, they originated *during* his appeal – and could have been addressed by the Air Force Court; thus, they were relevant and should have been considered.

Turning to the relevancy of the convening authority's order with respect to the UCI error (JA at 62-64), the government asserts that "use of the word 'verify,' by its plain meaning, meant that [the convening authority] was ordering the military judge to independently establish the accuracy of *whether* the missing exhibit was the same one that was admitted at trial." (Gov't Br. at 16) (emphasis added). The fallacy of this argument is apparent. Had the convening authority indeed chosen to use the conjunction "whether," his order would have given the military judge the choice between two alternatives: (1) confirm that a document purporting to be A1C Muller's missing performance report was the same document the military judge reviewed at trial; or (2) confirm that it was not. Instead, by its plain terms, the convening authority (a Major General) ordered the military

judge (a Lieutenant Colonel) to verify that a document whose authenticity was in question was what the military judge reviewed at trial. On its face, this is at least "some evidence" of apparent UCI. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (citations omitted). And again, the threshold for relevance was low. *Roberts*, 69 M.J. at 27. Accordingly, the Air Force Court should have attached the order to the record and then utilized it to consider A1C Muller's raised UCI issue.

A1C Muller also sought to attach the convening authority's order to demonstrate the government's dilatory response to the Air Force Court's remand. (JA at 27, 29.) The government declined to address this fact in its answer (Gov't Br. at 18-22); a notable omission considering its argument that the Air Force Court's independent review under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016), was alone sufficient to properly consider A1C Muller's post-trial delay complaint. (Gov't Br. at 20-21.) Assuming, *arguendo*, the Air Force Court reviewed this issue at all, it did so based on what may have been misleading information provided by the government. Specifically, in its motion for an enlargement of time, the

government asserted "[t]he convening authority's servicing legal office and the military judge have been diligently taking steps to comply with this Court's order." (JA at 23.) Yet, as A1C Muller noted in both his opposition to the government's motion and his supplemental assignment of errors, the convening authority's order was dated 25 days *after* the Air Force Court's remand. (JA at 27, 66-67.) The order thus disputed the government's earlier assertions of diligence while supporting A1C Muller's own claim of unreasonable delay, providing the Air Force Court additional justification to include it in the record and consider the raised issue.

The government's final relevancy argument targets A1C Muller's sworn declaration, citing *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) for the proposition that A1C Muller failed to provide "substantiated evidence" of prejudice from post-trial delay. (Gov't Br. at 18-19.) But *Allende* is inapt because it did not address a lower court's refusal to attach a document or consider a raised error.[3]

[3] The government's reliance on *Allende* actually underscores how Rule 15.5 prejudiced A1C Muller, as its 10-day deadline to file a supplemental brief did not afford him the requisite 60 days in which he could have further corroborated his claims. (JA at 121 (citing Joint Rule 15(b)).

Instead, the present case is more akin to *United States v. Brock*, 46 M.J. 11 (C.A.A.F. 1997), which the government cites in its brief but fails to apply to the issue of post-trial delay. (Gov't Br. at 14-15, 18.)

As ably described by the government, *Brock* involved an appellant who moved to attach documents relating to a co-actor's sentence to show how his own sentence was inappropriately severe. 46 M.J. at 12-13. The Air Force Court subsequently denied the motion and then refused to provide sentence relief based on a lack of evidence. *Id.* In analyzing these decisions, this Court noted that while "sentence appropriateness should be determined without reference to or comparison with the sentence received by other offenders . . . the door was closed to appellant from the start because [the Air Force Court] refused to admit the evidence relating to [the co-actor's] sentence even though there was evidence in the record of appellant's involvement with [the co-actor]." *Id.* at 13. Accordingly, this Court found the Air Force Court erred by failing to consider the appellant's proffered evidence, which was "relevant to the exercise of its fact-finding powers." *Id.*

A similar scenario exists in the present case, as the record

contains evidence of post-trial delays (i.e., the government's request for an enlargement of time and subsequent failure to timely file the certificate of correction) and A1C Muller sought to attach evidence relating to these delays. (JA at 90, 95.) The Air Force Court would have thus recognized its obligation under *Brock* to use its fact-finding powers to determine whether the delays were unreasonable and warranted relief, and duly granted the motions to attach. *See United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009) (noting that CCAs are presumed to know the law and follow it). Instead, the court closed the door on not just A1C Muller's ability to support his raised error with relevant evidence, it precluded him from raising the error in the first place. A purported lack of relevancy would not have justified the court's actions. Rather, the culprit is almost certainly Rule 15.5, which the Air Force Court would have (mistakenly) believed barred A1C Muller from filing a supplemental pleading, thus obviating the need to attach evidence to the record.

In addition to relevancy, the government argues that the Air Force Court properly denied consideration of the post-trial delay issue due to ripeness; specifically, because the Air Force Court's decision was

rendered "well short of the 18-month deadline set by [*United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)]. (Gov't Br. at 19.) The fatal flaw in this argument is, of course, that A1C Muller filed his supplemental pleading 15 days *prior to* the Air Force Court's decision. (*Compare* JA at 58 *with* JA at 1-2). It is thus highly improbable that the Air Force Court based its denial on an event that had yet to occur.[4]

In any case, A1C Muller's assignment of error was not solely based on his due process right to a speedy appellate review; rather, he also sought relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002) "due to the government's gross indifference to timely comply with [the Air Force Court's] order to correct the record." (JA at 68.) Accordingly, the "ripeness" of A1C Muller's assigned error should not have been determinative on the Air Force Court's denial of the motions to attach or the supplemental assignment of errors.

In sum, A1C Muller's assigned errors of UCI and post-trial delay were relevant to his appeal, and there is no ripeness problem that would have precluded the Air Force Court from considering the issues. The documents A1C Muller sought to attach were likewise relevant to

[4] If it did, this would also be error.

his claims and should have been added to the record. Thus, the only plausible explanation for the Air Force Court's denials in this case is the application of Rule 15.5. And to this end, the Air Force Court could have utilized Rule 15.5 in one of two ways: (1) denied A1C Muller's supplemental pleading as untimely,[5] or (2) denied the supplemental pleading because A1C Muller never "filed an initial brief and assignment(s) of error." (JA at 122.) Either way, this Court has justification to review the rule and should find its provisions invalid.

B. *Rule 15.5 required appellants to file supplemental pleadings contemporaneously with motions for leave to file.*

The government argues that Rule 15.5 did not conflict with Joint Rule 15(b)'s 60-day filing deadline because it did not actually require the filing of any briefs, just notification of an appellant's intent to do so. (Gov't Br. 16.) However, a plain reading of the Air Force Court's rules, including Rule 15.5 itself, fatally undercuts the government's position.

[5] Although A1C Muller maintains he timely filed his pleading, the Air Force Court's failure to formally re-docket remanded cases leaves open the possibility that he missed Rule 15.5's 10-day deadline. (*See* App. Br. at 30.)

Rule 15.5 states: "Supplemental filings must be submitted by motion for leave to file." (JA at 122.) A plain reading of this provision thus indicates that an appellant could not normally submit a supplemental pleading *after* a motion for leave to file, as the government's answer suggests. (Gov't Br. at 16). Rather, appellants were required to submit supplemental filings *by* a motion for leave to file, meaning *through*. *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/by (last visited September 30, 2019) (defining "by" as "through or through the medium of").

Rule 15.5 further mandates that appellate defense counsel comply with Rule 23 to request leave to file a supplemental pleading. (JA at 122.) Joint Rule 23(d) and Air Force Court Rule 23.3(o) then provide that "[a]ny filing not authorized or required by these rules shall be *accompanied by* a motion for leave to file." (JA at 123, 126) (emphasis added). Read in conjunction with Rule 15.5, these rules required appellants to file supplemental pleadings contemporaneously with motions for leave to file. Consequently, Rule 15.5's 10-day filing deadline conflicted with Joint Rule 15(b)'s 60-day benchmark.

C. *Even if Rule 15.5 merely required notice of an intent to file a supplemental brief, its 10-day deadline and application to external entities still conflicted with this Court's precedent, the UCMJ, the Joint Rules, and the rules of other Service Courts.*

The government's answer sidesteps the question of whether Rule 15.5 conflicts with *United States v. Gilley*, 59 M.J. 245 (C.A.A.F. 2004). (Gov't Br. at 9-17.) This is likely due to Rule 15.5's indisputable application to external entities – an application *Gilley* established to be in excess of the Air Force Court's limited rulemaking authority under Joint Rule 26. 59 M.J. at 247 (holding that Joint Rule 26 limited the Air Force Court to prescribing "internal" rules only).

The government's answer is similarly devoid of any meaningful analysis regarding the uniformity requirement of Article 66(f), UCMJ; namely, that the statute "require[s] *identical* rules among all Courts of Criminal Appeals regarding *any* course of action an appellant may take in a case before such court." 59 M.J. at 247. This is a notable omission, since the uniformity provision would apply with equal force to a filing deadline or a notification requirement. To wit, the notification of an intent to file – like a filing itself – represents an obligation "regarding [a] course of action" an Airman could take before the Air Force Court.

Id. Article 66(f), UCMJ, thus mandated its inclusion in the Joint Rules to ensure the Courts of Criminal Appeals applied "identical" notification requirements across the respective Services. But the Joint Rules contained no such requirement (JA 118-126), nor did the rules for the Army (JA at 130) or Coast Guard appellate courts.[6] And while the Navy's rules contained a similar condition, its appellate court provided Sailors and Marines 30 days to meet the deadline. (JA at 134.)

The government fails to address this inter-Service disparity, and instead frames Rule 15.5 as a tool to "expedite the processing of appellate cases." (Gov't Br. at 10.) This is a considerable understatement of Rule 15.5's applicability and ignores the practical effects of its 10-day deadline: Airmen were afforded significantly less time to decide whether to file a supplemental brief than their sister Service brethren. Even worse, if an Airman complied with Rule 15.5 by providing timely notification of his intent not to file a supplemental pleading but later changed his mind, the Air Force Court may have

[6] The Coast Guard Court of Criminal Appeals relied exclusively on the Joint Rules for its appellate practice.

already rendered its decision in his case. Consequently, Rule 15.5's notification requirement disparately disadvantaged Airmen and impermissibly conflicted with the Joint Rules, the rules of the other Service courts, *Gilley*, and the UCMJ.

D. *Like Grostefon submissions, CCAs must consider issues raised by counsel; failing to do so violates due process.*

The government concedes that if A1C Muller had submitted his supplemental pleading pursuant to *Grostefon*, the Air Force Court would have been required to accept the pleading and consider its underlying issues. (Gov't Br. at 21.) But because counsel assigned the errors and filed the pleading on A1C Muller's behalf, the government believes the Air Force Court had no obligation to accept or review the pleading. (Gov't Br. at 21.) There are numerous problems with this novel position.

Perhaps most glaring, if a CCA is authorized to wholly disregard a potentially meritorious issue filed by counsel, then an appellant is effectively forced to proceed "without a champion on appeal." *Douglas v. California*, 372 U.S. 353, 356 (1963). The CCA's "broad mandate to review the record unconstrained by an appellant's assignment of error" would not cure this due process defect, as "independent review is not

the same as competent appellate representation." *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) (citing *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987)); *see also United States v. Parker*, 71 M.J. 594, 628 (N.M. Ct. Crim. App. 2012) (noting that the right to appellate counsel under Article 70, UCMJ, "is based upon fundamental notions of due process found in the 5th and 6th Amendments to our Constitution and is rightly considered one of the most important aspects of our criminal justice system") (citing *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003)). Indeed, the interplay between an appellant's appeal of right under Article 66, UCMJ, 10 U.S.C. §866 (2016) and right to appellate representation under Article 70, UCMJ, 10 U.S.C. § 870 (2016), requires a CCA to review those issues raised by counsel. *Grostefon* does not lessen this obligation; rather, it expands an appellant's opportunity to raise issues for the appellate courts' attention. 12 M.J. at 435.

The rationale behind *Grostefon* was to balance an appellate defense counsel's ethical responsibilities with an appellant's unique benefits under the UCMJ. *Id.* Thus, while an appellate defense counsel is prohibited from "clog[ging] the court with frivolous motions

or appeals," (*id*. at 435 n. 6 (quoting *Polk County et. al. v. Doson*, 454 U.S. 312 (1981)), counsel is nevertheless required to invite the appellate courts' attention to matters an appellant desires raised. *Id*. at 436. This includes issues counsel believes frivolous. *Id*.

Given *Grostefon*'s underpinnings and the concomitant rights the UCMJ confers to appellants, it defies law and logic that a CCA could summarily disregard meritorious issues while being forced to review frivolous ones. If this was the case, Article 70, UCMJ, would be rendered meaningless and appellate defense counsel would have absolutely no "obligation to assign all arguable issues," since a CCA could just ignore those issues. *Id*. at 435. And to the extent that an appellant's right to counsel would survive at all, then appellate defense counsel would dutifully raise *every* issue pursuant to *Grostefon*, thus ensuring the CCA's review. This construct cannot be what Congress envisioned when it promulgated the UCMJ, nor this Court's predecessor when it decided *Grostefon*.

E. *Given the Air Force Court's fact-finding authority and ability to provide* Tardif *relief, this Court should remand the case*.

The government asks this Court to forego remanding the case,

find A1C Muller's assigned errors meritless, and affirm the findings and sentence. (Gov't Br. at 22-27.) This Court should decline the government's requests for several reasons.

First, A1C Muller's raised issues warrant additional fact-finding. Starting with the UCI claim, the plain language in the order from a Major General to a Lieutenant Colonel, which failed to provide any freedom of choice in the authentication of a missing prosecution exhibit (JA at 90), is at a minimum "some evidence" of apparent UCI. *Boyce*, 76 M.J. at 249 (citations omitted). Whether the government can rebut this evidence through mere affidavits, or if a post-trial hearing is required to settle the matter, are questions that should be answered by the Air Force Court.

Even more compelling, there is a significant factual dispute involving the government's response to the Air Force Court's remand – a dispute that commenced from the government's potentially misleading assertion that the involved parties were working "diligently" to comply with the court's order. (JA at 23.) This assertion is contradicted by the convening authority's direction to the military judge to prepare a certificate of correction, which was dated 25 days

after the court's remand. (*Compare* JA at 21-22 *with* JA at 33.) This timing strongly suggests that very little was done until five days before the court-imposed deadline. The government's answer does not address this incongruence, and instead portrays the certificate of correction process as a "detailed" affair that requires time. (Gov't Br. at 25-26.) This may be true generally, but not with respect to this particular case.

Unlike other cases involving missing exhibits, the government here did not need to expend any resources or time to finding the document in question. This is because the government already possessed what it believed to be the missing exhibit. (JA at 15-20.) Moreover, the various levels of required coordination, which the government contends justified more than the 30 days provided by the Air Force Court (Gov't Br. at 25-26), were all accomplished within five days of the convening authority's order to the military judge. (*Compare* JA at 33 *with* JA 38-40.) The government then appears to have squandered an additional 16 days before it actually moved to attach the materials to the record. (*Compare* JA at 51 *with* JA at 43.) And because this motion exceeded the Air Force Court's *second* deadline –

due to a purported "internal administrative error" (JA at 43-44) – the government had to resubmit it as an "out-of-time" filing, further delaying the process by five days. (JA at 43-44.)

All told, it took the government 52 days to move to attach to the record a document it already possessed. This is a facially unreasonable delay. So, too, is the 25 days it took the convening authority to direct the military judge to prepare a certificate of correction. Accordingly, this Court should remand the case so that the Air Force Court can use its fact-finding powers to properly weigh the government's "reasons for the delay." *See Barker v. Wingo*, 407 U.S. 514, 530 (1972). Remanding the case will also allow the Air Force Court to determine if A1C Muller was prejudiced by any unreasonable delays or, if not, whether he should receive *Tardif* relief; a remedy not otherwise available from this Court. 57 M.J. at 224. And contrary to the assertions of the government (Gov't Br. at 27), a form of meaningful *Tardif* relief would potentially include reducing portions of A1C Muller's executed confinement, which would result in the reimbursement of pay and allowances forfeited as a result of Article 58b(a), UCMJ, 10 U.S.C. §858b(a) (2016). *See* Article 58b(c), UCMJ, 10 U.S.C. § 858b(c) (2016);

Article 75(a), UCMJ, 10 U.S.C. §875(a) (2016).

For these reasons, A1C Muller respectfully requests that this Court remand the case to the Air Force Court.

II. The Air Force Court of Criminal Appeals properly remanded this case for a certificate of correction, and its decision does not present a justiciable controversy requiring this Court's intervention.

A1C Muller maintains that when a record of trial was deemed to need correction, R.C.M. 1104(d)(1) required the use of certificates of correction. (App. Br. at 40-47.) To this point, the government's answer interprets R.C.M. 1104(d)(1)'s use of the word "may" as providing discretion to correct the record through a certificate of correction or alternate means. (Gov't Br. at 34-35.) But a more accurate reading is that "may" refers to a court's ability to determine whether an incomplete or defective record needs any correction at all. If a particular defect was insubstantial, for example, the rule allowed a court to either correct the defect or allow it to stand. *Cf. United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). This interpretation is consistent with the remaining portions of R.C.M. 1104(d), as well as the accompanying discussion to R.C.M. 1104(d)(1), which

unambiguously clarified: "The record of trial *is corrected with* a certificate of correction." (Emphasis added.) The government's position on the discussion's language is unclear, since its answer fails to address it. (Gov't Br. at 34-35.) However, A1C Muller respectfully posits that this persuasive authority illuminates any potential ambiguity in the rule itself.

Even if this Court disagrees with A1C Muller's interpretation, it is indisputable that the Air Force Court possessed the authority to order a certificate of correction. The government's answer concedes this point but gives it short shrift (Gov't Br. 34-35), instead framing the issue as one involving a court that believed "the only means to correct a record of trial" was through R.C.M. 1104(d). (Gov't Br. at 37.) This is inaccurate, as the Air Force Court's remand order never explicitly states as much. (JA at 21.) Nevertheless, even if the Air Force Court held such a position, it would not alter the fact that a certificate of correction was an authorized option available to the court. The Air Force Court's employment of this option, therefore, was either not erroneous or harmless error – at least with respect to its effect on the government.

To be sure, A1C Muller concurs with the government's policy observation that allowing alternate methods of record correction could expedite the post-trial process and ultimately benefit certain appellants. (Gov't Br. at 36-37; App. Br. at 46.) But this does not mean that the Air Force Court is *required* to accept such alternate methods, as the government seems to suggest. (Gov't Br. at 36.) Moreover, a CCA's decision to return a case for correction should not absolve the government from its responsibility to timely process the required action, which is what the government is asking this Court to do. (Gov't Br. at 36, 38.)

Simply put, the government had a duty to compile an accurate and complete record of trial. It failed to do so. It was well within the Air Force Court's discretion to return the record for correction, and any subsequent failures by the government to fulfill its obligations should be attributed solely to the government. A finding to the contrary would alleviate the government from its burdens, condone its dilatory responses, and sanction similar indifference in future cases.

Should this Court agree that the Air Force Court was authorized to return the case for correction, and otherwise decline the

government's invitation to blame the court for any resulting delays, then resolving the specified issue will have no effect on A1C Muller's findings or sentence. Accordingly, the Court should exercise its continued restraint regarding advisory opinions and refrain from addressing the issue. *See*, *e.g.*, *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981). However, in the event that this Court believes the government's unsuccessful motion to attach is relevant to A1C Muller's post-trial delay complaint, then this fact actually weighs in favor of A1C Muller because it demonstrates the unreasonableness of the government expending 52 days to move to attach to the record a document it already possessed.

CONCLUSION

The Air Force Court applied an invalid rule to deny A1C Muller his due process right to raise issues on appeal. This Court should clarify, yet again, the UCMJ's requirement for uniformity and remand the case so that the Air Force Court can properly consider A1C Muller's assigned errors. Conversely, this Court should decline to address whether R.C.M. 1104(d) required certificates of correction, as to do so would constitute an advisory opinion. In the alternative, however, this

Court should hold that where a court determines a record of trial needs correction, such correction is to be accomplished through a certificate of correction.

Respectfully Submitted,

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil

YOLANDA D. MILLER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35149
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
yolanda.d.miller3.mil@mail.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because: this Brief contains 4,424 words and 440 lines of text.

This Brief complies with the typeface and type style requirements of Rule 37.

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on October 7, 2019.

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil