UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40809**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua D. ALLEN	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 2 June 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First), requesting an additional 60 days to submit Appellant's assignments of error. The Government generally opposed the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 4th day of June, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **9 August 2025**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

[redacted]
OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JOSHUA D. ALLEN** United States Air Force *Appellant*	)	No. ACM 40809 2 June 2025

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **9 August 2025**. The record of trial was docketed with this Court on 11 April 2025. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]
JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 June 2025.

Respectfully submitted,

[redacted]
JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **JOSHUA D. ALLEN,** United States Air Force, *Appellant.*	)	No. ACM 40809
	)	3 June 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 June 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40809**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Joshua D. ALLEN	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 4th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JOSHUA D. ALLEN** United States Air Force *Appellant*	)	No. ACM 40809 2 August 2025

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

Pursuant to Rule 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 September 2025**. The record of trial was docketed with this Court on 11 April 2025. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 11 December 2024, contrary to his pleas, Appellant was convicted at a general court-martial consisting of a military judge sitting alone at Minot Air Force Base, North Dakota, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Volume 1, Entry of Judgment (EOJ), dated 3 February 2024; Record (R.) at 523. Appellant was sentenced to be reprimanded, to be confined for 16 months, and to be discharged from the service with a dishonorable discharge. R. at 574.

The convening authority took no action on the findings or sentence in this case. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Joshua D. Allen*, dated 13 January 2025.

The electronic record of trial is 1 volume and consists of 6 Prosecution Exhibits, 6 Defense Exhibits, 33 Appellate Exhibits, and 1 Court Exhibit; the transcript is 476 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]
JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 August 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **JOSHUA D. ALLEN,** United States Air Force, *Appellant.*	)	No. ACM 40809
	)	5 August 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 August 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3), **JOSHUA D. ALLEN,** United States Air Force, *Appellant.*	)	No. ACM 40809
	)	20 August 2025

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B) and Rules 3.1 and 23.3(f)(1) of this Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine the following materials sealed by the military judge:

1. Appellate Exhibits III-VI, XXII, XXVII-XXIX: Mil. R. Evid 412 materials;
2. PHO Exhibits 13 and 14;
3. Audio recording of closed sessions; and
4. Sealed transcript pages of closed sessions.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be able to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of

trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998).

At trial, the military judge, trial counsel, and defense counsel at trial reviewed items 1, 3, and 4 of the listed materials. All parties at the preliminary hearing reviewed the PHO exhibits. DD Form 457, *Preliminary Hearing Officer's Report*. The sealed materials here must be reviewed for counsel to provide "competent appellate representation." *May*, 47 M.J. at 481. Viewing these exhibits and transcript pages is reasonably necessary to determine whether Appellant is entitled to relief due to errors concerning the substance during any portion of the proceedings—before, during, or after trial. Therefore, undersigned counsel's examination of the sealed materials is reasonably necessary to fulfill her responsibilities in this case as counsel cannot perform her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, or fulfill her duty to provide effective assistance of counsel without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by Appellant.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

Respectfully Submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 20 August 2025.

Respectfully Submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40809**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua. D. ALLEN	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 20 August 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting to be allowed to examine; (1) Appellate Exhibits III–VI, XXII, XXVII–XXIX; (2) Preliminary Hearing Officer; (PHO) Exhibits 13 and 14; (3) audio recordings of closed sessions; and (4) sealed transcript pages of closed sessions. All of these were reviewed by trial counsel and trial defense counsel at Appellant's court-martial or during the preliminary hearing. The Government does not oppose the motion so long as its counsel are also permitted to view the sealed material.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities . . . ." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 26th day of August, 2025,

ORDERED:

Appellant's Motion to Examine Sealed Materials dated 20 August 2025 is **GRANTED**.

Appellate defense counsel and appellate government counsel may view Appellate **(1) Appellate Exhibits III–VI, XXII, and XXVII–XXIX; (2) PHO**

Exhibits 13 and 14; (3) audio recordings of closed sessions; and (4) sealed transcript pages of closed sessions, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **JOSHUA D. ALLEN** United States Air Force *Appellant*	)	No. ACM 40809 29 August 2025

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

Pursuant to Rule 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 October 2025**. The record of trial was docketed with this Court on 11 April 2025. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 11 December 2024, contrary to his pleas, Appellant was convicted at a general court-martial consisting of a military judge sitting alone at Minot Air Force Base, North Dakota, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Volume 1, Entry of Judgment (EOJ), dated 3 February 2024; Record (R.) at 523. Appellant was sentenced to be reprimanded, to be confined for 16 months, and to be discharged from the service with a dishonorable discharge. R. at 574.

The convening authority took no action on the findings or sentence in this case. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Joshua D. Allen*, dated 13 January 2025.

The electronic record of trial is 1 volume and consists of 6 Prosecution Exhibits, 6 Defense Exhibits, 33 Appellate Exhibits, and 1 Court Exhibit; the transcript is 476 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 August 2025.

Respectfully submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3) **JOSHUA D. ALLEN,** United States Air Force, *Appellant.*	)	No. ACM 40809
	)	2 September 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 September 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
JOSHUA ALLEN,
United States Air Force,
Appellant

BRIEF ON BEHALF OF APPELLANT

Before Panel No. 3

No. ACM 40809

8 October 2025

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

Assignments of Error

I. WHETHER THE ALLEGED VICTIM'S PHONE DATA WAS WITHIN THE POSESSION, CUSTODY, OR CONTROL OF THE GOVERNMENT FOR PURPOSES OF R.C.M. 701 WHERE THE GOVERNMENT MADE A FULL FORENSIC EXTRACTION OF THE DATA. IF SO, IS RELIEF WARRANTED?

II. WHETHER SPECIFICATION 2 of CHARGE I IS FACTUALLY INSUFFICIENT.

III. WHETHER RELIEF IS WARRANTED FOR IMPROPER EVIDENCE AND ARGUMENT.

IV. WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT BECAUSE HE WAS CONVICTED OF OFFENSES THAT DO NOT FALL WITHIN THE

NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.[1]

Statement of the Case

On 25 November 2024 and 24-26 February 2025, Appellant was tried by a general court-martial composed of a military judge sitting alone, at Nellis Air Force Base, Nevada. Appellant, Airman First Class Joshua Allen, was convicted, contrary to his pleas, of one specification of sexual assault (Sleeping) in violation of Article 120, UCMJ, 10 U.S.C. § 920. (R. at 523). Appellant was acquitted of multiple other charges. (R. at 523). The military judge sentenced Appellant to be reprimanded, confined for sixteen months, and dishonorably discharged. (R. at 574). The convening authority waived automatic forfeitures for a period of six months for the benefit of Appellant's dependents but otherwise took no action on the findings or sentence. (Convening Authority Decision on Action).

Statement of Facts

Appellant's conviction arises from accusations made by his wife, AG, after their marriage fell apart. She accused him of a number of physical and sexual offenses, but due to the mixed verdict, the only one before this Court is the allegation

[1] Assignment of Error IV is raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

that Appellant had sex with her while she was sleeping on various occasions throughout their marriage.

The dates of these allegations were vague, but AG testified that Appellant first had sex with her while she was asleep while they were living in an apartment in Glenburn, North Dakota. (R. at 210). She described it as "very infrequent, not a whole bunch. But very much towards the end of when we were living there." (R. at 210). AG testified she would know Appellant had sex with her due to seeing semen or realizing her pants were off or halfway off. (R. at 210). These occurrences continued and increased in frequency after the couple later moved to Minot, North Dakota. (R. at 232). On a few occasions, AG woke to find Appellant having sex with her. (R. at 214-15). AG would be lying on her left side with Appellant behind her with his hand on her breast or hip. (R. at 258-63). On cross-examination, AG acknowledged telling the Air Force Office of Special Investigations (OSI) that she did not know when these occurrences had begun. (R. at 256). She further acknowledged that she had not told OSI that this occurred frequently at the Minot house, but at the time of trial, she was now recalling that it happened a lot more frequently at the Minot house. (R. at 271). Throughout this timeline, the couple was having consensual sex, and AG wanted to work on the relationship. (R. at 279, 324-25). AG also wanted to have a baby with Appellant at this time, even in the midst of the alleged sexual assaults. (R. at 329).

AG testified on direct that she had asked Appellant about having sex with her while she was sleeping "5 to 10 times, maybe a little bit more than that." (R. at 218). On one of these occasions, she secretly recorded him. (R. at 218-21). The military judge admitted the video into evidence as Pros. Ex. 1, but limited consideration of AG's statements on the video to the effect on the listener (to give context to Appellant's statements). (R. at 221).

In the video, AG is berating Appellant for various misdeeds, primarily involving his communication with other women. (Pros. Ex. 1); *see also* (R. at 221-27) (transcript of video). AG makes a host of profanity laced accusations about Appellant and threatens to tell his grandmother bad things about him. Appellant, meanwhile, is trying to calm her down and prevent her from either leaving the house in the rain, apparently on foot, or contacting his grandmother. AG's primary complaint seems to be that Appellant is interested in other women when she should be enough for him. However, more relevant to the case at hand, at one point in the video, she asks Appellant:

WIT: Why fuck me while I'm sleeping? Why not fuck me when I'm awake?

ACC: Because whenever you're awake, you usually don't want to do it.

(R. at 222-23). AG testified on direct that on other occasions when she had asked him about having sex with her while she was sleeping, Appellant denied it. (R. at 233).

On cross examination, AG testified that the purpose of this recording, which was apparently made just days before the divorce proceedings were formally initiated, "was to get proof – or evidence against him". (R. at 288). Prior to the video being recorded, AG had been arguing with Appellant for hours. (R. at 289). She had been asking him over and over again about whether he had sex with her while she was sleeping. (R. at 289). Prior to the recording, Appellant had denied having sex with AG while she was sleeping. (R. at 289).

When Appellant denied having sex with AG while she was sleeping, she called him a liar and didn't believe him. (R. at 300). That response was not good enough for her. (R. at 300). So AG proceeded to "continue to pester him," and Appellant apparently continued to deny it. (R. at 300). AG later reiterated that Appellant had denied it multiple times in the past. (R. at 301).

AG initially just "thought maybe that was a normal thing that people do in relationships." (R. at 212). AG testified that at some point she had talked to another woman about this, and the other woman told AG it was not normal. (R. at 274). But AG could not remember with confidence who the other woman was. (R. at 274). AG did not mention any prior disclosures to OSI. (R. at 275). AG attributed this omission to her brain being overloaded. (R. at 275). AG elaborated that: "It was very fuzzy, hard to remember things. (R. at 276). AG then looked up the definition

of sexual assault on Google, apparently in July of 2022 – just weeks before the divorce proceedings began. (R. at 275).

AG acknowledged significant memory issues. As noted above, AG testified: "It was very fuzzy, hard to remember things." (R. at 276). AG expressly described to OSI that she had memory issues. (R. at 276). AG described that she struggled to remember things. (R. at 276). The OSI agent who interviewed AG, confirmed AG "admitted that she had a bad memory." (R. at 458). When confronted with a seeming inconsistency between her trial testimony and OSI statement, AG acknowledged she was having a hard time remembering. (R. at 302).

At some point in the relationship, Appellant had gone through AG's phone and found romantic communications with another man. (R. at 281-82). This escalated into a mutual combat over the phone – with AG alleging physical abuse. (R. at 282-86). The next day, civilian law enforcement interviewed AG. (R. at 287). AG testified she "gave them everything I could recall." (R. at 288). Yet AG acknowledged that she did not make any mention in this interview of the fact that Appellant had been sexually assaulting her for the past year and a half. (R. at 287).

AG also acknowledged being untruthful with OSI. OSI specifically asked her about GM, the male whom she was romantically communicating with. (R. at 291). AG pretended not to know his name. (R. at 291). AG did not want OSI to talk to GM. (R. at 291). This was because AG did not want OSI to find out she had been

romantically involved with GM. (R. at 292). Defense counsel asked AG whether, after the OSI interview, she asked GM to delete messages from his phone. (R. at 324). AG claimed not to recall, but admitted that it was a possibility she asked GM to destroy evidence. (R. at 324). She further admitted that it was a possibility that she did so because she did not want law enforcement to find the messages. (R. at 324).

AG further acknowledged being deceptive to Appellant about her relationship with GM. (R. at 323).

The only evidence of a prior statement from AG outside official reporting channels was a statement made by AG to her sister, RM. (R. at 411). This statement, from August of 2022, seemed to be roughly contemporaneous with AG's report to law enforcement. Unlike in AG's trial testimony, AG told her sister that she would wake up to Appellant either masturbating or attempting to have sex with her. (R. at 411). This statement was admitted substantively. (R. at 412). RM apparently encouraged AG to collect evidence to build her case. (R. at 403).

The OSI agent who interviewed the victim acknowledged that, even in the relatively immediate aftermath of the charged events, the victim was having trouble with memory and struggling to recall facts. (R. at 437). To help combat this trouble, the OSI agent used a technique called "cognitive interviewing" – which apparently involved a hypnotism-type process of having the interviewee close their eyes and

then transporting them back to the place in question in order to access the memories of the event, though this technique seemed to have been limited to one of XX's accusations of physical assault. (R. at 437-41).

When OSI apparently challenged AG's accusation – asking how she knew it had happened if she was asleep, AG stated, apparently for the first time, that on some of the occasions she had actually been awake – or had waken up mid-act – but pretended to be asleep. (R. at 444).

When OSI asked AG about giving consent to examine her phone, she was hesitant. (R. at 446). AG asked if she could delete some things from her phone before handing it over. (R. at 446). AG apparently indicated to OSI that she had a "hidden folder" on the phone. (R. at 446).

Argument

I. WHETHER THE ALLEGED VICTIM'S PHONE DATA WAS WITHIN THE POSESSION, CUSTODY, OR CONTROL OF THE GOVERNMENT FOR PURPOSES OF R.C.M. 701 WHERE THE GOVERNMENT MADE A FULL FORENSIC EXTRACTION OF THE DATA. IF SO, IS RELIEF WARRANTED?

Standard of Review

Questions of statutory interpretation, to include the interpretation of provisions of the R.C.M., are questions of law this Court reviews de novo. *H.V.Z. v. United States*, 85 M.J. 8, 13 (C.A.A.F. 2024) (citation omitted). Issues of

prejudice from erroneous evidentiary rulings are reviewed de novo. *United States v. Cano*, 61 M.J. 74, 75 (C.A.A.F. 2005) (citation omitted). "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request . . . the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id.* (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013).[2]

Law and Argument

In United States v. Braum, the following issue is awaiting disposition form the Court of Appeals for the Armed Forces (CAAF):

> CAN THE GOVERNMENT PROPERLY REFUSE TO DISCLOSE RELEVANT, NON-PRIVILEGED DATA IN ITS POSSESSION, CUSTODY, AND CONTROL ON THE BASIS THAT THE WITNESS WHO PROVIDED THE DATA GAVE LIMITED CONSENT WITH RESPECT TO ITS USE? IF NOT, IS RELIEF WARRANTED?

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[2] Of note, this prejudice standard applies equally to scenarios where the government's disclosure obligations are litigated at trial, and the military judge declines to compel government disclosure. For example, in *Cano*, this Court was evaluating prejudice from "the military judge's erroneous decision to deny him the opportunity to review the withheld documents." 61 M.J. at 76.

No. 25-0046/AF, 2025 CAAF LEXIS 83, at *1 (C.A.A.F. Feb. 4, 2025) (order granting review). This case raises a very similar issue to the one currently pending before CAAF.

Here, as in *Braum*, law enforcement received limited consent from the alleged victim to extract data from the alleged victim's cell phone. *See* (App. Ex. VIII, IX, X, XXI); *see also* (R. at 121-51) (oral argument on motion to compel).[3] Law enforcement then proceeded to make a full forensic extraction of all the data on the phone. The government conducted a review of the data and disclosed some of it to the defense. The defense requested AG's phone data pursuant to R.C.M. 701, arguing that it was within the possession, custody, or control of the government. (App. Ex. VIII at 9-10). The military judge ruled that the data fell outside of R.C.M. 701. (App. Ex. XXI at 7-8). ("While R.C.M. 701 seems clearly by its terms to cover the extraction of Ms. A.G.'s phone, it is equally clear that rule is intended to apply to information in investigative files as to which the government has a right to review.").

This question largely hinges on whether the full forensic extraction was within the possession, custody, or control of the government. Precedent is clear that

[3] AG provided consent for OSI to search her cellphone "for pictures, videos, and text messages from 1 Jul 21 – 25 Aug 22 regarding my husband, Joshua Allen." (App. Ex. IX at 6)

military courts' interpretation of the R.C.M. "must be" rooted in their text and interpreted in accordance with the "plain meaning" thereof. United States v. Vargas, 83 M.J. 150, 154 (C.A.A.F. 2023) (interpreting R.C.M. 701 using its plain meaning). The military judge seemed to acknowledge that, under the plain meaning of the text, the data in question would seem to be covered. (App. Ex. XXI at 7-8). ("R.C.M. 701 seems clearly by its terms to cover the extraction of Ms. A.G.'s phone. . . ."). However, the military judge went beyond the plain meaning for policy reasons. (App. Ex. XXI at 7-8). Appellant's position is that this is an improper application of textual interpretation, and that the plain text should have been applied to conclude the data was covered by R.C.M. 701. As this question will almost certainly be settled by the CAAF prior to the resolution of the present case, however, extensive briefing on the subject seems to be unnecessary. The CAAF decision in *Braum* will likely settle this question one way or the other.

If the CAAF clarifies that, in such circumstances, the full forensic extraction is not covered by R.C.M. 701, that would seem to foreclose relief on this issue. If, however, the CAAF goes the other way, then the military judge definitionally applied the wrong law. The only remaining question would be the low bar of showing relevance to defense preparation. This low bar was clearly met. AG's phone was a frequent topic of discussion at trial. The government's best evidence came from her phone. She acknowledged recording a great deal of videos but

focusing on turning over the one that was produced with the intention of getting evidence against Appellant. There was evidence that AG was hesitant to turn over her phone data to law enforcement, and even evidence that she lied to OSI and attempted to get her romantic friend to delete data for fear OSI would find it. (R. at 105-06, 324, 446. This background is more than enough to meet the low bar of relevance to defense preparation.

At this point, the question would shift to prejudice, and it would be the government's burden to disprove prejudice beyond a reasonable doubt. That is a high bar, and it is difficult to see how the government could meet its burden given that the record does not contain the data itself. Additionally, the weaknesses in the evidence explored below, as well as preexisting credibility issues with AG contribute to the heavy lift of proving harmlessness beyond a reasonable doubt. In any event, as it is the government's burden, Appellant will allow the government to make its case.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

II. WHETHER SPECIFICATION 2 of CHARGE I IS FACTUALLY INSUFFICIENT.

Standard of Review

Issues of factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted); *see also United States v. Harvey*, 85 M.J. 127 (C.A.A.F. 2024) (discussing new factual sufficiency standard).

Law and Argument

There is a specific deficiency in the evidence as to the question of whether the charged act (sex while AG was sleeping) actually occurred. The evidence raised serious questions about AG's bias and her ability to accurately perceive and recall. Her testimony was riddled with inconsistent statements, persistent memory lapses, and outright admissions of deception. The accusations were made in the midst of a marital breakup and emotional accusations of cheating and other unfaithfulness. AG made no accusations of sexual abuse for well over a year while it was supposedly happening, even when specifically questioned by police. Only when the marriage was breaking up did she levy her accusations. The evidence also raised major questions about her reliability as a witness. She acknowledged hiding evidence from OSI and all but acknowledged conspiring with her romantic friend to delete and hide evidence. There was also a great deal of evidence regarding AG's shockingly poor memory. (*See* R. at 276, 302, 437, 458).

Additionally, a prior statement from AG that was inconsistent with guilt was admitted substantively at trial. (R. at 412). Specifically, AG told her sister that she would wake up, not to Appellant penetrating her as she later claimed, but to Appellant either masturbating or *attempting* to have sex with her. (R. at 411). Given this statement, directly from AG, the evidence failed to foreclose the possibility that Appellant did not actually penetrate AG during her sleep, as she alleged at trial, but merely masturbated next to her or perhaps tried to penetrate her.

AG's candid disclosures to her sister and her openness in discussing the nature of her interactions with appellant case significant doubt on the government's theory of guilt and supports reasonable doubt. *See* Def. Ex. E. It is very possible that the version of the story AG told her sister was true, and AG's version to OSI and the trial was exaggerated.

This possibility is particularly notable in light of the substantial information about AG being deceptive to OSI. This version of AG's story would also be consistent with Appellant's statements in Pros. Ex. 1, and therefore provide a logical explanation for Appellant's statements that was still inconsistent with guilt.

There is no logical reason why AG would lie to her sister or would tell her sister a version of events that was less serious than the truth. AG had no motivation to downplay her accusations to her sister. By contrast, AG had plenty of motivation to exaggerate her accusations to OSI. Thus, it is far more likely AG would have told

her sister the full extent of any wrongdoing, rather than downplay it. Whereas her motivation to exaggerate to law enforcement was clear.

There was also evidence that Appellant had repeatedly denied having sex with AG when she was asleep. (R. at 233, 300-01). This is direct evidence that the charged conduct did not occur. The evidence, viewed as a whole, fails to exclude the reasonable possibility that the charged act did not occur as alleged. The government's case rested on the testimony of AG, whose credibility was deeply compromised, and whose own statements cast doubt on the prosecution's theory.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

III. WHETHER RELIEF IS WARRANTED FOR IMPROPER EVIDENCE AND ARGUMENT.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo and, in the absence of an objection, for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted).

Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quotations omitted).

Repeated violations of the Rules for Courts–Martial and/or Military Rules of Evidence can constitute prosecutorial misconduct. *Id*. This includes asking improper questions or eliciting improper testimony. *Id.* Similarly, an improper argument can constitute prosecutorial misconduct. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021).

In assessing prejudice, courts look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Reversal is warranted for nonconstitutional error only when the trial counsel's comments, taken as a whole, were so damaging that the appellate court cannot be confident that the members convicted the Appellant on the basis of the evidence alone. *Sewell*, 76 M.J. at 18 (quotation omitted). In the case of constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt. *United States v. Flores*, 69 M.J.366, 369 (C.A.A.F. 2011) (citations omitted).

Argument

At several points, the government elicited evidence, or made arguments, that

Appellant submits were plainly improper.

During the questioning of the OSI agent, the government asked whether it appeared to the OSI agent that AG was trying to hide anything from OSI about GM (her romantic friend). (R. at 460). The OSI agent replied that it did not appear AG was trying to hide anything from her. (R. at 460). The government's questioning of the OSI agent about AG's truthfulness amounted to improper human lie detector testimony. Along these same lines, the government asked whether OSI found any evidence of obstruction of justice committed by AG. (R. at 461).

In an attempt to blunt the impact of evidence about AG's hesitance to disclose information from her phone, trial counsel asked the OSI agent about whether other victims in other cases had consented to the search of their phones. (R. at 461). What other victims may or may not have done in unrelated cases is not relevant. To the extent this was an attempt to elicit expert-like testimony about victim behavior, the OSI agent had not been qualified as an expert, and no foundation was laid for expert testimony.

In closing, the government argued that the various charged sexual assaults involved "the same M.O." (R. at 475). The record does not demonstrate that the government sought or obtained permission to argue a common M.O. between charged offenses. The government returned to this spillover argument in rebuttal, stating that there were important consistencies between the two sexual assault

specifications. (R. at 519) ("The sexual assaults, Your Honor, I can talk briefly. There are consistencies of both Specification 1 and Specification 2, and I think that's important for the Court to consider."). The government then drew comparisons between the two specifications. This kind of spillover argument is prohibited and risks unfairly strengthening the government's case by inviting the court to consider similarities between offenses rather than the evidence for each charge individually. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). This was particularly prejudicial because one of the problems with Specification 2 was, of course, that the victim was not awake at the time of the conduct – and bootstrapping conduct that occurred when she was awake to support it is particularly problematic.

The government further argued that Appellant's admissions to unrelated conduct – cheating and watching pornography – corroborated the sexual assault specifications, because Appellant's reaction to being confronted with those misdeeds was mirrored in his reaction to the sexual assault accusations. (R. at 476). This is an improper argument about general character and propensity.

The government argued in both closing and rebuttal that Appellant was trying to get in front of the accusations by filing for divorce. (R. at 480, 517). The record does not demonstrate that the government sought or obtained permission to argue the divorce filing for some sort of Mil. R. Evid. 404(b) purpose.

In the concluding lines of the government closing, the government again

invoked the actions of other victims in other cases. (R. at 480-81) ("You know, if every one of our victims ran out of the house screaming and crying and took a SANE kit and gave a statement and just sent over all the evidence, then we could sit here and say she reacted the way we wanted her to, she didn't try to make it work, and she got — it's a crime, she ran out."). This was irrelevant and encouraged consideration of facts not in evidence. *See United States v. Clifton*, 15 M.J. 26, 29-30 (C.M.A. 1983) ("When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles [confrontation and the opportunity to impeach]."

Regarding prejudice, the impact of the improper evidence and argument is be viewed cumulatively. *Erickson*, 65 M.J. at 224. This prejudice may also be viewed cumulatively with all other errors this Court may find. *United States v. Shelby*, 85 M.J. 292 (C.A.A.F. 2025) (discussing the cumulative error doctrine's applicability on appeal). Much of the error was of constitutional dimensions, triggering the government's burden to disprove prejudice beyond a reasonable doubt. Prejudice is increased because the improper evidence and argument went to common themes that were at the heart of the case: improperly bolstering AG's credibility and improperly attacking Appellant's character.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Suite 1005-506
Woodbridge, VA 22192
Tel. 586-930-8359
hockenberry@militaryattorney.com
www.militaryattorney.com

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612- 2880
joyclin.webster.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 October 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: joyclin.webster.1@us.af.mil

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matter:

IV. WHETHER THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT BECAUSE HE WAS CONVICTED OF OFFENSES THAT DO NOT FALL WITHIN THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

Additional Facts

The first indorsements to both the Entry of Judgement and Statement of Trial Results state that Appellant is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgement; Statement of Trial Results.

Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Zegarrundo*, 77 M.J. 612, 613–14 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

Appellant acknowledges that the CAAF recently held that this Court lacks the authority to act upon the indication of a firearm prohibition under 10 U.S.C. § 922.

United States v. Johnson, __ M.J. __, No. 24-0004/SF, 2025 CAAF LEXIS 499, at *2 (C.A.A.F. June 24, 2025). However, Appellant asserts that *Johnson* was wrongly decided and that the firearm prohibition indicated on the first indorsement to the EOJ is unconstitutional, as applied, because the offenses to which he pleaded guilty do not fall within the Nation's historical tradition of firearm regulation. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) (holding that the Government must justify a firearm regulation by demonstrating that it is "consistent with this Nation's historical tradition of firearm regulation"). Based on CAAF precedent, Appellant raises this issue for preservation purposes.

WHEREFORE, Appellant respectfully requests that this Court hold that 18 U.S.C. § 922 is unconstitutional as applied to him.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **JOSHUA D. ALLEN,** United States Air Force, *Appellant.*	)))))))))	UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST) Before Panel No. 3 No. ACM 40809 30 October 2025

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

Pursuant to Rule 23.3(m)(3) of this Court's Rules of Practice and Procedure, the United States requests a 7-day enlargement of time, to respond in the above-captioned case. This is the United States' first request for an enlargement of time.

The record of trial was docketed with this Court on 11 April 2025. As of the date of this request, 203 days have elapsed since docketing. The United States' brief is currently due on 7 November 2025. If the enlargement of time is granted, the United States' response will be due on 14 November 2025, and 218 days will have elapsed since docketing.

There is good cause for enlargement of time because an additional 7 days is needed to review the record, complete the brief, and have supervisory review. Due to undersigned counsel's assigned cases and duties, she has completed a cursory review of Appellant's brief but has not yet reviewed the record of trial. This brief is undersigned counsel's second priority after United States v. Coley, No. ACM 40675, which she anticipates filing on 8 November.

Since being assigned Appellant's case, undersigned counsel has prepared for and argued United States v. Braum, No. 25-0046/AF, before the CAAF on 8 October; filed a motion for enlargement of time in United States v. Souza, No. ACM S32813 on 7 October; drafted and filed the United States' answer in United States v. Griffin, No. ACM 40642 on 24 October. Undersigned

counsel has also been involved in roundtables and moots courts for 5 other oral arguments in which JAJG will participate in from 21-29 October.

While neither the record nor the number of assignments of error is particularly lengthy, the first three assignments of error require detailed analysis of the law and the record to respond to Appellant's arguments. Undersigned counsel's workload and duties have prevented completion of the necessary research and analysis to file the brief without an extension. Due to office workload, there has been no other appellate government counsel who could work on this brief sooner. However, since the office has filed several other briefs this week, a second attorney will soon be assigned to assist undersigned counsel on this brief, enabling the office to file the brief by 14 November 2025.

Additionally JAJG, as a whole, currently has 12 briefs with due dates pending at this Court all requiring supervisory review. An extra 7 days will ensure there is adequate time for undersigned counsel to prepare a thorough brief that is helpful to the court and to secure supervisory review.

WHEREFORE, the United States respectfully requests that this Court grant this motion for an enlargement of time.

[redacted]

HEATHE R BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 October 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Airman First Class (E-3) **JOSHUA ALLEN** United States Air Force *Appellant.*	)	No. ACM 40809 14 November 2025

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

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
[redacted]

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
[redacted]

INDEX

III.

TABLE OF AUTHORITIES

SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL CIRCUIT COURTS

OTHER AUTHORITIES

Military Rules of Evidence

Rules for Courts-Martial

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Airman First Class (E-3) **JOSHUA ALLEN** United States Air Force *Appellant.*	)	No. ACM 40809 14 November 2025

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

ISSUES PRESENTED

I.

WHETHER THE ALLEGED VICTIM'S PHONE DATA WAS WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF THE GOVERNMENT FOR THE PURPOSES OF R.C.M. 701 WHERE THE GOVERNMENT MADE A FULL FORENSIC EXTRACTION OF THE DATA. IF SO, IS RELIEF WARRANTED?

II.

WHETHER SPECIFICATION 2 OF CHARGE I IS FACTUALLY INSUFFICIENT?

III.

WHETHER RELIEF IS WARRANTED FOR IMPROPER EVIDENCE AND ARGUMENT?

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT BECAUSE HE WAS CONVICTED OF OFFENSES THAT DO

NOT FALL WITHIN THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION?[1]

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant and the victim, AG, met online in 2018 and were married in 2021 after Appellant completed basic training. (R. at 201-202). They experienced financial strain and struggled to adjust to married life as Appellant began his Air Force career at Minot AFB, ND. (R. at 192, 198). AG began communicating with GM, whom she met on Xbox. (R. at 195). There were accusations from both parties of cheating as AG focused her time on this external relationship. (R. at 199, 281). Despite this, Appellant and AG planned to buy a house in Minot in the spring of 2022 and thought AG was pregnant. (R. at 199). Appellant went through AG's phone and found romantic communications with GM, while AG was upset about Appellant visiting pornographic websites. (Id.) Both started distrusting each other and looked through each other's phones. (Id.)

AG accused Appellant of first having sex with her while she was sleeping while they were living in their apartment in Glenburn, ND. (R. at 194, 210). AG testified it occurred after Appellant woke her up, directed her to go the restroom, and she would find his semen. (R. at 194, 234). These incidents increased in frequency after they moved to their Minot house. (R. at 194, 232). AG testified that, on occasion, she would wake up during these acts but would pretend to be asleep. (R. at 194, 214-217).

[1] Appellant personally raises issue IV under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

AG confronted Appellant about the sexual assaults and secretly recorded him, days before initiating divorce proceedings. (R. at 195, 220). In the recording, AG asked Appellant why he would have sex with her while she was asleep. (R. at 222). In response, Appellant stated, "Because whenever you're awake, you usually don't want to do it." (R. at 223). AG eventually reported Appellant's sexual assaults to OSI. (R. at 183). AG also told her sister, RM, about the sexual assaults. (R. at 489).

Appellant elected to be tried by military judge alone. (R. at 190-191). The military judge ultimately convicted Appellant of one specification of sexual assault while sleeping. (R. at 523). The military judge acquitted Appellant of the remaining four specifications of sexual assault and domestic violence. (Id.) Appellant was sentenced to a reprimand, sixteen months of confinement, and a dishonorable discharge. (R. at 574).

ARGUMENT

I.

THE FORENSIC EXTRACTION OF AG'S PHONE THAT IMPLICATED DATA BEYOND HER LIMITED CONSENT WAS NOT SUBJECT TO DISCOVERY UNDER R.C.M. 701.

Additional Facts

When AG reported Appellant's crime to the Air Force Office of Special Investigation (OSI), the agent requested permission to search her phone using Cellebrite – technology which makes a digital copy of the data in on a phone commonly referred to as an extraction. (R. at 425). The OSI agent explained that she would not be able to pull a limited scope of information from AG's phone with Cellebrite but that AG could limit what OSI could look at with her consent. (R. at 425).

AG was initially reluctant because she had personal things on her phone. (App. Ex. XXI, *Ruling: Defense Motion to Compel Discovery*, para. 11). Although AG asked if she could delete things from her phone before allowing the search, such as nude or other private photos in her gallery, she did not delete anything from her phone before allowing OSI to search it with Cellebrite. (R. at 105, 107-108, 446). She ultimately consented to OSI making an extraction of her phone but limited the scope of the search to "pictures, videos, and text messages" from 1 July 2021 to 25 August 2022 "regarding" Appellant. (App. Ex. VIII, *Defense Motion to Compel Discovery*, Attach. 3). Later, AG expanded the scope of her consent to include "all Snapchat, Facebook messenger, and Xbox Party Chat messages on the extraction of her phone that is currently in OSI's possession." (Id. at para. 15).

From the extraction, the Government provided between 800 and 900 pages of communications to the defense. (App. Ex. XXI, *Ruling: Defense Motion to Compel Discovery*, para. 14). The defense filed a discovery request seeking "access to the forensic extraction taken from [AG] by AFOSI." (Id. at Attach. 14). After the Government denied the request, the defense filed a motion to compel discovery.

In the motion to compel discovery, the defense argued the extraction was in the possession, custody, or control of the Government and therefore subject to R.C.M. 701. (App. Ex. VIII, para. 45.b.). The defense argued the "raw" data was relevant to defense preparation so counsel could "determine if (and when) [AG] deleted any communications with [GM] and whether those communications could be discovered." (Id.) The defense did not argue any part of the extraction other than the data related to AG's communications with GM was relevant to the defense preparation.

During oral argument on the motion to compel discovery, the defense again asserted the evidence was in the Government's possession, custody, or control. (R. at 122). The defense argued the extraction was relevant to determine if AG was "talking about [the allegations] with people," to show a lack of inculpatory evidence. (R. at 123). Further, the defense argued the extraction was relevant to determine if messages between AG and GM were deleted. (R. at 125).

The judge asked trial defense counsel if there was anything on the extraction beyond AG's communications with GM and AB, "to include deleted stuff" that was relevant. (R. at 134). The defense conceded that, along with AG's communications to Appellant, that was all. (R. at 135).

The judge explained his concern about relevance as follows:

> [P]eople put a lot of private things on their phone. Some of them may be relevant to this case and if so, their privacy gets overruled by, you know – constitutional right. But there may be [. . .] private things on there that are just completely unrelated to this case at all. And I have [. . .] some concern about [. . .] ordering these folks to just [. . .] lay that bare for the world to see without establishing that there's something relevant beyond [. . .] just speculation.

(R. at 135).

The judge partially denied the defense's motion to compel. (App. Ex. XXI). He found, "Absent a warrant or consent, the government does not have the right for a general exploratory rummaging through someone's cell phone." (Id. at para. 50). Therefore, the Government only "had a right to review materials within the scope" of AG's consent and "only such material as they had a right to review is subject to R.C.M. 701." (Id.)

But the judge was "not confident" that "the Government has met its obligations within R.C.M. 701 for the portions of AG's phone for which she gave consent to search. . ." (Id. at para. 51). Therefore, the judge ordered trial counsel to,

> [R]eview all material in the extraction of AG's cell phone that come within the scope of her consent (to include her expanded consent) and produce any material that is required by R.C.M. 701. This should include all pictures, videos, and text messages that were sent, received, captured, or saved between 1 July 2021 through 25 August 2022 that are 'regarding' [Appellant] as well as material covered by the expanded consent. To the extent possible, this review should also include the 'hidden' folder mentioned by AG and any deleted communications between AG and [GM]. Trial counsel is ordered to disclose any records contained therein that are required under R.C.M. 701 or any other applicable law.

(Id. at para. 52).

The judge found the extraction in its entirety, "any material outside the scope of AG's consent," was governed by R.C.M. 703. (Id. at para. 53). He found the defense failed to establish relevance and necessity. (Id.) He explained, "the Defense motion fails to identify anything that might be found on AG's phone that would be outside the scope of AG's relatively broad consent. Because they [the defense] cannot specifically state what they expect to find, they also fail to meet their burden to show the evidence's relevance and necessity." (Id.) He continued, "the Court fails to see how AG's lie [about not knowing GM's name] and instruction [to GM] to delete messages make the entire contents of her phone relevant and necessary under R.C.M. 703." (Id. at para. 54).

Standard of Review

A trial judge's decision on a request for discovery is reviewed for an abuse of discretion. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004). Judges abuse their discretion when their findings of fact are clearly erroneous, when they are incorrect about the applicable law, or when they improperly apply the law. Id.

The interpretation of a provision of the R.C.M. is a question of law that this Court reviews de novo. United States v. Secord, ___M.J. ___, 2025 CAAF LEXIS 646, *8 (C.A.A.F. 2025).

Law and Analysis

Article 46, UCMJ, requires that both trial and defense counsel have "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. R.C.M. 701 is one of the rules implementing Article 46, UCMJ. It provides that the Government shall, after service of charges, with a defense request, permit inspection of items in the Government's "possession, custody, or control" that are "relevant to defense preparation." R.C.M. 701(a)(2)(B).

When reviewing discovery matters, this Court conducts a two-step analysis: "[F]irst, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013) (quoting Roberts, 59 M.J. at 325).

When the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. Coleman, 72 M.J. at 187 (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." Id. (citation omitted). However, "[m]ere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor . . . should such suspicion suffice to impose a duty on [defense] counsel to

advance a claim for which they have no evidentiary support." Strickler v. Greene, 572 U.S. 263, 286 (1999).

The moving party bears the burden to establish facts necessary to resolve a motion by a preponderance of the evidence. R.C.M. 905(c)(1)-(2). Therefore, on a motion to compel discovery under R.C.M. 701, the defense must establish that evidence relevant to the defense preparation exists in the item it seeks to compel. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable. M.R.E. 401.

Mere speculation about what could exist on a cell phone extraction is insufficient to establish that it contains evidence "relevant to defense preparation" under R.C.M. 701. *See* United States v. Secord, 2024 CCA LEXIS 263, *11-13 (A. Ct. Crim. App. 26 June 2024). The Army Court of Criminal Appeals found that the defense had failed to meet their burden to establish by a preponderance of the evidence that evidence relevant to the defense preparation was in the extracted data. Id. Trial defense counsel in Secord did not request access to specific files or documents but instead wanted access to all the cellphones data. Id. at *8. The court explained, "other than the trial defense counsel's mere and barely perceptible argument – which is not evidence – alleging a generic incantation that impeachment evidence existed on the cellphone . . . the defense did not offer, and after our complete review of the record we did not find, any actual evidence or testimony that any specific impeachment text messages or other data existed on appellant's cellphone that would constitute an 'item . . . relevant to defense preparation.'" Id. at *11-12. The court concluded that there was no prejudice, even under a harmless beyond a reasonable doubt standard, because the defense had filed to "adequately address two of the most fundamental discovery questions (the exact nature of the evidence sought and that such evidence existed on his cellphone)[.]" Id. at *12

1. The extraction of AG's phone that was beyond her limited consent was not subject to discovery under R.C.M. 701.

The Fourth Amendment blocked the data extracted from AG's phone, beyond her limited consent, from being subject to disclosure to the defense under R.C.M. 701. The Government agrees with Appellant that the Court of Appeals for the Armed Forces is currently considering whether an extraction of a cell phone is within the Government's possession, custody, or control when the Fourth Amendment prevents the Government from accessing the data. (App. Br. at 9-10). The Government maintains that an extraction of anyone's phone is blocked from the Government's possession, custody, or control by the Fourth Amendment.

A. This Court correctly found that extracted data beyond a person's consent is not subject to discovery under R.C.M. 701

This Court correctly concluded in United States v. Braum, 2024 CCA LEXIS 419 (A.F. Ct. Crim. App. 10 Oct. 2024), that extracted data that is outside of a person's limited consent to search is not within the Government's possession, custody, or control for the purpose of R.C.M. 701. This conclusion is correct because both R.C.M. 701 and Article 46, UCMJ, are beholden to the limits of the Fourth Amendment. By giving only limited consent to search, a person constrains the Government's lawful access to evidence under the Fourth Amendment. Neither R.C.M. 701 nor Article 46, UCMJ, can compel the Government to violate the Fourth Amendment by searching or allowing a third party to search beyond the person's consent. *See* Olson v. Cnty. Of Grant, 127 F.4th 1193, 1198 (9th Cir. 2025) (holding the Fourth Amendment was violated when Olson allowed Idaho police to make an extraction of her phone but Idaho police transferred that extraction to another jurisdiction to search without her consent; rejecting that the third-party doctrine applies when the "third-party" the information is given to is the Government). The trial judge correctly analyzed the Fourth Amendment and R.C.M. 701 and reached the correct conclusion that the Fourth Amendment prevented the Government from

disclosing any of the extraction that went beyond AG's limited consent to search. (App. Ex. XXI, *Ruling: Defense Motion to Compel Discovery*). So the military judge's partial denial of the defense motion to compel discovery of the entire extraction of AG's phone was not an abuse of discretion.

But even as CAAF considers this issue, there is another reason to deny Appellant's requested relief. Trial defense counsel failed to establish, by a preponderance of the evidence, that the full extraction of AG's cell phone contained evidence relevant to the defense preparation. As a result, the trial judge's partial denial of the defense's motion to compel discovery was not an abuse of discretion.

B. The defense did not meet their burden to compel discovery of all the data extracted from AG's phone under R.C.M. 701

The defense received, pursuant to the judge's order, everything from the extraction encompassed by AG's consent that was covered by R.C.M. 701. (App. Ex. XXI; R. at 167, 182). The defense failed to establish by a preponderance of the evidence that anything else within the extraction of AG's phone contained evidence relevant to the defense preparation. Because the defense failed to meet their burden, the trial judge's decision to deny the defense's motion to compel discovery of the entire extraction was correct and should be affirmed.

As the moving party, it was the defense's burden to establish by a preponderance of the evidence that the discovery sought contained evidence relevant to the defense preparation. R.C.M. 701, 901. "Preponderance of the evidence simply means it is 'more likely than not.'" United States v. Babian, 2021 CCA LEXIS 115, *12 (A.F. Ct. Crim. App. 19 Mar. 2021) (quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

Speculation about the existence of evidence is insufficient to establish the existence and relevance of such evidence by preponderance of the evidence. When evaluating whether a

moving party has met the preponderance of the evidence standard in other contexts, courts have found speculation insufficient to establish that something is more likely than not. *See* United States v. McClure, 2021 CCA LEXIS 454, *14 n.8 (A. Ct. Crim. App. 2 Sept. 2021) (explaining that a judge properly denied production of a diary when the defense produced "nothing more than speculation in support of their motion." A "fishing expedition based on an assumption" was insufficient to establish the relevance of or necessity of a diary); United States v. Hutchins, 2018 CCA LEXIS 31, *156-158 (N.M.C.C.A. 29 Jan. 2018) (finding the judge did not abuse his discretion in concluding that the defense had failed to meet the preponderance of the evidence standard to compel production under R.C.M. 703 when the defense "offered nothing more than speculation as to the value of personally inspecting" a site or locating witnesses); United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014) (finding "mere speculation and conjecture" about inevitable discovery insufficient to meet the preponderance of the evidence standard for inevitable discovery).

In this case, trial defense counsel did not even attempt to meet their burden to establish by a preponderance of the evidence that all of the data in the extraction was relevant to their defense. In fact, the defense did not even speculate that there was any relevant evidence beyond the communications they received in the extraction when given the opportunity to do so by the judge. (R. at 135). Instead, when judge explicitly asked trial defense counsel if she could point to anything relevant on the extraction beyond AG's communications with GM and AB, the defense conceded that the relevant part of the extraction was AG's communications with Appellant, Ms. Beal, and GM.[2] (R. at 135).

[2] The Government maintains that this speculation is insufficient to establish relevance by a preponderance of the evidence. But there is no evidence the defense did not receive that information from the extraction. The judge required the Government to review the extraction

The full extraction of AG's phone was certainly not entirely composed of data of AG's communications with Appellant or with GM and AB regarding Appellant. When the defense fails to even allege the existence of evidence in the extraction of AG's phone, beyond what they received, they certainly have not met their burden to establish by a preponderance of the evidence that some unnamed evidence exists and is relevant to the defense preparation. Therefore, like Secord, the defense failed to establish two "of the most fundamental discovery questions" to compel discovery under R.C.M. 701 – the exact nature of the evidence sought and that such evidence existed on the cell phone. Secord, 2024 CCA LEXIS at *12.

The judge correctly identified this deficiency. He explained, "The Defense motion fails to identify anything that might be found on AG's phone that would be outside the scope of AG's relatively broad consent. Because they cannot specifically state what they expect to find, they also fail to meet their burden to show the evidence's relevance and necessity." (App. Ex. XXI, para. 53). He further clarified that defense's argument did not "make matters unrelated to communications between AG and [GM] relevant and necessary." (Id. at para. 54). Although he made this analysis when considering R.C.M. 703, the fact that the defense failed to identify any evidence as well as the limited scope of the defense's argument for relevance, the judge's analysis of relevance applies equally to R.C.M. 701. Because the judge correctly identified that the defense had failed to establish by a preponderance of the evidence that all the data in AG's

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and directed the Government to turn over any material required by R.C.M. 701 covered by both of AG's consents. This included "any deleted communications between AG and [GM]" (App. Ex. XXI, para. 52). This would require a review of the underlying data. More than two weeks after the judge's ruling, the defense confirmed that the motion to compel was resolved. (R. at 161, 187). The defense never alleged they did not receive the metadata for the required disclosures.

cell phone extraction contained relevant evidence, denying discovery of the full extraction of AG's phone was correct.

Even if our superior Court were to find the Fourth Amendment is not a bar to discovery of an extraction under R.C.M. 701, this Court should still deny Appellant's requested relief. The full extraction of AG's phone was not subject to discovery under R.C.M. 701 because the defense could not, and did not, establish of all the data extracted was relevant to defense preparation by a preponderance of the evidence. "[I]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." United States v. Leiffer, 13 M.J. 337, 345 n10 (C.M.A. 1982); *See also* United States v. Robinson, 58 M.J. 429, 433 (C.A.A.F. 2003) (concluding that error was harmless because the judge reached the correct result, albeit for the wrong reason).

2. Denial of the full extraction of AG's phone was harmless beyond a reasonable doubt.

Even if the defense had established relevance of all the data in AG's phone extraction, denial of discovery was harmless beyond a reasonable doubt. The Court must determine "the materiality of the withheld information to the results of the trial." Roberts, 59 M.J. at 326. There is no evidence that any of the data within the full extraction of AG's cell phone "might have affected the outcome of the trial." Coleman, 72 M.J. at 187.

Before the judge's ruling on the motion to compel, the defense received between "800 and 900 pages" of data from the extraction of AG's phone. (App. Ex. XXI). The Government complied with the judge's ruling and provided additional data from the extraction to the defense. (R. at 161, 187). The defense then used some of that data at trial. Trial defense counsel attempted admit 924 pages of messages which mostly contained "completely irrelevant"

information at trial. (R. at 303, 314-315). Once the judge narrowed it down to 29 pages of relevant messages, the defense used that data to show AG was not afraid of asserting herself in the relationship and that Appellant never "explicitly" confessed to the sexual assault in a message. (R. at 315—317; Def. Ex. C). The defense also used videos from AG's phone of her and Appellant during the charged time frame to suggest that AG wasn't sexually assaulted because she recorded herself being cheerful or discussing sex with Appellant. (R. at 325-331; Def Exs. D, E). Much like Braum, possession of all of this data and using it at trial should leave this Court convinced that "nondisclosure of the full extraction of the phone [. . .], if it was erroneous, was harmless beyond a reasonable doubt. Braum, 2024 CCA LEXIS at *15-16.

Additionally, the evidence of AG's guilt was overwhelming. AG was a heavy sleeper. (R. at 212, 234). She testified that on several instances she woke up to Appellant having sex with her or to him pushing her out of the bed and telling her to go to the bathroom. (R. at 210-212, 214, 232-234, 264-265). When she got to the bathroom, she found semen inside and around her vaginal area when she wiped. (R. at 210-212, 214).

Appellant's action of waking AG up to go to the bathroom supports her conclusion that he was having sex with her while she was asleep. AG explained that early on in their relationship she told Appellant that she had to use the restroom after sex to avoid getting a urinary tract infection (UTI). (R. at 213). Appellant would have no reason to push her out of the bed and tell her to use the restroom unless he just had sex with her and wanted her to avoid getting a UTI.

Beyond AG's testimony, Appellant tried to explain away having sex with AG while she was asleep. When AG asked Appellant, "Why fuck me while I'm sleeping? Why not fuck me when I'm awake?" Appellant responded, "Because whenever you're awake you usually don't

want to do it." (Pros. Ex. 1). Even the Defense's evidence supported that Appellant had sex with AG while she was sleeping. The defense introduced a video that AG captured on her phone of her, and Appellant continuing to discuss Appellant's actions after the end of the video in Prosecution Exhibit 1. (Def. Ex. A; R. at 351). In that video, AG was lying in bed with Appellant and told him,

> I haven't wanted to have sex with you very much. And I'm sorry about that, but that can't be an excuse for you to have sex with me while I'm sleeping. That's not okay. I did not consent to that. I did not consent to you doing that to me, and you knew that, and you lied. When I asked you, did you have sex with me while I was sleeping last night, and you said no, that was a lie. You lied to me. But I remembered. I remember you waking me up and pushing me over to the side of the bed and telling me to go to the bathroom.

(Def. Ex. A).

As the defense highlighted, Appellant was calmly lying next to AG as she made these accusations and was not arguing with her about it. (R. at 299). Additionally, this video corroborates AG's trial testimony because it is consistent.[3] The defense also admitted text messages in which AG again accused Appellant of having sex. (Def. Ex. C). Appellant responded ". . . I'm trying to change. I'm trying to save us. I'm trying to fix what I've so majorly screwed up. . ." (Def. Ex. C., pg. 29). Appellant's statements and actions, as well as AG's repeated and consistent accusation that Appellant had sex with her while she was sleeping, support Appellant's guilt.

Further, the defense's theory for why Appellant was not guilty of sexually assaulting AG while she was sleeping was weak. The defense attacked AG's credibility based on her false

[3] AG's statements in the video were admitted substantively after trial counsel withdrew his objection based on hearsay. (R. at 297-299). Therefore, the judge could consider them for the truth of the matter asserted.

statement to OSI that she did not know GM's name because she wanted to hide her romantic relationship with GM, her memory, and because she continued her relationship with Appellant. (R. at 276-277, 279, 291-292, 319-324, 327-329, 336-337). But none of these attacks address why Appellant tried to justify having sex with AG while she was asleep and his concession that he was trying to change. Their argument that Appellant admitted guilt after AG kept "pestering" him about having sex with her while she was sleeping is unpersuasive. (R. at 288-289, 300). It is not reasonable to believe that person would admit to committing a heinous crime, and explain why he did it, in response to "pestering."

This Court should find nondisclosure of all of the data in the extraction of AG's phone was harmless beyond a reasonable doubt. The evidence of Appellant's guilt was overwhelming. There is nothing to suggest that any part of the extraction that was withheld would have impacted the verdict. Therefore, this Court should deny Appellant's requested relief.

II.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY SUFFICIENT.

Standard of Review

A CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." 10 U.S.C. § 866(d)(1)(A). If all offenses occurred on or after 1 January 2021[4], factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024).

[4] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The CCA must also give "appropriate deference to findings of fact entered into the record by the military judge." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 85 M.J. at 130. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

Law

Factual Sufficiency

Deference for a witness who testified might be high because the CCA judges did not see the witness testify, and the deference for objective evidence, like documents, might be low because the CCA can assess the evidence. Harvey, 85 M.J. at 131. It is within this court's discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. (internal quotation marks omitted).

For this Court "to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." Harvey, 85 M.J. at 132. First, this Court must find that the evidence, "does not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

Article 120, UCMJ

To prove Appellant guilty of sexual assault while asleep under Specification 2 of Charge I, the Government was required to prove:

(1) That at or near Minot, North Dakota, on divers occasions between on or about 1 June 2021 and on or about 31 July 2022, Appellant committed a sexual act upon AG by penetrating her vulva with his penis;

(2) That Appellant did so when AG was asleep; and

(3) That Appellant knew or reasonably should have known that AG was asleep.

(MCM, Part IV ¶ 60) (2020 ed.).

Analysis

Appellant argues that his conviction for Specification 2 of Charge I is factually insufficient. (App. Br. at 1.) He claims that AG's bias, memory lapses, inconsistent statements, and prior deception raise a specific deficiency of proof, calling into question whether the charged act actually occurred. (App. Br. at 13-14). Appellant also points to AG's prior statement to her sister which was inconsistent with guilt. (App. Br. at 14). Finally, Appellant argues that the Government's case rested on AG, whose credibility was deeply compromised and whose own statements cast doubt on the prosecution's theory. (App. Br. at 15). None of these arguments constitutes a deficiency in proof.

Appellant's arguments amount to merely a disagreement with the factfinder's conclusion that AG was credible and that Appellant's statements in Prosecution Exhibit 1 were credible admissions of guilt. Our sister service courts have found that a mere disagreement with a verdict falls short of establishing a deficiency in proof. United States v. Valencia, 85 M.J. 529 (N-M Ct. Crim. App. 2024); United States v. Brassfield, 85 M.J. 523 (A. Ct. Crim. App. 2024).

Appellant argues that AG's accusations are biased because they came amidst a marital breakup and accusations of cheating and unfaithfulness. (App. Br. at 13). While it is true that the accusations arose during a tumultuous time, this does not automatically negate their validity. The military judge was aware of the context and could weigh this factor when assessing AG's credibility. Further, as discussed below, Appellant admitted guilt. Therefore, the surrounding facts do not diminish the credibility of AG.

Appellant claims that AG's ability to accurately perceive and recall events was demonstrated by inconsistent statements, persistent memory lapses and admissions of deception. (App. Br. at 13-14; R. at 276, 302, 437, 458). While AG did acknowledge memory issues, this does not mean that her testimony was entirely unreliable. (R. at 276, 458). The military judge was able to observe her demeanor and assess the impact of these issues on her overall credibility. To highlight one such instance of AG's memory lapse, Appellant notes that she made no accusations of sexual abuse for over a year while it was supposedly happening. (App. Br. at 13). However, this delay does not negate the veracity of the claims. The fact that AG only came forward later does not necessarily indicate fabrication, and this argument should not be given much weight.

Appellant stresses AG's concealment of evidence from OSI and alleged conspiracy with a friend to delete data. (App. Br. at 14; R. at 105-06, 324, 446). However, the military judge was aware of these incidents, and it was within his purview to determine the impact of these acts on AG's credibility. While such actions *could* suggest an attempt to manipulate the evidence, they could also stem from a desire to protect personal information or from uncertainty about the legal process. The military judge assessed AG's credibility notwithstanding these facts.

Additionally, the Government introduced a prior consistent statement from the victim's sister, RM, under Military Rule of Evidence (MRE) 801(d)(1)(B)(ii). (R. at 408, 411-12). RM testified that the victim told her "she would wake up – she would, like, have been asleep and wake up to him either masturbating or attempting to have sex with her, and she was not a willing participant. She did not want those actions towards her." (R. at 411). Appellant argues that this prior consistent statement creates doubt and calls into question whether the charged act actually occurred because the precise verbiage AG's sister testified to was slightly different than what AG told OSI occurred. (App. Br. at 14; R. at 411). Specifically, Appellant claims AG must have told her sister the truth and lied to OSI. (App. Br. at 15). But inconsistencies in testimony do not automatically invalidate a witness's entire account. The gist of what AG reported was consistent with her trial testimony – Appellant initiated some form of nonconsensual sexual activity while AG was asleep. Accordingly, AG's statement to her sister does not constitute a deficiency in proof.

Finally, the Appellant brings up his repeated denials of having sex with AG while she was asleep, alleging that this is direct evidence that the charged conduct did not occur. (App. Br. at 15; R. at 233, 300-01). While Appellant did deny the allegations, there are also credible admissions in Prosecution Exhibit 1 where Appellant admitted to having sex with AG while she was asleep. Moreover, the military judge could have reasonably concluded that the Appellant was lying or downplaying his actions in his denials.

Even if this Court determines that a deficiency in proof exists, the evidence presented at trial clearly supports the military judge's finding of guilt beyond a reasonable doubt. The military judge, sitting as the fact finder, was in the best position to weigh AG's testimony, assess her demeanor, and resolve any perceived inconsistencies or memory lapses. Harvey, 85 M.J. at

130. AG testified that she asked Appellant about having sex with her while she was sleeping "5 to 10 times, maybe a little bit more than that." (R. at 218). AG also testified she would know Appellant had sex with her due to seeing semen or realizing her pants were off or halfway off. (R. at 210).

Most significantly, the military judge heard and considered Appellant's own words captured in Prosecution Exhibit 1. In that video, AG asked Appellant, "Why fuck me while I'm sleeping? Why not fuck me when I'm awake?" to which Appellant responded, "Because whenever you're awake, you usually don't want to do it." (R. at 222-23). While Appellant argues that this statement could have other interpretations, the military judge, having observed the demeanor of both AG and Appellant, reasonably concluded that this was an admission of guilt.

Appellant argues that Appellant repeatedly denied having sex with AG while she was sleeping *prior* to admitting to it on video. (App. Br. at 5). Therefore, Appellant's denials constitute "direct evidence the charged conduct did not occur." (App. Br. at 15). But such communications are inherently self-serving and offer no opportunity for real-time scrutiny or questioning. Importantly, Appellant did not testify at trial (R. at 465); therefore, the factfinder was limited to assessing his credibility solely through the self-serving text messages he sent to HC, which lack the weight and persuasiveness of sworn testimony subject to the scrutiny of cross-examination. and now asks the Court to overturn his conviction based upon those same unverified, out-of-court statements.

AG testified under oath that she woke up with Appellant's penis inside her, detailing the slower, quieter nature of the sexual assault as opposed to their regular consensual sex. (R. at 215-27). Additionally, AG testified she woke up to find evidence of a sexual assault: Appellant

waking her up and directing her to the restroom where she would find semen on the toilet paper or around her vaginal area. (R. at 213-14).

The military judge considered the evidence and witness testimony and concluded that, despite any alleged inconsistencies or biases, AG was a credible witness and that the government had proven its case beyond a reasonable doubt. This Court should give significant deference to the military judge's credibility determination. In light of the applicable standard of review, there is no basis for overturning the military judge's findings.

This court should not be clearly convinced Appellant's conviction was against the weight of the evidence. The evidence of record does prove that the appellant is guilty beyond a reasonable doubt, and the court should be clearly convinced of the correctness of this decision. Harvey, 85 M.J. at 132. The United States respectfully requests this Honorable Court to deny the assignment of error and affirm the findings and sentence.

III.

TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING HIS RE-DIRECT EXAMINATION OF SA KB OR DURING FINDINGS ARGUMENT.

Additional Facts

Trial defense counsel cross-examined both AG and SA KB extensively regarding the victim's relationship with GM, insinuating that AG was deceptive and potentially hiding information about GM from investigators. (R. at 291-292, 450-451). For instance, trial defense counsel established that AG initially pretended not to know GM's name when first interviewed by OSI:

> Q. When you interviewed with OSI, they asked you about [GM], right?

(R. at 291).

> Q. And I asked you yesterday about how you pretended to not know who [GM] was, right?

(Id.)

Trial defense counsel then highlighted that AG did not want OSI to talk to GM, supporting the inference that AG may have been trying to conceal something about their relationship:

> Q. Because you didn't want them to find out that this is somebody that you were actually romantic with, yes?

(Id.)

Finally, trial defense counsel questioned AG about whether she asked GM to delete messages after her OSI interview:

> Q. After your interview with [GM], you asked him to delete messages that he had on his phone between you and him, yes?
>
> A. I still do not recall this, but as we said before, it's a possibility.
>
> Q. Okay. So it's a possibility that you asked [GM] to delete messages off his phone?
>
> A. Yes.

(R. at 324).

On redirect examination, in response to trial defense counsel's cross examination, trial counsel asked SA KB about GM:

> Q. Did she appear to be trying to hide Mr. [GM] from you?
>
> A. No.

(R. at 460).

> …
>
> Q. Did you have – did you refer any evidence of obstruction of justice, again, by Mr. [GM] or by [AG], to the local police department?

A. No.

(R. at 461).

> Q. Has – to your knowledge, and based upon just the cases you've done, has any victim ever given you consent to forensically extract their phone?
>
> A. In my own cases, to the best of my knowledge, she was the first.

(Id.)

Trial counsel's initial findings argument spanned 12 pages of transcript. (R. at 1274-1297). Trial defense counsel did not object once. (Id.) In rebuttal, trial defense counsel objected twice but not on the grounds he now asserts on appeal. (R. at 512-521). The military judge ultimately convicted Appellant of some, but not all, charges. (R. at 523).

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). However, where no objection is made, the claim is reviewed for plain error. Andrews, 77 M.J. at 398.

Under plain error review, the appellant has the burden of proving: "(1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. at 401 (citation omitted). For improper argument, a court must specifically determine: "(1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" Voorhees, 79 M.J. at 9 (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

Law

Prosecutorial misconduct is behavior that oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is defined as an action or inaction taken by a trial counsel in violation of a legal norm or standard. United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

A trial counsel is charged "with being a zealous advocate for the government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003). He may argue not only the evidence within the record, but also "all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In determining whether an argument is improper, the Court is to view it in its entire context. Id. at 239. The Court reviews a comment not in isolation, but rather the entire argument "viewed in context." United States v. Young, 470 U.S. 1, 16 (1985).

Analysis

With scant analysis, Appellant levies six different allegations of "prosecutorial misconduct" for two unobjected to questions trial counsel asked on re-direct examination of the lead OSI agent and four unobjected to arguments trial counsel made in closing argument. (App. Br. at 15-19). Because trial defense counsel failed to object to any of these arguments that he now claims were improper, he has the burden to show clear or obvious error that led to material prejudice to a substantial right. Appellant has failed to meet that burden and is not entitled to relief. First, Appellant has failed to show error because trial counsel did not engage in prosecutorial misconduct. Second, even if this Court finds trial counsel to have engaged in

prosecutorial misconduct, Appellant is still entitled to no relief because it was harmless under the facts of his case.

1. Trial Counsel Did Not Plainly Err in his Re-Direct Examination of SA KB.

A. *Trial counsel did not improperly elicit human lie detector testimony.*

First, Appellant argues trial counsel improperly elicited "human lie detector" testimony from SA KB during re-direct examination. (App. Br. at 17). Appellant argues the questions regarding AG's relationship with GM and potential obstruction of justice constituted such testimony. (App. Br. at 17). This argument fails because SA KB 's testimony did not amount to an opinion, express or implied, about AG's truthfulness, and did not invade the factfinder's unique province to determine credibility.

"Human lie detector testimony" occurs when a witness offers an opinion on a person's truthfulness regarding a specific fact at issue. United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014). Courts examine testimony for its "functional equivalent" where an explicit opinion on truthfulness is not given. *See* United States v. Brooks, 64 M.J. 325, 329 (C.A.A.F. 2007). Testimony is the functional equivalent if it improperly influences the factfinder's credibility determination or leads them to infer that the witness believes a person is truthful or deceitful. United States v. Mullins, 69 M.J. 113, 116 (C.A.A.F. 2010).

Defense counsel, during cross-examination, made AG's credibility surrounding her relationship with GM a central issue. The defense insinuated AG was deceptive and trying to conceal information from OSI, aiming to undermine her overall credibility. Trial counsel's questions rebutted trial defense counsel's insinuation that AG was not forthcoming with OSI. The questions posed to SA KB did not ask about KB's truthfulness; rather, they explain the facts that SA KB had received AG during the investigation.

Despite a plethora of caselaw on the topic of human lie detector testimony, Appellant cites none – perhaps because any error in its admission was invited by trial defense counsel. The invited error doctrine prevents a party from "creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal]." United States v. Eggen, 51 M.J. 159, 162 (C.A.A.F. 1999) (internal quotation marks omitted). , Because trial defense counsel tried to elicit from SA KB evidence that AG was trying to obstruct justice by conspiring to delete information on her phone, it was fair game for trial counsel to elicit countering evidence that AG did *not* obstruct justice. *See* United States v. Carnio-Navarro, 2017 CCA LEXIS 90, *7 (A.F. Ct. Crim. App. February 9, 2017) (unpub. op.) ("Because trial defense counsel first elicited the evidence on cross-examination in an attempt to bolster his theory that Appellant's demeanor was indicative of a lack of knowledge and wrongfulness, Appellant cannot now complain on appeal about the admission of human lie detector evidence.") Therefore, even if SA KB's testimony constituted human lie detector testimony, the invited error doctrine precludes Appellant from relief on appeal. *See* United States v. Martin, 75 M.J. 321, 327 (C.A.A.F. 2016) ("Because trial defense counsel first elicited human lie detector evidence on cross-examination, the invited error doctrine precludes Appellant from complaining about the Government's elicitation of this type of evidence on redirect.")

B. *Trial counsel did not improperly elicit expert testimony from SA KB.*

On cross-examination, trial defense counsel elicited from SA KB that the victim "eventually" provided consent for OSI to perform a forensic extraction of her cell phone. (R. at 447). But there were "specific parameters" that limited OSI's search. (Id.) On re-direct examination, trial counsel asked SA KB:

> Q. Has — to your knowledge, and based upon just the cases you've done, has any victim ever given you consent to forensically extract their phone?
>
> A. In my own cases, to the best of my knowledge, she was the first.

(R. at 461).

Trial defense counsel did not object. (Id.) For the first time on appeal, Appellant argues trial counsel committed prosecutorial misconduct by attempting to "elicit expert-like testimony about victim behavior." (App. Br. at 17). It is unclear how. SA KB drew on her experience as an OSI agent to offer lay knowledge that AG was the first victim in SA KB's cases to consent to a forensic extraction. This brief testimony did not require "scientific, technical, or otherwise specialized knowledge" under M.R.E. 702. And trial defense counsel certainly did not interpret the question as improperly eliciting "expert" testimony since he did not object. In sum, trial counsel's argument was not error, plain or otherwise.

2. Trial Counsel did not Plainly Err in His Closing Argument.

A. *Trial Counsel did not violate the spillover instruction in this judge alone case.*

Appellant argues trial counsel improperly drew a comparison between the sexual assault specifications, violating the spillover rule by arguing the similarities between Specification 1 and Specification 2 of Charge I. (App. Br. at 17-18). However, trial counsel was not urging a guilty verdict based on the existence of multiple charges. Trial counsel did not state the conduct from Specification 1 and Specification 2 was "evidence that Airman Allen was a bad person" with a propensity to commit sexual assault, as Appellant alleges. (App. Br. at 17-18). In context, trial counsel argued Appellant's non-confrontational nature and opportunity:

> He was — it was the same M.O., right? It was the same thing with both of them. It was the slower penetration than normal. It was the quietness. It was only waking her up — to pushing her, nudging her off of the bed, because he knew about the UTIs, right? And that

> was reaffirmed through [SA KB] that [AG] had told him that there's a prior consistent statement. He was also consistent in ejaculating in her every time, of pushing her off the bed.
>
> So these — this shows you know — that there can be some level of, I don't know — goodness in him, that in his mind, well, I'm at least, you know — telling her to go clean up and, and get a, you know, to save her the, the, the urinary tract infection, right? He's not a confrontational guy. He's 90 pounds soaking wet, Your Honor.
>
> mean, he's — you know, he doesn't — clearly he doesn't like confrontation. These aren't sexual crimes of a physical aggressive nature. Even the domestic violence isn't really, on a scale of domestic violence, like, ultra-aggro. Again, it doesn't minimize the criminality of it though, right? That if anything, it's — I'm going to submit to you, Your Honor, is it makes this the crime of opportunity of a young husband taking advantage of his exhausted, sleeping spouse. It doesn't reduce the criminality, it just changes the flavor.

(R. at 475-76).

> The sexual assaults, Your Honor, I can talk briefly. There are consistencies of both Specification 1 and Specification 2, and I think that's important for the Court to consider. The consistencies of rhythm, of cadence, of silence, right? We are necessarily not going to have evidence of how it felt when [AG] was asleep, but what we do have is consistency of how he ended it. The same way he ended the times when she was awake, are the same way he ended the times when she was asleep. He ejaculated inside of her, he nudged her off of the bed towards the bathroom, and told her to go to the bathroom to wipe. I don't believe, Your Honor — the government does not contend that it is inconsistent that he had showed some modicum of respect for his wife. He's a man who's not confrontational. Throughout the text messages that you see in in Defense Exhibit C; throughout the statements and the videos we see in the prosecution's exhibit and defense exhibits — [Appellant] is not confrontational, he's not prone to violence unless there's a stimulus for it with his phone. He's sexually frustrated. Again, he's a horny young man, obsessed with porn and dating websites that he uses to get off, and it is absolutely a crime of opportunity. It's an inability to control his urges.

(R. at 519.)

Arguing that Appellant "had the same MO" for two crimes on the charge sheet is not the same thing as a propensity argument. And trial defense counsel's failure to object further demonstrates he did not have any concerns with Mil. R. Evid. 404(b) notice or otherwise.

It is also crucial that this was a military judge-alone case. This significantly reduces the risk of improper spillover. United States v. Hudgins, 2014 CCA LEXIS 227, *34-35 (A.F. Ct. Crim. App. April 3, 2014) (unpub. op.). In fact, the lone case Appellant cites in support of his argument is a members case. (App. Br. at 18.) *See* United States v. Burton, 67 M.J. 150, 151 (C.A.A.F. 2009) ("At different points during the closing argument on findings in this case, trial counsel suggested that the ***members of the panel*** could compare the similarities between charged offenses for a propensity to commit 'these types of offenses') (emphasis added). Therefore, without members, there was no harm from improper spillover because the trial judge understood the exact facts of the case.

Finally, the military judge's mixed findings demonstrate that he clearly weighed the evidence independently for each specification. He convicted Appellant of only a single specification of sexual assault, acquitting him on the remaining four specifications. This selective conviction demonstrates the military judge assessed each specification separately and impartially. Therefore, any argument from an improper spillover argument should be deemed harmless.

For the above reasons, trial counsel did not plainly err by mentioning the evidence of Appellant's modus operandi and this is something counsel may present in closing arguments.

B. *Trial Counsel did not improperly argue infidelity and pornography as propensity.*

In a two-sentence argument, Appellant complains trial counsel argued Appellant's admission to cheating and watching pornography as "improper argument about general character

and propensity." (App. Br. at 18). But trial counsel never argued Appellant was more likely to commit sexual assault because he was unfaithful to the victim or watched legal pornography. (R. at 476). Rather, the argument focused on a pattern of behavior: "The same way, Your Honor, that [Appellant] progresses through this denial to, essentially, acceptance of admission of the cheating and of the pornographic websites and of all that stuff, is the same response that he gave her to the allegations of sexual assault." (Id.) In context, the purpose of trial counsel's argument was to show that this pattern of denial and eventual reluctant admission was how Appellant processed confrontations in his relationship with AG. Trial defense counsel argued at trial, as Appellant repeats now on appeal, that the factfinder should have accorded Appellant's initial denials to sexual assault more weight than his ultimate admission, captured in Prosecution Exhibit 1. (App. Br. at 15). Trial counsel's statements were not offered as character evidence under Mil. R. Evid. 404(a) or (b), but to rebut and undermine defense arguments as were appropriate on the record. Therefore, there was no plain error.

C. *Trial counsel did not improperly argue divorce as propensity.*

In another two-sentence argument, Appellant contends that trial counsel improperly argued that Appellant's filing for divorce was evidence he was trying to get ahead of the accusations. (App. Br. at 18). This argument is based on the premise that trial counsel did not seek or obtain permission to argue the divorce filing for an M.R.E. 404(b) purpose. (Id.)

But trial counsel's argument was rooted in the chronology of events and the reasonable inferences to be drawn therefrom. He argued, "and when [AG] finally has the courage to go to OSI, he hightails it to the courthouse, to file for divorce, to get out in front of it." (R. at 517). Trial counsel did not present evidence of the divorce filing to show Appellant had a propensity to commit wrongs – to the extent that filing for divorce could even be characterized under an

M.R.E. 404(b) theory. Trial counsel was merely highlighting that Appellant's actions were evidence that he recognized his guilt and was afraid to be discovered. (R. at 516-17). Therefore, there was no error, no less plain error.

D. *Trial Counsel did not improperly argue victims in unrelated cases.*

Appellant asserts trial counsel improperly invoked the actions of other victims in other cases, violating principles of confrontation and consideration of facts not in evidence. (App. Br. at 19). But in context, trial counsel did not invite comparison to other victims to bolster the credibility of AG. Trial counsel's statement "if every one of our victims" was used to explain how victims of sexual assault may respond and react to situations. This was rebuttal to arguments that AG behaved abnormally. After all, as a zealous advocate, trial counsel may "forcefully assert reasonable inferences from the evidence." United States v. Coble, No. 201600130, 2017 CCA LEXIS 113, *10 (N-M. Ct. Crim. App. 23 February 2017) (unpub. op.) (quoting Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)). Trial counsel was merely arguing a fair and logical inference based on the evidence regarding AG's behavior and the known behaviors of victims of sexual assault. Therefore, there was no error, no less plain error, in this military judge alone context.

3. Appellant cannot demonstrate that he suffered any prejudice.

Even if this Court finds trial counsel's unobjected to statements were plain and obvious error, Appellant has not shown how he has been prejudiced. CAAF explained that the test for prejudice where improper arguments were made requires a balancing of three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Fletcher, 62 M.J. at 184. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's

comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id. Here, the three factors weigh in favor of finding no prejudice.

Appellant broadly argues "[m]uch of the error was of constitutional dimensions, triggering the government's burden to disprove prejudice beyond a reasonable doubt." (App. Br. at 19.) It is unclear how. Importantly, Appellant does not argue that trial counsel impermissibly commented on Appellant's constitutional right to remain silent. *See* United States v. Webb, 38 M.J. 62, 66 (C.M.A. 1993) ("A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury "naturally and necessarily" would interpret the summation as a comment on the failure of the accused to testify.) Here, none of the complained-of arguments explicitly or implicitly invoked Appellant's constitutional rights. Therefore, this Court should not apply the heightened constitutional error standard.

Bypassing the Fletcher factors entirely, Appellant entire prejudice argument is: "Prejudice is increased because the improper evidence and argument went to common themes that were at the heart of the case: improperly bolstering AG's credibility and improperly attacking Appellant's character." (App. Br. at 19).

Under the first Fletcher factor, the severity of misconduct was slight. The complained-of remarks only occurred during two questions posed to one government witness and during closing argument in a trial that spanned five days. (R. at 1339-1345.) The statements were not made repeatedly and spread throughout trial but were limited to a few occasions that occurred close in time during a relatively brief closing argument and brief re-direct examination of SA KB. The

record does not support a finding that the misconduct was "pervasive and severe" as required under CAAF precedent. Fletcher, 62 M.J. at 185.

In addition, trial defense counsel's lack of objection, despite ample opportunity, is "some measure of the minimal impact of [the] prosecutor's [alleged] improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001). Therefore, the first factor weighs in favor of the Government.

The second factor also weighs in favor of the Government. "When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." Id. (citation omitted). Therefore, "plain error before a military judge sitting alone is rare indeed." Id. (quoting United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)).

And here, this Court need not rely on a *presumption* of the military judge is capable of filtering out inadmissible evidence—the military judge affirmed this presumption in response to a *different* improper argument objection: "So, [the] Court is aware that arguments of counsel are not evidence. The Court will base its decision on evidence presented and not counsel's arguments." (R. at 516). That is considered a curative measure. Id.

Under the third factor, as discussed under Issue II above the evidence supporting Appellant's conviction "so clearly favor[s] the government that [A]ppellant cannot demonstrate prejudice." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). Appellant has not demonstrated that any improper questions posed to SA KB or argument was instrumental to the finding of guilty. Thus, the third factor also weighs in favor of the Government.

On balance, the three factors demonstrate that Appellant suffered no prejudice.

After reviewing the record, this Court should be "confident that the [military judge] convicted the appellant on the basis of the evidence alone." Fletcher, 62 M.J. at 184. Accordingly, Appellant suffered no prejudice and is entitled to no relief.

IV[5].

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ.

Additional Facts

Both the Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (STR and EOJ, ROT, Vol. 1).

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Courts of Criminal Appeals possess "limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). The Court of Appeals for the Armed Forces recently rejected the argument that Courts of Criminal Appeals have jurisdiction to address the firearms prohibition notation in the STR under Article 66(d)(1), UCMJ, in United States v. Williams, 82 M.J. 121, 126 (C.A.A.F. 2024).

[5] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Appellant acknowledges that the Court of Appeals for the Armed Forces also concluded that neither Article 67(c) nor Article 66(d)(2), UCMJ, could give our superior Court or the Courts of Criminal Appeals the authority to modify the § 922 indication in the EOJ. United States v. Johnson, __ M.J. __, No. 24-0004/SF, 2025 CAAF LEXIS 499, *13-14 (C.A.A.F. 24 June 2025) (App. Br. at 1a).

Since our superior Court has ruled that this Court neither has jurisdiction to modify the notation on Appellant's STR or EOJ under Article 66, UCMJ, this Court should deny Appellant's claim.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

[redacted]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

[redacted]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 14 November 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
JOSHUA ALLEN,
United States Air Force,
Appellant

REPLY BRIEF ON BEHALF OF APPELLANT

Before Panel No. 3

No. ACM 40809

21 November 2025

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

Appellant, Airman First Class Joshua Allen, Appellant, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply Brief to the Appellee's Answer (Gov. Br.), dated Nov. 14, 2025. In addition to the arguments in his opening brief, filed on Oct. 8, 2025 (Appellant's Br.), Appellant submits the following arguments.

Argument

I. WHETHER THE ALLEGED VICTIM'S PHONE DATA WAS WITHIN THE POSESSION, CUSTODY, OR CONTROL OF THE GOVERNMENT FOR PURPOSES OF R.C.M. 701 WHERE THE GOVERNMENT MADE A FULL FORENSIC EXTRACTION OF THE DATA. IF SO, IS RELIEF WARRANTED?

The governing standard under R.C.M. 701(a)(2)(B) is clear: the government must permit inspection of items within its "possession, custody, or control" that are "relevant to defense preparation." This is a low threshold, which makes sense as the rule ensures the defense has access to information that could assist in preparing its case, not just evidence that would be admissible at trial.

The government's burden, should error be found, is correspondingly high. Where discoverable evidence is withheld in response to a specific request, the government must show that the nondisclosure was harmless beyond a reasonable doubt. *See United States v. Carter*, 61 M.J. 30, 33-35 (C.A.A.F. 2005) (*citing United States v. Powell*, 49 M.J. 460, 463–65, n.* (C.A.A.F. 1998); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999)).

The Government states: "This Court correctly concluded in *United States v. Braum*, 2024 CCA LEXIS 419 (A.F. Ct. Crim. App. 10 Oct. 2024), that extracted data that is outside of a person's limited consent to search is not within the Government's possession, custody, or control for the purpose of R.C.M. 701." (Gov. Br. at 9). This was not the holding of *Braum*. To the contrary, this Court in *Braum* "presume[d] error" and decided the issue based on prejudice. 2024 CCA LEXIS 419, *15. As both sides note, the relevant question in *Braum* is currently before CAAF, and CAAF's decision will create controlling precedent one way or the other.

See No. 25-0046/AF, 2025 CAAF LEXIS 83, at *1 (C.A.A.F. Feb. 4, 2025) (order granting review).

The Government urges in the alternative that this Court could still affirm even "if the lower court relied upon a wrong ground or gave a wrong reason." (Gov. Br. at 13) (quotation omitted). Of course, this is an option, but if this Court is going to rely on a ground different from the military judge's, the standard of review is different, and deference is not warranted.

In places, the Government conflates R.C.M. 701(a)'s standard of "relevant to defense preparation" with something akin to a Mil. R. Evid. 401 standard of relevant evidence to be admitted at trial. *See* (Gov. Br. at 11, 13) (questioning whether the data would have produced "relevant evidence."). Relevance to defense preparation, the proper standard, is a notably low bar.[1]

Harmlessness beyond a reasonable doubt, on the other hand, is a particularly high bar. The Government properly recognizes this heightened prejudice standard would apply should this Court find error. (Gov. Br at 7). It is difficult to see how the Government could meet this highest burden known to the law without any of the

[1] To be fair, in other places the Government quotes the correct "relevant to defense preparation" standard in its brief. *See* (Gov. Br. 8-13).

withheld data being accessible within the record, particularly given the already borderline evidence.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

II. WHETHER SPECIFICATION 2 OF CHARGE I IS FACTUALLY INSUFFICIENT.

The Government opens by contending Appellant has not raised a specific showing of a deficiency in proof. (Gov. Br. at 18). The Government seems to be making this argument in every answer on factual sufficiency.[2] The Government seems to view most, if not all, issues raised pursuant to factual sufficiency as "mere disagreement with the verdict." *See* (Gov. Br. at 18) (citations omitted). This Court's caselaw does not support the Government's narrow view of what constitutes a specific deficiency in proof. For example, This Court recently reached factual sufficiency review after an appellant "generally challenge[d] the believability of [the victim's] testimony." *United States v. Edwards*, No. ACM S32787, 2025 CCA LEXIS 178, at *6 (A.F. Ct. Crim. App. Apr. 24, 2025). As argued in the opening

[2] *See* Answer to Assignments of Error at 15, *United States v. Slayton*, No. ACM 40583, 2025 CCA LEXIS 427 (A.F. Ct. Crim. App. Sep. 8, 2025); Answer to Assignments of Error at 13, *United States v. Echaluse*, No. ACM 24027, 2025 CCA LEXIS 453 (A.F. Ct. Crim. App. Sep. 25, 2025); Answer to Assignments of Error at 16, *United States v. Kim*, No. ACM 24007, 2025 CCA LEXIS 386 (A.F. Ct. Crim. App. Aug. 15, 2025).

line of Appellant's AOE brief: "There is a specific deficiency in the evidence as to the question of whether the charged act (sex while AG was sleeping) actually occurred." (Appellant's Br. at 13). That is a pretty significant and specific. In support of this contention, Appellant pointed, *inter alia*, to evidence of bias / motive to fabricate, difficulty in accurately perceiving and recalling information, inconsistent statements, and outright admissions of deception towards OSI. *See* (Appellant's Br. at 13). Appellant also emphasized that AG had made a prior inconsistent statement to her sister that was inconsistent with guilt. (Appellant's Br. at 14-15).

The Government acknowledges these credibility issues but argues they do not "automatically negate" AG's testimony or "mean that her testimony was entirely unreliable." (Gov. Br. at 19). That may be, but these tepid defenses of AG's credibility are not tailored to the standard of review or the burden of proof (it is not necessary for the defense to completely negate the Government's evidence or establish that it is entirely unreliable). The Government further concedes that AG's "actions *could* suggest an attempt to manipulate the evidence," but quickly moves on. (Gov. Br. at 19) (emphasis in original). In appellate defense counsel's view, the Government should be more bothered by AG's active attempts to deceive OSI and hide evidence from the Government itself. One can only imagine how the

Government would crucify a defendant if the shoe were on the other foot. The Government should not apply such a vastly different standard to its own witnesses.

AG's prior inconsistent statement to her sister is particularly notable for factual sufficiency. AG told her sister that she would wake up, not to Appellant penetrating as charged, but to Appellant either masturbating or attempting to have sex with her. (R. at 411). If this version were true, then Appellant would not be guilty of the offense as charged, because an actual penetration sex act was a required element. The Government responds that: "The gist of what AG reported was consistent with her trial testimony – Appellant initiated some form of nonconsensual sexual activity while AG was asleep." (Gov. Br. at 20). To obtain and sustain a conviction, the Government had to prove the specific act charged, not just the "gist" thereof.

The Government says: "Appellant claims AG must have told her sister the truth and lied to OSI." (Gov. Br. at 20) (citing (Appellant's Br. at 15)). This misapprehends the standard of review and the defense position. AG told the Government one version of events consistent with guilt to the charged offense and told her sister a different version of events inconsistent with guilt to the charged offense. It was not necessary either at trial or on appeal for the defense to establish that the later version "must" have been true or that the former version "must" have

been a lie. AG's prior statement presents a reasonable hypothesis inconsistent with guilt, and that is enough to undermine proof beyond a reasonable doubt.

That said, there is considerable reason to ascribe more credibility to AG's prior inconsistent statement to her sister. AG had no discernible motivation to downplay her accusations to her sister. On the other hand, AG had plenty of motivation to exaggerate her accusations to OSI. There is all the more reason to doubt her candor with OSI, given the evidence that AG was actively deceptive to OSI in other areas, asking her paramour to delete evidence because she did not want OSI to find it. *See* (R. at 324).[3] The Government offers no discernible reason why AG would tell her sister a story that was untrue. Where, as here, the victim gave a version of events inconsistent with the charged elements, and the Government does not have so much as a theory as to why the prior statement should be disbelieved, this Court should find that it undermines proof beyond a reasonable doubt.

AG's prior inconsistent statement to her sister is also notable because it provides an explanation for Appellant's supposedly highly incriminating statements on AG's secret recording. *See* (Pros. Ex. 1). Appellant's statements were consistent

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[3] It is also notable that AG's statements to OSI was made under the influence of the OSI agent's hypnotism-type interviewing techniques to supposedly recover lost memories. (R. at 437-41). Although not fully developed on the record, and apparently related to AG's accusations of physical abuse, appellate defense counsel are deeply uncomfortable with OSI agents employing techniques like this.

with the history AG described to her sister. Indeed, all the evidence seems to fit quite neatly with AG's prior version of events – and this version of events clearly does not meet the charged elements.

Finally, the Government argues: "Importantly, Appellant did not testify at trial" or give "sworn testimony subject to the scrutiny of cross-examination." (Gov. Br. at 21). Appellant understands the Government's point, that Appellant's various exculpatory out of court statements are not evidentiarily identical to in-court testimony. However, to the extent this Government argument approaches a comment on Appellant's exercise of his right not to testify, this Court should assess it appropriately.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

III. WHETHER RELIEF IS WARRANTED FOR IMPROPER EVIDENCE AND ARGUMENT.

The Government is correct that the standard of review is more challenging, given that trial defense counsel should have, but did not, object, and therefore this Court's review is for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted).

Regarding human lie-detector type testimony, the Government suggests Appellant invited the error by eliciting testimony that AG was trying to obstruct justice by conspiring to delete information on her phone. (Gov. Br. at 26-27). But

merely raising a given credibility issue does not invite human lie-detector testimony to rebut it. This is demonstrated by contrast through the very cases cited by the Government: *United States v. Carnio-Navarro*, 2017 CCA LEXIS 90, *7 (A.F. Ct. Crim. App. February 9, 2017) (unpub. op.) and *United States v. Martin*, 75 M.J. 321, 327 (C.A.A.F. 2016). In those cases, the appellants opened the door themselves by first introducing human lie detector evidence. That is not similar to the situation here. A defendant may invite error by "first elicit[ing] human lie detector evidence on cross-examination," but not simply by raising a credibility issue about a witness. *Martin*, 75 M.J. at 327. If merely raising a credibility issue opened the door, then human lie detector evidence would always be admissible as long as it involved a credibility issue in controversy – that is clearly not the state of the law.

Regarding trial counsel's argument that the various charged sexual assaults involved "the same M.O." (R. at 475), the Government suggests that: "Arguing that Appellant 'had the same MO' for two crimes on the charge sheet is not the same thing as a propensity argument." (Gov. Br at 30). That may be, but "M.O." is a Mil. R. Evid. 404(b) purpose – and the Government neither sought nor obtained permission to argue it is such. *See, e.g.*, *United States v. Garcia*, No. ARMY 20130660, 2015 CCA LEXIS 335, at *18 (A. Ct. Crim. App. 18 Aug. 2015) ("If trial counsel wanted to use evidence [of one offense] as extrinsic evidence to prove . . . modus operandi for [the other offenses], trial counsel was required to follow the

notice provisions of Mil. R. Evid. 404(b) and the military judge was required to make Mil. R. Evid. 404(b) findings.").

Regarding trial counsel's comparison of the charged conduct to various uncharged conduct (R. at 476), the Government asserts trial counsel was not making a propensity argument, but rather highlighting "a pattern of behavior" that was consistent in both the charged and uncharged conduct. (Gov. Br. at 31). Trial counsel are not allowed to argue that a pattern of behavior runs through charged and uncharged conduct, absent specific authority such as Mil. R. Evid. 404(b) or 413 – none of which is present here.

Regarding trial counsel's argument that Appellant was trying to get in front of the accusations by filing for divorce (R. at 480, 517), the Government answers that this was not an unnoticed Mil. R. Evid. 404(b) argument, but rather "evidence that [Appellant] recognized his guilt and was afraid to be discovered." (Gov. Br. at 31) (citing (R. at 516-17)). But this *is* a Mil. R. Evid. 404(b) purpose. Consciousness of guilt is a classic Mil. R. Evid. 404(b) purpose that the Government routinely argues at trial and before this Court, but now the Government seems to be suggesting it can do so without implicating Mil. R. Evid. 404(b) or complying with its requirements.

Regarding trial counsel's invocation of the actions of other victims in other cases, the Government characterizes this argument as "rebuttal to arguments that AG

behaved abnormally." (Gov. Br. at 32). The Government further characterizes it as a comment on "known behaviors of victims of sexual assault." (Gov. Br. at 32). Appellant believes caselaw is clear, and has been for decades, that trial counsel commentary about counterintuitive victim behavior or the behavior of victims in other cases is improper (at least absent the introduction of such topics through expert testimony). *See United States v. Clifton*, 15 M.J. 26, 29-30 (C.M.A. 1983). In *Clifton*, the CMA held trial counsel erred "when he described the attitudes of unrelated rape victims" – holding this argument "was not drawing upon legitimate inferences from evidence of record or appealing to the common sense of the court-martial." *Id.* at 30. The Government may have been able to introduce similar topics through expert-testimony, subject to confrontation and impeachment, but the trial counsel could not forgo the presentation of expert testimony and simply argue these extra-record considerations directly.

The test for prejudice is whether the error had a substantial influence on the findings. In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Ayala*, 81 M.J. 25, 29 (C.A.A.F. 2021)(citing *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019) (alteration to original) (internal quotation marks omitted).

First, the strength of the Government's case was weak. Second, the defense case was strong. Third, the materiality of the evidence was strong. Fourth, the quality of the evidence was equally strong.

The Government correctly notes that the prejudice prong of plain error may be more challenging because this was a military judge alone trial, and a military judge should be able to recognize and disregard improper evidence and argument. That said, this dynamic also raises a question where the factfinder was also the gatekeeper for improper advocacy. If the military judge was so readily able to identify impropriety, one would expect him to have identified it and stopped it. The fact that the military judge allowed what Appellant contends was plainly improper suggests that the military judge did not recognize it as such. The Government also correctly notes that trial defense counsel's lack of objection, is some measure of limited prejudice. (Gov. Br. at 34) (citing *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001)). While this is true, it is somewhat baked into the plain error framework already. Regarding the strength of the evidence generally, it is hard to reconcile the Government's argument that this factor so clearly favors the Government with the weaknesses in the evidence, and the Government's own concessions relating thereto, discussed in the preceding assignment of error.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

[redacted]

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel

[redacted]

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 November 2025.

Respectfully submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40809**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Joshua D. ALLEN	)	**CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to Panel 2 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner