

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40439 (rem)
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF
William C.S. HENNESSY	)	DOCKETING
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 24th day of March, 2026,

ORDERED:

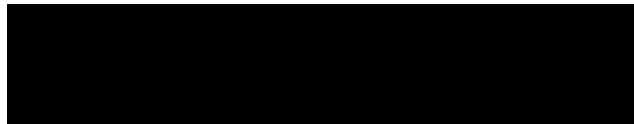
That the record of trial in the above styled matter is referred to a Special Panel for review. The Special Panel in this matter shall be constituted as follows:

GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
KUBLER, JOSEPH J., Colonel, Appellate Military Judge
MORGAN, CHRISTOPHER S., Colonel, Appellate Military Judge

Counsel may submit briefs to address the factual sufficiency issue in light of our superior court's decision in *United States v. Hennessy*, 2026 CAAF LEXIS 72, at *8–9, No. 25-0112 (C.A.A.F. 23 Jan. 2026) (citing *United States v. Moore*, 2026 CAAF LEXIS 73, at *12, No. 25-0110 (C.A.A.F. 23 Jan. 2026)) **not later than 23 May 2026.**



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Airman First Class (E-3)

WILLIAM C.S. HENNESSY

United States Air Force

Appellant

BRIEF ON BEHALF OF APPELLANT

Before a Special Panel

No. ACM 40439 (rem)

26 May 2026

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

ASSIGNMENT OF ERROR

Airman First Class Hennessy's conviction for sexual assault is factually insufficient.

STATEMENT OF THE CASE

A panel of members with enlisted representation sitting as a general court-martial convicted Airman First Class (A1C) William C.S. Hennessy, United States Air Force, contrary to his pleas, of one specification of sexual assault upon KE, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.¹ A1C Hennessy was also convicted of two specifications of abusive sexual contact, one each, upon KG and IE, both in violation of Article 120, UCMJ (*Manual for Courts-Martial, United States* (2016 ed.)). The military judge sentenced Appellant to a dishonorable discharge, confinement for thirty-four months, reduction to the grade of E-1, and a reprimand. Appellant requested that the convening authority defer the adjudged reduction in grade and automatic forfeitures until the Entry of Judgment. The convening authority denied Appellant's deferment request, took no action on the findings, and approved the

¹ Reference to the Article 120, UCMJ, offense involving KE (Specification 1) is to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). Unless otherwise noted, all references to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial are to the 2019 *MCM*.

sentence in its entirety. Convening Authority Decision on Action – *United States v. Airman First Class William C.S. Hennessy*.

On 25 November 2024, this Court set aside the finding of guilty for sexually assaulting KE. *United States v. Hennessy*, 2024 CCA LEXIS 503, at *25 (A.F. Ct. Crim. App. Nov. 25, 2024). The Court of Appeals for the Armed Forces (CAAF) reviewed that decision and remanded Appellant’s case to this Court for a new factual sufficiency review to ensure this Court considered the application of the third legal principle discussed in *United States v. Moore*, 86 M.J. 308, 2026 CAAF LEXIS 73 (C.A.A.F. 2026). *United States v. Hennessy*, No. 25-0112, 86 M.J. 315, 2026 CAAF LEXIS 72, at *8-9 (C.A.A.F. 2026). In doing so, CAAF expressed “no opinion on whether [this Court] should or should not find the evidence to be factually sufficient.” *Id.* at *9. Additionally, CAAF did not analyze Appellant’s mistake of fact as to consent.

On 24 March 2026, this Court issued the Notice of Docketing and authorized additional briefing to “address the factual sufficiency issue in light of [CAAF’s] decision” in Appellant’s case. In addition to the facts and arguments provided in his opening brief, filed on 1 February 2024, and in his reply brief, filed on 21 March 2024, Appellant submits the following.

STATEMENT OF THE FACTS

The Government charged Appellant with sexually assaulting KE without her consent. Charge Sheet.

I. Appellant and KE were developing a potential relationship before the sexual encounter.

Appellant and KE first began communicating through Instagram² when Appellant direct-

² Instagram is a social media platform wherein individuals may direct message or “chat” with each other through their profiles.

messed her after the two had previously matched on Tinder.³ R. at 666. After initially messaging each other through Instagram, KE and Appellant exchanged SnapChat⁴ information and continued talking for about one week. R. at 666–67. During this period, their conversations were “genuine” and consisted of the “getting to know you type of conversation.” R. at 668. After a week of exchanging messages, Appellant and KE made plans to meet in person. R. at 667–68.

They agreed to “hang out,” and KE went to Appellant’s dorm room. *Id.* When KE arrived, she and Appellant sat on Appellant’s couch, watched a cooking show, and talked. R. at 669. While they were sitting together, Appellant held KE’s hand with interlaced fingers. R. at 670. KE never attempted to pull her hand away. *Id.* At some point while talking on Appellant’s couch, Appellant began leaning toward KE. *Id.* In response, KE pulled away a “little bit” in a non-obvious manner and continued talking. R. at 670–71. A few minutes later, Appellant kissed KE, and KE “let it happen.” R. at 671. The kiss did not last long because KE pulled away when Appellant put his hand on her face. *Id.* Appellant later apologized and told KE that he is super affectionate. R. at 672.

While in Appellant’s dorm room, they discussed a concert happening that night. R. at 673. KE wanted to go to the concert but did not have anyone to go with because her friends were busy. *Id.* Appellant invited KE to the concert with him and his friends, and she agreed. R. at 674.

KE arrived at the concert between 1915 and 1920. *Id.* When KE arrived, she approached Appellant and his friends at their table. *Id.* Appellant introduced KE to his friends, and KE went to get herself a drink. *Id.* When KE returned to the table, Appellant complimented her clothing

³ Tinder is a dating website.

⁴ SnapChat is a social media platform wherein individuals may share pictures called “snaps” with their friends and may also “chat” with their friends.

and told KE she looked nice. *Id.* Toward the end of the concert, KE and Appellant left Appellant's friends to be closer to the band and enjoy the music. R. at 675. After the concert, Appellant and KE got in line to take a picture with the band. R. at 676. KE did not think too much about getting a picture with Appellant but thought it was weird because it seemed like something you would do with a significant other. *Id.*

Altogether, KE was at the club for at least three hours. *Id.* KE testified that while Appellant and KE were sitting alone at the club, Appellant asked her, "so my room or yours." R. at 679. KE responded, "you go to yours and I'll go to mine." *Id.* After this exchange, KE and Appellant continued spending time together alone at the club.

While at the club, KE drank approximately four to five Jack and Cokes. R. at 712. Prior to this night, KE had experienced gaps in her memory due to alcohol consumption. R. at 677. KE further testified that she cannot tell the difference between herself feeling "buzzed or drunk." R. at 681.

When Appellant and KE left the club, he offered her a piggyback ride. R. at 682. She agreed. *Id.* KE believed she was drunk because she normally does not accept piggyback rides. *Id.* KE testified she was not sure why she assumed Appellant would take her to her room because Appellant did not know where she lived. *Id.* KE then experienced a gap in memory. *Id.*

II. KE's recollection of events leading up to her sexual encounter with Appellant is incomplete because of a large gap in her memory.

KE's next memory after agreeing to a piggyback ride was of being on Appellant's bed and having sex. *Id.* The Government presented no evidence regarding what happened between KE agreeing to a piggyback ride and the charged sexual act. The Government presented no evidence of what KE and Appellant discussed on the walk back, how KE made her way upstairs

to Appellant's dorm, how they interacted during this period, what they did in Appellant's dorm room before having sex, how long they were alone in his dorm room, or whether she fell asleep.

KE recalled that Appellant's television was on, and her pants and underwear were off. R. at 682. KE's legs were on Appellant's shoulders. R. at 683. When she realized they were having sex, she panicked because she did not know how they got to that point. R. at 685. KE decided to fake sleep by closing her eyes and turning her head to get Appellant to stop. *Id.*

As soon as KE pretended to fall asleep, Appellant stopped, twice called KE's name, said "oh no," shook her shoulder, and tried to get her to wake up. *Id.* Appellant did not continue to have sex with KE after she faked sleep and instead left the room. R. at 686. When Appellant returned to the room, KE was no longer pretending to be asleep. *Id.* She told Appellant she had to go because her friend needed her and left. *Id.*

III. KE made numerous inconsistent statements about her sexual encounter with Appellant.

The first person KE spoke with after leaving Appellant's room was KB. R. at 689. KE testified that she and KB were "maybe acquaintances, like, we only interacted with each other at work." R. at 690. KE said she called KB because "on Messenger when you initially become friends with someone on Facebook, like, it'll tell you, like oh, waive to your friend or say hi to your new friend. And so he was at, like, the top of my Messenger list, and I just—I panicked and I called him." *Id.*

But KE and KB had hung out a few times in group settings before this night. R. at 584–85, 587. Prior to that night, KE told SL that she had a crush on KB. R. at 633. KE and SL were "very close friends." R. at 604. They saw each other every weekend to every other weekend and for holidays and birthdays. *Id.* After KE reported Appellant for sexual assault, KE and KB began dating for approximately two years. R. at 594, 581.

When KE told KB about her sexual encounter with Appellant, she said she was “raped.” R. at 588, 691. KE explained to him that she remembered going to Appellant’s room after the piggyback ride. R. at 590. In that version of events, KE went to Appellant’s room and sat on his futon. R. at 591. She claimed she fell asleep on Appellant’s futon and woke up to him having sex with her. *Id.* KE also told him that at the end of the encounter, she put her pants back on and ran down the hill from the dorm. R. at 579.

Later that night, KE relayed a different version of events to SL. She told SL that she went to a concert with some friends and coworkers. R. at 631. KE did not tell SL that she was going there to meet Appellant. *Id.* KE said the first time she met Appellant was at the concert. R. at 632. KE said she was drinking and that Appellant invited her back to his room. *Id.* KE agreed because she “didn’t want to hurt his feelings.” *Id.* KE further told SL that KE “didn’t know how to say no” and that she did not “say no” to Appellant. *Id.*

That same night, KE relayed yet another version of events to a group when LV was present. R. at 650–51. KE told the group that she met Appellant at the “E-Club” earlier that day. R. at 651. She said they hung out at the E-Club all day before going back to Appellant’s room where they hung out and had drinks. R. at 652. In this version of events, KE said she blacked out while drinking in Appellant’s room. *Id.* KE then told them she woke up to Appellant penetrating her. *Id.* Notably, KE alleged that she told Appellant to get off but he continued to have sex with her until he climaxed. R. at 652–53. KE further alleged that she asked Appellant why he would do that and that at the end of the interaction, Appellant laughed. R. at 653–54.

After multiple attempts to do so, KE’s friends eventually convinced her to report Appellant. R. at 631. Ms. LN was the nurse who performed KE’s forensic exam. R. at 976. KE reported to LN that she remembered going to Appellant’s room and that she laid down on

Appellant's couch and fell asleep. R. at 986. KE reported that she woke up to Appellant penetrating her, that she told him to get off, and then she went back to sleep. *Id.*

On cross-examination, LN explained that information about prior encounters and the alleged sexual assault were captured in different places of the examination form. R. at 993–94. In the section related to the charged sexual act—not related to prior interactions before the alleged assault—KE told LN that she remembered kissing. *Id.* On re-direct examination, LN reiterated to the prosecution that KE's memory of kissing was during the alleged sexual assault. R. at 996.

IV. Dr. KR's Testimony regarding alcohol blackouts.

Dr. KR is a forensic psychologist who was qualified as an expert at trial. R. at 1042. Dr. KR educated the Court about alcohol-induced blackouts. *Id.* As he explained, when one consumes a large amount of alcohol in a short period of time, the hippocampus does not transfer short-term memories into long-term memory. *Id.* Dr. KR distinguished an alcohol blackout from being passed out. To be passed out means the person drank so much they went unconscious. R. at 1043. But in a blackout, the person is still conscious. *Id.* Dr. KR further explained, “[i]t’d actually be really hard to tell if somebody was in a blackout, because they’re not exhibiting typically the kinds of signs and symptoms that you would see with somebody who’s been drinking.” R. at 1043–44. “It would be really hard for anybody to tell that you were in a blackout.” R. at 1045. Typically, someone who experienced a blackout would describe the end of their night as something akin to “I remember walking out of the bar and then nothing after that.” R. at 1052.

There is no specific blood alcohol concentration that one must reach before experiencing a blackout. R. at 1048. But, if a person has previously experienced an alcohol blackout, they are at a higher risk of blacking out again. R. at 1050–51.

People experiencing an alcohol blackout can engage in complex behaviors and later not remember their actions. R. at 1044. There are reported instances of people in alcohol blackouts being able to drive a car, fly an airplane, or even perform surgery. *Id.* During an alcohol blackout, a person can climb up a flight of stairs, buy their own drinks, and even engage in consensual sexual activity. R. at 1054.

ARGUMENT

I. Appellant’s conviction for sexually assaulting KE is factually insufficient because the Government failed to prove beyond a reasonable doubt that Appellant did not have a mistake of fact as to consent, that KE did not consent to the sexual act, or that KE was asleep when the sexual act began and did not consent to the ongoing sexual act.

Regardless of CAAF’s holding in *Casillas* or the legal principles addressing the “without consent” element of Article 120, UCMJ, the Government failed to prove beyond a reasonable doubt that Appellant did not hold an honest and reasonable mistake of fact as to consent in this case. This mistake of fact requires the Court to, again, set aside Appellant’s finding of guilty for sexually assaulting KE because it is factually insufficient.

But even if this Court does first address the legal principles identified in *Moore* and *Casillas*, it should conclude that Appellant’s case is distinguishable from *Casillas* and is factually insufficient for three reasons: (1) the Government failed to prove beyond a reasonable doubt that KE did not affirmatively consent to the charged sexual act during the gap in her memory, (2) the Government failed to prove beyond a reasonable doubt that KE was asleep when the sexual act began, and (3) Appellant did not continue to have sex with KE after KE expressed a lack of consent by pretending to fall asleep. Appellant will address these three arguments before addressing his mistake of fact as to consent.

A. Standard of review.

This Court reviews issues of factual sufficiency de novo. Article 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

B. The Government failed to prove beyond a reasonable doubt that KE did not consent to the charged sexual act during the gap in her memory.

Appellant's conviction for sexually assaulting KE is factually insufficient because the Government failed to prove beyond a reasonable doubt that KE did not consent while she was experiencing an alcohol blackout. KE's testimony provides no evidence of what happened between her agreeing to a piggyback ride and having sex with Appellant in his bed. R. at 682. As this Court previously found, "[t]here was no evidence presented illuminating what actually occurred between these events." *Hennessy*, 2024 CCA LEXIS at *22.

The present case is directly analogous to *United States v. Slayton*, 2025 CCA LEXIS 427 (A.F. Ct. Crim. App. Sep. 8, 2025). Here, Appellant and KE met and communicated through social media, got to know each other for about one week, kissed and held hands during a previous meeting, agreed to go to a concert together, and drank alcohol. R. at 666-68, 670-76, 712. In *Slayton*, the alleged victim and appellant met and communicated through social media, went to a concert about five days after meeting, and engaged in interactions that "could be characterized as flirtatious." *Slayton*, 2025 CCA LEXIS at *2, 23. Here, KE experienced a gap in memory between agreeing to a piggyback ride after leaving the E Club and having sex with Appellant in his bed. R. at 682. In *Slayton*, the alleged victim experienced a gap in memory from being at the Waffle House and having sex with the appellant in her hotel room. *Slayton*, 2025 CCA LEXIS at *5-6.

In both cases, an expert forensic psychologist explained that an individual experiencing an alcohol blackout can be conscious, functioning, and engage in consensual sexual behavior but will not remember doing so later. R. at 1042-45, 54; *Slayton*, 2025 CCA LEXIS at *21.

In its brief, the Government argues “the surrounding circumstances” prove KE did not consent by relying on a footnote from CAAF’s opinion in *Moore*. Gov. Br. at 8. But this reliance is misplaced because the footnote referenced by the Government relates to the second legal principle identified in *Moore*. 2026 CAAF LEXIS 73, at 11-12. In its review of Appellant’s case, CAAF said this Court’s opinion did not violate the second legal principle and its remand was limited to considering the third legal principle. *Hennessy*, 2026 CAAF LEXIS 72, at *8. The Government similarly attempts to rely on KE’s speculation that she would not have consented to sex when she testified “I don’t see how I would have been okay with sex happening later on if I wasn’t okay with the kissing earlier on.” Gov. Br. at 9; R. at 782. But this reliance ignores the progression from that first kiss to the sexual act occurring, ignores that KE admitted that she had a hard time saying no to Appellant and did not say no to Appellant, and that KE does not recall what happened during the most significant portion of the night that would shed light on whether KE consented. The Government cannot jump to the conclusion that KE did not consent when there is no evidence to show what happened during this gap in KE’s memory.

In *Slayton*, considering the totality of the circumstances and given the alleged victim’s “complete lack of memory” about what occurred in her hotel room, this Court was not convinced beyond a reasonable doubt that the alleged victim did not consent. *Id.* at 23. Here, considering KE’s complete lack of memory about what occurred before the charged sexual act, the progression of interactions between KE and Appellant from their social media communications and in-person interactions, KE admitting to agreeing to things with Appellant that she normally

said no to, R. at 682, and admitting that she “did not say no” to Appellant, R. at 632, this Court should similarly find that the evidence does not prove beyond a reasonable doubt that KE did not consent to the charged sexual act during the gap in her memory. Therefore, this Court should set aside Appellant’s conviction for sexually assaulting KE.

C. The Government failed to prove that the sexual act began while KE was asleep or unconscious and continued after she was awake and did not consent.

In *United States v. Moore*, CAAF identified three legal principles applicable to the legal and factual sufficiency of the “‘without . . . consent’ element” of Article 120(b)(2)(A), UCMJ, 10 U.S.C. § 920(b)(2)(A). 2026 CAAF LEXIS 73, at *7-8 (C.A.A.F. 2026) (quoting 10 U.S.C. §§ 920(b)(2)(B), 920(b)(3)(A)). In its review of Appellant’s case, CAAF concluded that this Court’s “decision did not violate the first or second legal principles identified in *Moore*.” *Hennessy*, 2026 CAAF LEXIS 72, at *8. Instead, CAAF remanded the case to this Court because it did not believe this Court considered the application of the third legal principle identified in *Moore*. *Id.*

“The third legal principle identified in *Moore* is [CAAF’s] holding in *United States v. Casillas*, 86 M.J. 94 (C.A.A.F. 2025).” *Id.* at *7. In *Casillas*, CAAF held that evidence may be legally sufficient to prove the “without consent” element if the evidence shows that the victim was asleep when the sexual act began but awoke before the sexual act was complete, and, while awake, did not consent to the ongoing sexual act. *Casillas*, 86 M.J. at 102.

Here, the holding in *Casillas* should not apply because: (1) the evidence did not show that KE was asleep or unconscious when the sexual act began and (2) Appellant did not continue the sexual act after KE expressed a lack of consent by pretending to fall asleep.

1. The evidence did not show that KE was asleep or unconscious when the sexual act began.

CAAF’s decision in this case was predicated on KE’s testimony that she “woke up while the sexual act was occurring and that she undertook efforts “to get [Appellant] to stop.” 2026

CAAF LEXIS 72, at *8-9. The Government’s brief is also almost entirely predicated on the assumption that KE was asleep when the sexual act began. But KE’s testimony does not prove she was asleep when the sexual act began for multiple reasons.

First, for context, KE’s testimony about what happened in Appellant’s room is not credible. KE changed her story multiple times, tailoring the facts to her audience. Despite testifying under oath that she had no memory after the piggyback ride, R. at 682, KE told the forensic nurse that she remembered being in Appellant’s room and kissing him during the sexual act, R. at 986, 996. And KE separately alleged to her friends that she was awake, she told Appellant to stop, he refused, and he laughed when she asked why he assaulted her. R. at 653–54. These statements contradict her in-court testimony and demonstrate a willingness to change material facts to fit her audience. Therefore, this Court should not rely on KE’s testimony that she “woke up” during the sexual act to apply *Casillas*.

Second, even if KE earnestly believed she was asleep—it was not proven beyond a reasonable doubt—and the expert testimony shows KE was likely in an alcohol blackout and not passed out. Dr. KR explained that people often confuse blackouts and pass outs. R. at 1043. This is compounded by KE struggling to distinguish between being “buzzed” and being “drunk.” R. at 681. Dr. KR further explained that if a person has previously experienced an alcohol blackout, they are at a higher risk of blacking out again. R. at 1050-51. Here, KE had a history of alcohol blackouts. R. at 677. KE’s timeline of not remembering walking out of the club, remembering agreeing to a piggyback ride, and then experiencing a gap in time is nearly identical to Dr. KR’s example of a person in a blackout who remembers “walking out of the bar and then nothing after that.” R. at 1052. Considering KE’s testimony in light of Dr. KR’s testimony, it is likely that KE was experiencing an alcohol blackout when the sexual act started and was not passed out. *See*

Slayton, 2025 CCA LEXIS, at *22 (Considering the expert testimony and the testimony provided by the alleged victim and the appellant, this Court concluded the alleged victim was “likely in varying stages of alcohol blackout” in the time surrounding the alleged sexual assault).

Considering KE’s testimony in light of Dr. KR’s testimony, this Court should not find beyond a reasonable doubt that KE was asleep when the sexual act began; this is especially true given Appellant’s reaction to KE later pretending to be asleep (see argument *infra*). Consequently, because the Government failed to prove beyond a reasonable doubt KE was asleep when the sexual act began, this Court should not rely on *Casillas* to affirm Appellant’s conviction.

2. Appellant did not continue the sexual act after KE expressed a lack of consent.

After realizing that Appellant and KE were having sex, KE expressed a lack of consent by closing her eyes and turning her head to face the wall. R. at 685. Rather than continuing to have sex with KE, Appellant stopped, called KE’s name two times, said “oh no,” shook her by her shoulders, and tried to wake her up. R. at 685. Appellant’s stark reaction to believing that KE fell asleep shows that (1) KE was likely awake and engaging at all times before that moment, and (2) the sexual act did not continue without KE’s consent. At a minimum, as addressed below, Appellant’s reaction shows he honestly and reasonably believed KE had consented prior to that moment.

To rely on *Casillas*, the evidence must show that the alleged victim awoke during the sexual act and did not consent to the ongoing sexual act. The Government acknowledged this, but ignored the fact that Appellant did not continue to penetrate KE after she expressed a lack of consent. Gov. Br. at 10. Instead, the Government solely relies on the fact that KE testified she faked sleep to get Appellant to stop. *Id.* But this ignores the principle of *Casillas*’ that implicates 10 U.S.C. § 920(b)(2)(A)—that the sexual act continued without the alleged victim’s consent.

Here, because the sexual act did not continue after KE “woke up” and expressed a lack of consent, this Court should not rely on *Casillas* to affirm Appellant’s conviction.

D. The Government failed to prove beyond a reasonable doubt that Appellant did not have an honest and reasonable mistake of fact as to consent.

Separate from the legal sufficiency principles identified in *Casillas* and *Moore*, this Court can and should set aside the finding of guilty for sexually assaulting KE because the Government failed to prove beyond a reasonable doubt that Appellant did not have an honest and reasonable mistake of fact as to consent. Appellant’s mistake of fact distinguishes the present case from *Casillas* and *Moore* and is an independent basis to resolve his case.

1. *Casillas* did not support a mistake of fact as to consent. The present case does.

In *Casillas*, mistake of fact as to consent was not at issue. There, the victim hosted a birthday party for her friend and Appellant was invited through a third party. *Casillas*, 86 M.J. at 99. Conversely, here, Appellant and KE met and communicated through social media, got to know each other for about one week, kissed and held hands during a previous meeting, agreed to go to a concert together, and drank alcohol together. R. at 666-68, 670-76, 712. Furthermore, as the night progressed, Appellant and KE left Appellant’s friends and spent the rest of the night at the club together. R. at 675-76. KE even testified that the way they interacted after the concert was “something you would do with, like a significant other.” R. at 676. While KE thought this was “a little weird considering” they had recently met, it shows the increased intimacy as the night progressed. From the outset, the relationship dynamic and interactions between Appellant and KE are dramatically different from the facts in *Casillas*.

The cases are further distinguishable because the victim in *Casillas* had drunk to the point of becoming sick and “couldn’t keep her eyes open.” *Casillas*, 86 M.J. at 102. Here, there are no facts to suggest KE was feeling sick or was incapable of staying awake. Instead, when KB saw

Appellant and KE together that night, KB testified that the two were “chatting,” “sharing drinks,” that KE “didn’t appear distressed,” and that KE “didn’t appear uncomfortable.” R. at 586. The appellant in *Casillas* had no reasonable basis to engage in sexual acts with the victim he did not know, who went to sleep in a separate room, and who had become intoxicated to the point of becoming sick. But Appellant did have an honest and reasonable basis to believe KE consented to sexual behavior with him considering they matched on Tinder, continued to get to know each other through social media, met in person, and spent a night largely alone together before the charged sexual act.

2. Appellant honestly believed KE consented to the charged sexual act.

While KE testified that she was uncomfortable at certain points, there is no evidence to show that she communicated these feelings to Appellant. Instead, KE acknowledged that several times she allowed Appellant to do things she was internally uncomfortable with and that she did things she normally did not agree to, such as agreeing to the piggyback ride in her last memory before sex. R. at 679, 682. As KE told SL, she did “not say no” to Appellant. R. at 632.

The Government presented no evidence—much less evidence beyond a reasonable doubt—to show that Appellant did not honestly believe that KE was consenting when the sexual act began, and KE’s own testimony provides support for his mistake of fact defense.

If Appellant knew that KE was asleep, unconscious, or otherwise was not consenting when the sexual act began, he would not have responded to KE pretending to fall asleep by closing her eyes and turning her head in the way he did. If he knew he was having sex with KE without her consent, he would not have called her name twice, shook her by her shoulders, and he would not have said “oh no.” If he did not believe she was consenting, he would not have stopped having sex with her when she closed her eyes and turned her head away.

Instead, at the first indication that KE did not, or could not consent to the ongoing sexual acts, Appellant stopped. As this Court concluded in *Slayton*, even:

[i]f you believe [the alleged victim], there was no point in the brief moment when she was awake and capable of consenting wherein Appellant would have known she in fact did not consent. The moment he realized she did not want to engage sexually with him, he respected her wishes not to engage in sexual act(s).

Slayton, 2025 CCA LEXIS 427, at *30. This Court should reach the same conclusion here.

3. Appellant's belief that KE consented was reasonable.

Based on the increased level of intimacy and relationship progression as Appellant and KE spent time together that night, it was reasonable for Appellant to believe KE consented to sex. Appellant and KE's relationship steadily progressed from meeting on a dating website—Tinder no less—engaging in substantive conversations to get to know each other through social media, to meeting in person, going to an event together, and then spending the evening alone after the event ended. Even KE acknowledged that their actions and behaviors together the night they had sex seemed like “something you would do with, like a significant other.” R. at 676.

The reasonableness of Appellant's belief was bolstered by Dr. KR's testimony that individuals experiencing an alcohol blackout many times act normally and do not exhibit signs or symptoms of impairment. R. at 1043-44. He further testified that it is difficult for others to tell if someone is experiencing a blackout. *Id.* Consequently, it is reasonable that Appellant did not know KE was experiencing an alcohol blackout when the two had sex and believed the increasing level of intimacy and comfort between the two was knowing and consensual.

Further, Appellant's response to KE pretending to fall asleep is clear evidence of the reasonableness of his belief that KE had been consenting to the sexual encounter. The moment

Appellant knew that KE either did not want to engage in sexual acts with him, or that she had fallen asleep or become unconscious, he stopped.

The Government attempts to ignore Appellant's actions after KE faked sleep by failing to consider or even acknowledge how Appellant's actions show his honest and reasonable mistake. Gov. Br. at 11-12. This attempt to ignore Appellant's reasonable actions, coupled with trial counsel's barb that Appellant "does not get a medal because he stopped," lays bare the fatal weakness of the Government's case—it is built on an improper application of a legal theory that was not charged and insufficient evidence to factually prove the theory that was charged. *See* Brief on Behalf of Appellant, dated 1 February 2024, Assignment of Error II (arguing that the Government violated Appellant's due process rights by convicting him under a theory of criminality absent from the charged sheet).

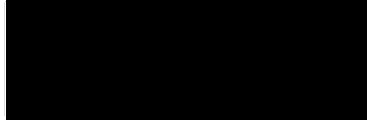
Appellant's actions "at the first indication something might be amiss" shows his mistake of fact was honest and reasonable. *Slayton*, 2025 CCA LEXIS 427, at 29-30. Because the Government cannot prove beyond a reasonable doubt that Appellant did not have an honest and reasonable mistake of fact as to consent, this Court should conclude that Appellant's finding of guilty for sexually assaulting KE is factually insufficient.

CONCLUSION

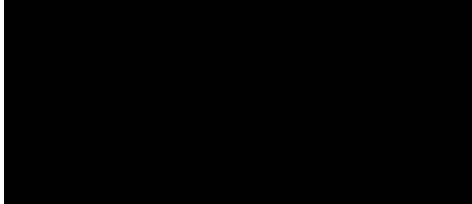
In its review of this Court's prior decision, CAAF acknowledged that, even though the evidence may be legally sufficient, this Court could still find the evidence to be factually insufficient, and it expressed no opinion on whether this Court should find Appellant's finding of guilty to be factually sufficient. *Hennessy*, 2026 CAAF LEXIS 72, at *7-8, 9. Regardless of how this Court reviews and applies *Casillas* to the present case, Appellant's finding of guilty is factually insufficient because the Government failed to prove beyond a reasonable doubt that Appellant did not have an honest and reasonable mistake of fact as to consent. Therefore, this

Court should set aside the finding of guilty for Specification 2 of the Charge and the sentence.

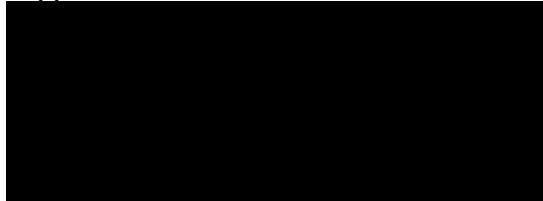
Respectfully,



Heather M. Bruha, Maj, USAF
Senior Defense Counsel

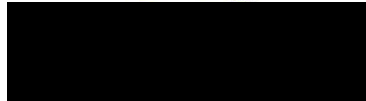


Joshua L. Lopes, Capt, USAF
Appellate Defense Counsel

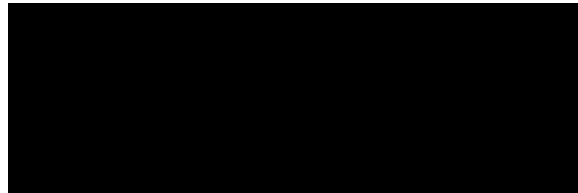


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 26 May 2026.



JOSHUA L. LOPES, Capt, USAF
Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	UNITED STATES' BRIEF
	)	ON SPECIFIED ISSUE
	)	
v.	)	Before Special Panel
	)	
Airman First Class (E-3)	)	No. ACM 40439 (rem)
WILLIAM C.S. HENNESSY,	)	
United States Air Force	)	26 May 2026
<i>Appellant.</i>	)	

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

SPECIFIED ISSUE

**WHETHER APPELLANT'S CONVICTION IS FACTUALLY
SUFFICIENT IN LIGHT OF OUR SUPERIOR COURT'S
DECISION IN UNITED STATES V. HENNESSY, 86 M.J. 315
(C.A.A.F. 2026) (CITING UNITED STATES V. MOORE, 86
M.J. 308 (C.A.A.F. 2026)).**

STATEMENT OF CASE

A general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault and two specifications of abusive sexual contact without consent in violation of Article 120, UCMJ. (*Entry of Judgment*, ROT, Vol. 1.) The court-martial sentenced Appellant to a dishonorable discharge, confinement for 34 months, reduction in grade to E-1, and a reprimand. (Id.) After considering post-trial submissions, the convening authority took no action on Appellant's case. (*Convening Authority Decision on Action*, ROT, Vol. 1.)

On appeal, this Court initially affirmed the findings and modified the sentence based on excessive post-trial delay. United States v. Hennessy, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024). After the Court of Appeals for the Armed Forces (CAAF) decision in United States v. Mendoza, 85 M.J. 213 (C.A.A.F. 2024), this Court vacated its

original opinion and set aside Appellant’s conviction for sexual assault without consent as factually insufficient, citing the “absence of evidence...that [the victim] was, at the time of the sexual act, capable of consenting, but did not consent.” United States v. Hennessy, No. ACM 40439, 2024 LX 48579 (A.F. Ct. Crim. App. Nov. 25, 2024).

On 5 March 2025, the officer performing the duties of The Judge Advocate General for the Air Force certified the following issue for review by CAAF:

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING UNITED STATES V. MENDOZA, ___ M.J. ___ (C.A.A.F. 2024) TO FIND [APPELLANT]’S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

On 23 January 2026, CAAF answered the certified question in the affirmative, holding that: (1) while the Government cannot prove the absence of consent by “merely” establishing that a victim was incapable or asleep, (2) evidence that the victim did not consent before falling asleep and that the sexual act subsequently occurred while the victim was asleep is legally sufficient to prove the absence of consent, and (3) evidence that the victim was asleep when the sexual act began but awoke before the act was complete and, while awake, did not consent to the ongoing sexual act, is also legally sufficient to prove the absence of consent. United States v. Hennessy, 86 M.J. 315 (C.A.A.F. 2026) (citing United States v. Moore, 86 M.J. 308 (C.A.A.F. 2026)). Finding that this Court had failed to consider the third principle, CAAF vacated this Court’s decision and remanded the case for a new factual sufficiency review. Id.

STATEMENT OF FACTS¹

KE Repeatedly Rejects Appellant's Physical Advances

In summer 2019, Appellant and KE connected on social media. (R. at 666.) On 8 June 2019, after approximately a week of messaging back and forth, Appellant invited KE to hang out in his dorm room, and she agreed. (R. at 666-68)

Upon KE's initial arrival, the two sat on the couch and watched TV. (R. at 669.) Eventually, they transitioned to talking to each other. (Id.) As they conversed, Appellant scooted closer to KE until they were only "inches" apart and grabbed her hand. (R. at 669-670.) KE thought Appellant was "moving too fast" given that it was their first time meeting in person, and did not reciprocate the gesture but continued their conversation. (R. at 670.)

As KE was talking, Appellant leaned in to kiss her. (Id.) KE noticed and thwarted Appellant by "lean[ing] the opposite direction." (R. at 671.) Several minutes later, undeterred by his unsuccessful first attempt, Appellant again tried to kiss KE. (Id.) This time, he succeeded in kissing her on the lips. (Id.) But the kiss did not last long. (Id.) As Appellant grabbed KE's face with his hand mid-kiss, KE pulled away. (Id.) Feeling "uncomfortable and awkward," KE left shortly thereafter and returned to her own room. (R. at 672-73.)

Sometime later that day, Appellant messaged KE and apologized: "I'm sorry if I was moving too fast." (R. at 672.) He then asked her if they could "start over" and if she was willing to meet him for a concert at the Enlisted Club ("E-Club") later that evening. (Id.) Feeling better about Appellant based on his apology, KE, who wanted to attend the concert but did not have anyone to go with, agreed to accompany Appellant and his friends. (R. at 672-73.)

¹ While the United States incorporates the statement of facts from its original answer brief, pertinent facts have been reproduced here for the Court's convenience.

Around dinnertime, KE joined Appellant and his friends at a table in the E-Club. (R. at 674.) As the evening progressed, Appellant and KE stayed together as they moved around the E-Club. (R. at 675-76.) At some point, while they were sitting by the bar, KE received a call from her brother. (R. at 679-680.) As KE spoke to her brother over the phone, Appellant started rubbing her back. (JA at 184.) KE was “weirded out” and brushed Appellant’s hand off. (R. at 680-81.) At another point, while they were sitting at a table near the DJ booth, Appellant asked KE: “So my room or yours?” (R. at 679.) In rebuffing Appellant, KE responded: “*You go to yours and I’ll go to mine.*” (Id.) (emphasis added).

At the end of the evening, Appellant offered to give KE a piggyback ride as they left the E-Club. (R. at 682.) Tired, drunk, and not thinking about the fact that Appellant did not know where she lived, KE agreed. (R. at 681-82, 715.)

KE Awakes to Vaginal Penetration

The next thing KE remembered was waking up to find herself on Appellant’s bed, naked from the waist down with her legs on his shoulders as Appellant penetrated her vagina with his penis. (R. at 682-83.) Realizing she “didn’t know how [they] got to that point,” KE panicked and “decided to fake sleep to get him to stop.” (R. at 685.) Without saying anything, she closed her eyes and turned her head to face the wall. (Id.) Appellant noticed and tried to get KE’s attention, calling her name before saying, “Oh no.” (Id.) Appellant then shook KE’s shoulder in an attempt to get her to open her eyes. (Id.) When KE did not respond and kept her eyes shut, Appellant stopped what he was doing and went to the restroom. (R. at 686, 728.) KE then sat up and began to gather her things so she could leave. (R. at 686-87, 730.)

As KE tried to leave, Appellant asked her if he had done something wrong. (R. at 730.) Reluctant to “alert” Appellant to the possibility that something was wrong, KE responded in the

negative before leaving his room. (R. at 730-31.) Afraid that Appellant “might come after [her] if he heard [her] running,” KE walked out of his room and continued walking down the stairs. (R. at 689.) Upon reaching the ground floor, KE broke into a run. (Id.)

KE Reports the Sexual Assault

After running to her dorm building, KE cried and began “freaking out.” (Id.) Not knowing who to call, KE, who was “scared,” “confused,” and “angry,” unsuccessfully attempted to reach her friend SL. (R. at 643, 689.) Panicked, KE then called a different friend, KB, who agreed to meet KE outside her dorm building. (R. at 690.)

As KB approached KE, he noticed that she had “red eyes...like she had just got done crying.” (R. at 561-62.) KE, who had been trying to “keep [her] cool,” broke into tears again and said to KB, “I just got raped.” (JA at 563, 691.) As KB tried to console her, KE called SL again because she “felt like [she] needed a female to help [her].” (R. at 572, 607-08, 691.) Approximately 15 minutes later, SL arrived and escorted KE, who was “crying very intensely,” to her room, where KE told SL and LV, another friend, what had happened. (R. at 607-09, 614, 646, 691-92, 781.)

Around midnight, KE reported the incident to the Sexual Assault Response Coordinator (SARC), after which she submitted to a forensic examination by a sexual assault medical forensic examiner. (R. at 694-98, 976-992.) Months later, when KE saw Appellant at the E-Club, she cried and hid in a restroom to avoid him. (R. at 700-701.)

The Case at Trial

Appellant was charged with, inter alia, “commit[ting] a sexual act upon [KE] by penetrating her vulva with his penis, without her consent.” (*Charge Sheet*, ROT, Vol. 1.) At trial, during the prosecution’s proof on this charge consisted of KE’s testimony, the sexual

assault forensic examination (SAFE) report, and testimony from various outcry witnesses.

During her direct examination, KE unequivocally testified that she did not want to have sex with Appellant in June 2019. (R. at 702.) After a defense cross-examination that implied KE might have consented while drunk, the prosecution asked KE to explain why she believed she did not consent. (R. at 782.) KE testified: “I don’t see how I would have been okay with sex happening later on if I wasn’t okay with the kissing earlier on.” (Id.)

The defense presented expert testimony from a forensic psychologist about alcoholic blackouts, which he described as a “memory disturbance that’s brought on by a unique consumption pattern of alcohol.” (R. at 1042.) The expert’s testimony established that someone experiencing a blackout would maintain knowledge of things they knew “before they went in [to the blackout].” (R. at 1043-44) (giving examples of learned skills such as driving a car, performing surgery, and flying a plane). The expert distinguished blackouts from being “passed out,” that is, unconscious as a result of consuming too much alcohol. (Id.)

This Court’s Original Decision

On appeal, this Court initially concluded that Appellee’s conviction was factually sufficient: “We are convinced of [Appellant’s] guilt beyond a reasonable doubt.” Hennessey, 2024 CCA LEXIS 343, at *20. In finding that the encounter was nonconsensual and that any mistake of fact as to consent would have been “unreasonable under the circumstances,” this Court cited the fact that KE (a) “repeatedly rebuffed [Appellee]’s physical advances,” and (b) unequivocally suggested they go their separate ways when Appellee asked, “So my room or yours?” Id. This Court also opined that KE’s actions after the sexual assault—running away and immediately confiding in her friends—and the results of the forensic examination “substantially corroborate[d] her testimony.” Id.

ARGUMENT²

APPELLANT’S CONVICTION FOR SEXUAL ASSAULT AGAINST K.E. IS FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews factual sufficiency de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether, “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt.” United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017).

Law & Analysis

To sustain a conviction for sexual assault without consent in violation of Article 120, UCMJ, the evidence must show that (1) Appellant committed the charged sexual act upon KE in the manner alleged, with an intent to gratify his sexual desire; and (2) that he did so without KE’s consent. See Manual for Courts-Martial, United States part IV, ¶ 60.b.(2)(d) (2019 ed.) (MCM).

Proof that a sexual assault was “without consent” may not hinge “solely” on evidence that the victim was asleep or incapacitated at the time of the sexual act. Moore, 86 M.J. at 308; see also Mendoza, 85 M.J. at 222. However, the fact that the victim may have been asleep when the sexual act began does not mean the incident cannot constitute sexual assault “without consent.” Moore, 86 M.J. at 308; see also United States v. Casillas, 86 M.J. 94, 102 (C.A.A.F.

² This filing is limited to addressing the factual sufficiency of Appellant’s conviction in light of (a) this Court’s analysis in its initial opinion, and (b) our superior Court’s decision in Moore; however, the United States incorporates by reference the arguments from its previous filings. (See Ans. Br; Mot. for Recon.)

2025). The Government may rely on “[a]ll the surrounding circumstances” to prove that a sexual act that began while the victim was asleep was “without consent.” 10 U.S.C. § 120 (g)(7)(C). Relevant surrounding circumstances include “[e]vidence that the alleged victim did not consent before falling asleep and evidence that the victim was asleep when the sexual act occurred,” as well as evidence that “the victim was asleep when the sexual act began but awoke before the sexual act was complete and, while awake, did not consent to the ongoing sexual act.” Moore, 86 M.J. at 308. When the Government presents such evidence, “[it] is not attempting to ‘prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim’ was incapable of consenting.” Id.

A. The surrounding circumstances prove beyond a reasonable doubt that KE never consented.

In finding Appellant’s conviction factually insufficient after Mendoza, this Court cited the “absence of evidence ... that KE was, *at the time of the sexual act*, capable of consenting, but did not consent.” Hennessy, 86 M.J. at 315 (emphasis added). Admittedly, CAAF’s proclamation that “[s]ubsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent,” Mendoza, 85 M.J. at 220, combined with its subsequent emphasis on evidence of a victim’s capacity “during [the] period” of penetration, Casillas, 86 M.J. at 102, did appear to suggest that capacity to consent (and the lack thereof) needed to correspond with the moment a sexual act began. But as CAAF’s subsequent decisions in Moore and this case makes clear, the absence of consent can also be proved using the surrounding circumstances, including those before a victim falls asleep and after she wakes up—that is, proof of “without consent” need not be contemporaneous with when the sexual act occurred. Moore, 86 M.J. 308 n.4 (principle articulated in Mendoza “does not mean that under Article 120(b)(2)(A), UCMJ, the sexual act must coincide with a period when the person upon

whom the act is committed is capable of consenting”); Hennessey, 86 M.J. at 315. In other words, this Court got it right the first time. *See* Hennessey, 2024 CCA LEXIS 343, at *20 (citing surrounding circumstances in concluding that “[t]he evidence proved that KE did not consent to sex with Appellant and disproved that Appellant had a reasonable mistake of fact as to consent”).

KE’s testimony at trial established that she “woke up” to penetration that she never agreed to, that she did not want to have sex with Appellant that day, and that she did not think she would have consented even while drunk. (R. at 682, 782.) This was supported by evidence that KE, who met Appellant in person for the first time that day, “repeatedly rebuffed [his] physical advances,” Hennessey, 2024 CCA LEXIS 343, at *20. The evidence portrayed KE as not reciprocating when Appellant grabbed her hand; leaning away from him to avoid being kissed; pulling away from him when he eventually did manage to kiss her; shrugging his hand off when he tried to rub her back; and turning down an invitation to his room by telling him, “You go to yours and I’ll go to mine.” (JA at 173-185.)

That KE nevertheless socialized with Appellant and accepted a piggyback ride from him because she was tired does not warrant a conclusion that she must have agreed to sex at some point, for “[a] current or previous dating or social or sexual relationship by itself ... does not constitute consent.” 10 U.S.C. § 120(g)(7)(A); *see also* United States v. St. Jean, 83 M.J. 109, 114 (C.A.A.F. 2023) (the fact that a person consented to kissing is “not particularly probative” of whether that person consented to full sexual intercourse later). Nor does the fact that KE was drunk and could not remember the initiation of the sexual act mean that she must have consented. The defense expert’s testimony established that even while blacked out, people maintain knowledge and skills that they learned or knew prior to the alcoholic blackout. (R. at 1043-44.) When this is paired with KE’s own testimony that she could not see how she would

have been “okay with sex happening later on if [she] wasn’t okay with the kissing earlier on,” (R. at 782), this Court can conclude that there is no realistic possibility that someone who repeatedly expressed aversion to Appellee’s physical touch and believed him to be “moving too fast” would suddenly have a 180-degree change of heart simply because she was intoxicated. See United States v. Baran, 22 M.J. 265, 270 (C.M.A. 1986) (emphasis added) (“[A]lcohol may affect a person’s memory and inhibitions *without* depriving [her] of volition.”). To the extent that such a farfetched possibility can be said to exist, it does not create reasonable doubt: “While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty.” United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959).

Since KE never consented prior to the moment she woke up, the penetration, which Appellant initiated while KE was unconscious or asleep, necessarily began without her consent, since “[a] sleeping, unconscious, or incompetent person cannot consent.” 10 U.S.C. § 120(g)(7)(B). And when KE awoke while penetration was ongoing, it continued without her consent: “K.E. testified that she woke up while the sexual act was occurring and that she *undertook efforts ‘to get [Appellant] to stop’ the sexual act.*” Hennessey, 86 M.J. at 315 (emphasis added). As in Casillas, this fact is critical. 86 M.J. at 102 (“Critically, SF’s testimony establishes that she was awake and aware of what was happening for at least a short time when Appellant was penetrating her.”). By faking sleep in the hopes that Appellant would stop, KE expressed “lack of consent through ... conduct.” Thus, there was no consent. 10 U.S.C. § 120(g)(7)(A).

That KE never consented to the act is further evidenced by her reaction in the immediate aftermath, specifically her distraught state as she sought help from other Airmen, her decision to receive a sexual assault forensic examination and report the sexual assault the very next morning,

and her tearful reaction to seeing Appellant at the E-Club months later. “[U]sing common sense and knowledge of human nature,” it would be unreasonable to conclude that someone who had such a vehement response to Appellant’s conduct might have freely consented to it just minutes before. *See* R.C.M. 918(c), Discussion.

B. The evidence establishes beyond a reasonable doubt that there was no honest or reasonable mistake of fact as to consent.

Appellant, for his part, asserts that his reaction to KE closing her eyes and appearing asleep is evidence that he had a mistake of fact as to consent. This Court was unpersuaded by this argument the first time, *see Hennessy*, 2024 CCA LEXIS 343, at *19-20, and should remain unpersuaded. A purported mistake of fact as to consent cannot serve as an affirmative defense unless the mistake is “honest and reasonable,” *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019), “under all the circumstances.” R.C.M. 916(k)(j)(1). And here, all the circumstances show that any such mistake on Appellant’s part would have been unreasonable.

All the evidence in the record shows that by the time Appellant inserted his penis into KE’s vulva, he had been “repeatedly rebuffed” by KE all day long—his attempt to kiss her thwarted, his hand brushed off her back, his invitation to his room denied. *Hennessy*, 2024 CCA LEXIS 343, at *20. KE’s behavior was tantamount to an advance declaration of no consent—no reasonable person would interpret her rejection of physical touch, all day long, as a sign that she was willing to engage in the ultimate form of physical intimacy later the same day. *See St. Jean*, 83 M.J. at 114 (even the fact that someone consented to kissing is “not particularly probative” of consent to sexual intercourse later). Further, there is nothing in the record that would suggest to a reasonable person that KE ever made a “freely given agreement” to sex. U.S.C. § 120(g)(7)(A). There is *no* evidence Appellant could point to, at trial or on appeal, that KE wanted to have sex with Appellant, invited him to have sex with her, or that Appellant had any

reason to believe that KE was being coy or did not mean what she said when she told him, “You go to your[] [room] and I’ll go to mine.” Under these circumstances, no reasonable person would mistake KE’s conduct as “freely given agreement” to sex later that night. *See* 10 U.S.C. § 920(g)(7)(A). Thus, as this Court aptly noted in its original opinion: “[I]f Appellant did have a mistake of fact as to consent, such a belief would be unreasonable under the circumstances.” Hennessy, 2024 CCA LEXIS 343, at *19-20.

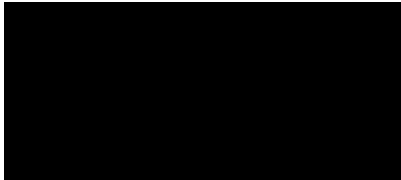
That KE may have been awake but incapacitated by intoxication, as opposed to asleep or unconscious, when the sexual act began does not change this analysis. *See Hennessy*, 2024 CCA LEXIS 503, at *22 (noting that alcohol could have affected KE’s capacity in a number of ways, including sleep, unconsciousness, inability to appraise the nature of the conduct, or inability to decline participation or communicate unwillingness). While it may be possible for an intoxicated person to “engage in voluntary behavior in relation to the charged sexual act,” *id.*, the fact of KE’s intoxication by itself does not warrant an inference that she consented. No available evidence suggested KE gave Appellant consent or that she did anything that would have indicated to a reasonable person that she consented. Given that “all the surrounding circumstances” show that KE never consented prior to this period of incapacity, any “mistake of fact” based simply on KE’s intoxication would be neither honest, reasonable, nor nonnegligent. McDonald, 78 M.J. at 379.

C. Conclusion

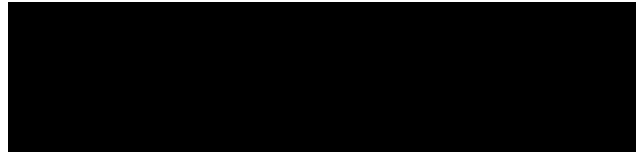
As this Court aptly found in its original opinion, “[t]he evidence proved that KE did not consent to sex with Appellant and disproved that Appellant had a reasonable mistake of fact as to consent.” *Id.* After weighing all this evidence and “making allowances for not having personally observed the witnesses,” Rosario, 76 M.J. at 117, this Court should once again be

convinced of Appellant's guilt beyond a reasonable doubt. Appellant's conviction for sexual assault without consent is factually sufficient, and he is unentitled to relief.

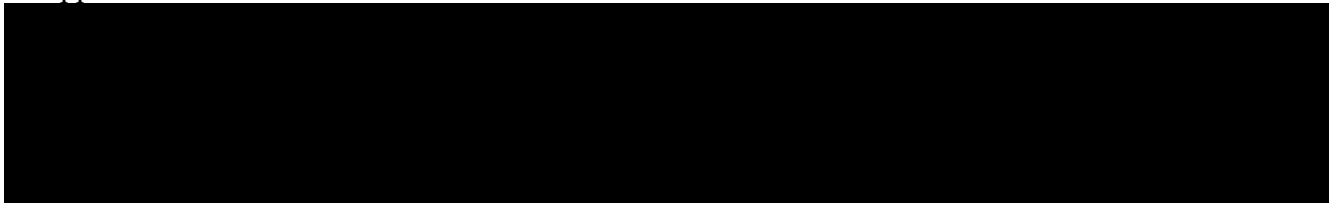
WHEREFORE, the United States respectfully requests that this Honorable Court affirm the conviction and sentence.



KATE E. LEE, Maj, USAF
Appellate Government Counsel



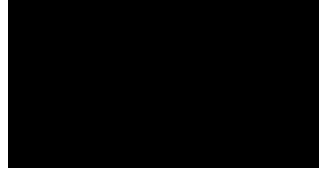
MARY ELLEN PAYNE
Associate Chief



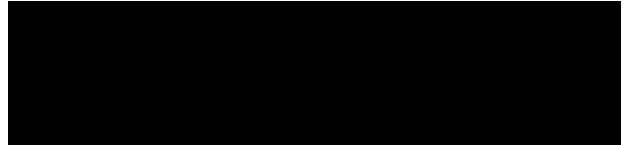
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force

Appellate Defense Division on 26 May 2026.



KATE E. LEE, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Airman First Class (E-3)
WILLIAM C.S. HENNESSY
United States Air Force

Appellant

MOTION FOR ORAL ARGUMENT

Before a Special Panel

No. ACM 40439 (rem)

2 June 2026

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

Pursuant to Rules 23 and 25 of this Honorable Court's Rules of Practice and Procedure, Airman First Class William C.S. Hennessy, Appellant, hereby moves for oral argument on the following issues:

I. Whether Airman First Class Hennessy's conviction for sexual assault upon KE is factually insufficient.

II. Whether Airman First Class Hennessy's Due Process rights were violated because he was convicted of a theory of criminality not on the charge sheet.

III. Whether trial counsel's findings argument was improper.

This Court should grant oral argument on issues I-III because of the complex development of the law since Appellant's conviction and the procedural history of Appellant's case. On 1 February 2024, Appellant submitted a brief to this Court that asserted five assignments of error, including all three issues Appellant now moves this Court to hold oral argument on. *See Brief on Behalf of Appellant*, dated 1 February 2024. On 25 November 2024, this Court decided issue I in Appellant's favor by finding that his conviction for sexually as factually insufficient and, consequently, determined that issues II and III were m *Hennessy v. Hennessy*, 2024 CCA LEXIS 503, at *25 (A.F. Ct. Crim. App. Nov. 25, 2024). The Court of Appeals for the Armed Forces reviewed that decision and remanded



DENIED
28 JUL 2026

Appellant's case to this Court for a new factual sufficiency review to ensure this Court considered the application of the third legal principle discussed in *United States v. Moore*, 86 M.J. 308, 2026 CAAF LEXIS 73 (C.A.A.F. 2026). *United States v. Hennessy*, No. 25-0112, 86 M.J. 315, 2026 CAAF LEXIS 72, at *8-9 (C.A.A.F. 2026).

On 24 March 2026, this Court issued the Notice of Docketing and authorized additional briefing to "address the factual sufficiency issue in light of [CAAF's] decision" in Appellant's case. This notice did not authorize additional briefing on the two assignments of error that this Court previously determined were moot. On 23 May 2026, Appellant and Appellee filed briefs with this Court addressing the specified issue.

Since Appellant's trial, case law has dramatically evolved regarding the interpretation of the 'without consent' element of Article 120, Uniform Code of Military Justice. Decisions such as *Mendoza*, *Casillas*, and *Moore*, have established new legal principles that were not available to Appellant at the time of his trial or his initial brief before this Court. *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024); *United States v. Casillas*, 86 M.J. 94 (C.A.A.F. 2025); *Moore*, 86 M.J. 308. These developments increase the complexity of this Court's factual sufficiency review in issue I and further implicate the Due Process and improper argument issues Appellant raised in issues II and III. Because of these significant developments in the law, oral argument can assist this Court in answering the three outstanding errors assigned for review. Furthermore, Appellant consents to any delay that oral argument may incur and disclaims any issues related to post-trial delay caused by this request.

Because oral argument will assist this Court in answering the outstanding errors assigned for review in this case, Appellant respectfully request that this Court grant the motion for oral argument.

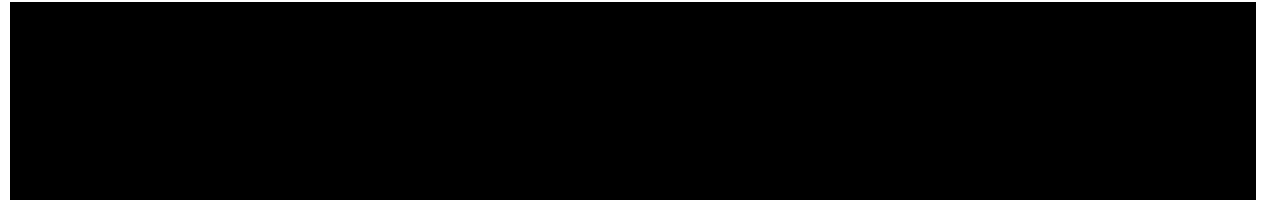
Respectfully Submitted,



Heather M. Bruha, Maj, USAF
Senior Defense Counsel

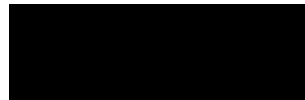


Joshua L. Lopes, Capt, USAF
Appellate Defense Counsel

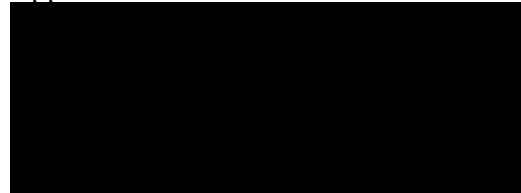


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 2 June 2026.



JOSHUA L. LOPES, Capt, USAF
Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	UNITED STATES’ OPPOSITION
	)	TO APPELLANT’S MOTION
	)	FOR ORAL ARGUMENT
	)	
v.	)	
	)	Before a Special Panel
Airman First Class (E-3)	)	
WILLIAM C.S. HENNESSY	)	No. ACM 40439 (rem)
United States Air Force	)	
<i>Appellant.</i>	)	3 June 2026

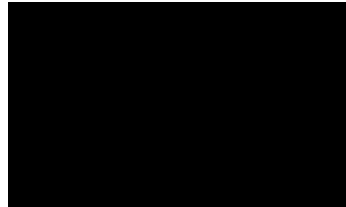
**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 23.2 of this Honorable Court’s Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant’s Motion for Oral Argument. (Mot. for Oral Argument, 2 June 2026.)

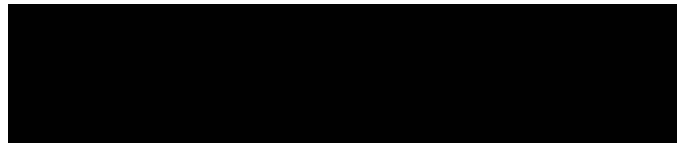
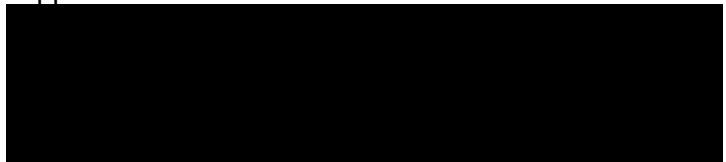
First, Appellant had an opportunity to address the impact of the Court of Appeals for the Armed Forces’ decisions in United States v. Mendoza, 85 M.J. 213 (C.A.A.F. 2024), United States v. Casillas, 86 M.J. 94 (C.A.A.F. 2025), and United States v. Moore, 86 M.J. 308 (C.A.A.F. 2026), in the additional factual sufficiency briefing permitted by this Court. (*See* App. Br., 26 May 26.) Second, the fact that this Court “did not authorize additional briefing” on the due process or improper argument issues does not mean that oral argument is warranted, given that: (1) this Court previously considered and decided both issues against Appellant, *see* United States v. Hennessy, No. ACM 40439, 2024 CCA LEXIS 343, *19, at *19-*28 (A.F. Ct. Crim. App. Aug. 20, 2024); and (2) neither Mendoza, Casillas, nor Moore articulated any principles of law that would impact this Court’s prior analysis.

Appellant's record of trial was initially docketed with this Court on 28 March 2023—more than three years ago. Oral argument would be redundant and primarily serve to prolong appellate review of issues that have already been briefed by the parties.

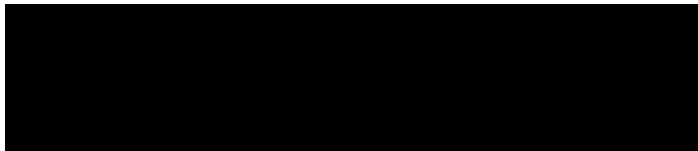
WHEREFORE, the United States respectfully requests this Court deny Appellant's Motion for Oral Argument.



KATE E. LEE, Maj, USAF
Appellate Government Counsel

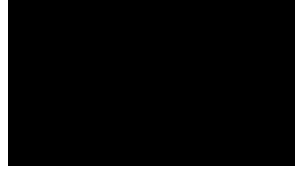


MARY ELLEN PAYNE
Associate Chief



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 3 June 2026.



KATE E. LEE, Maj, USAF
Appellate Government Counsel

