UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40442 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Nicholas J. MOORE	)	**DOCKETING**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 19 April 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 19th day of April, 2024,

ORDERED:

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

19 April 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

NICHOLAS J. MOORE,
Airman, USAF
Appellant.

Before Special Panel

No. ACM 40442 (f rev)

BRIEF ON BEHALF OF APPELLANT

MATTHEW L. BLYTH, Maj, USAFR
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[1] Assignments of error (AOEs) V, VI, and VII are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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Statement of the Case

On 9-13 January 2023, at a general court-martial at Hill Air Force Base, Utah, a panel of officer and enlisted members convicted Appellant, Airman (Amn) Nicholas J. Moore, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2018).[2] (Entry of Judgment (EOJ), 8 Mar. 2023.) The members sentenced Amn Moore to 18 months' confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. (R. at 672, EOJ.) The convening authority took no action on the findings or sentence and disapproved a request to waive forfeitures.[3] (Convening Authority Decision on Action, 10 Feb. 2023.)

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[2] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

[3] In a post-trial submission of matters, Amn Moore's defense counsel asked the convening authority to waive automatic forfeitures, but this was beyond the convening authority's power because Amn Moore has no dependents. *See* Article 58b(b), UCMJ. On appeal, Amn Moore claims no prejudice from this error.

Statement of Facts

A Typical Night in the Dorms

Amn Moore, [redacted] AB (the complaining witness), A1C KA, and Senior Airman (SrA) BM were friends who lived in the same dorm on Hill AFB. (R. at 308–09.) They would regularly get together to cook dinner and watch television. (R. at 309.) Around 2000 on 8 February 2022, the group of four Airmen did just that—cooked dinner and watched a TV show in AB's dorm. (R. at 310, 312.) There was a bottle of wine shared between the group—although AB only had a sip—and A1C KA and Amn Moore had several beers. (R. at 310–11, 364.) A1C KA was the first to leave, with estimates varying from 2200 to 2330; SSgt BM left shortly thereafter, which he estimated at 2200 to 2230. (R. at 312–13, 444, 436.)

When A1C KA left, [redacted] AB and Amn Moore were seated together, under a blanket, on the loveseat. (R. at 446; Def. Ex. B.) Amn Moore's legs were across AB's, which made A1C KA uncomfortable. (R. at 446.)

AB claims Amn Moore turned her body around, removed her bra, removed her shirt, lowered her tight pants, and pulled down her underwear to digitally penetrate her, all while she continued to sleep.

The following picture, Defense Exhibit B, shows the loveseat where the incident allegedly occurred.

AB confirmed that Amn Moore's legs were draped over her for about 45 minutes. (R. at 379.) According to her, she was on the left side of the loveseat (as viewed from the perspective of one viewing the picture above) with her hand holding up her head. (R. at 320, 382.) Her feet were curled up towards the middle of the couch to alleviate hip pain, with her feet touching Amn Moore, who was on the right side of the loveseat (as viewed from the same perspective). (R. at 378–79, 382.) She was also in the second week of a six-week healing process for an unspecified breast injury. (R. at 362–63.) She gradually became more horizontal, leaning back into the

couch and towards Amn Moore. (R. at 321, 379.) She denied there was a blanket around them. (R. at 321.)

AB claimed her next memory was awaking with the sensation of having to urinate. (R. at 324.) She felt fingers inside of her and recalled the feeling of fingers being removed. (*Id.*) At this point, her body and clothing were different than when she claimed to have fallen asleep. Her head was now, she said, on the right side of the loveseat, with her face now pointed towards the couch, rather than away. (*Id.*) Amn Moore was behind her, with his right arm underneath her around her chest area and his left hand coming from underneath her to penetrate her. (R. at 325.) He was biting or kissing her ear while doing so. (*Id.*)

Her shirt and bra were completely removed. (R. at 324.) The bra had a clasp in the back and elastic straps; thus, to take it off, her arms would have to be pulled through the armholes. (R. at 400; Def. Ex. D.) Her pants, which fit "like blue jeans" and were snug enough that she did not tie the drawstring, were pulled down to her thighs. (R. at 403; Def. Ex. E.) And her underwear, a thong style worn between the cheeks of the buttocks, was pulled down to her thighs. (R. at 403–06; Def. Ex. F.) AB is 5 feet 8 inches tall and weighed approximately 145 pounds.[4] (R. at 401.)

She claimed that she pushed him off after she "fully woke[] up," and said, "What the fuck are you doing?" (R. at 387–88.) She acknowledged that she is a quiet

[4] Amn Moore is of average build. *See* Preliminary Hearing Officer Exhibit 5, 6, Record of Trial Volume 4 (Amn Moore's interviews with law enforcement). While this preliminary hearing evidence is not part of the record the members considered, they would, of course, be able to see Amn Moore to make this same assessment.

person, and that "pretty loud for [her]" is still "pretty quiet." (R. at 388.) Amn Moore stopped immediately. (*Id.*) She claimed that Amn Moore said, "You're right, you're right," but did not rush to leave. (R. at 388–89.) According to AB, Amn Moore put a blanket on her, put his pants on, took the empty alcohol containers (because she was 20 years old), and asked if they could talk about it in the morning. (R. at 307, 389.)

The Aftermath

At 0001, AB called SrA BM and went directly to his room. (R. at 434.) He called the Sexual Assault Prevention and Response (SAPR) hotline and escorted her to a forensic examination. (R. at 423–24; 485–86.) Although DNA swabs were taken during the examination, no DNA was introduced at trial. (R. at 495.) AB had no marks, redness, or injuries of any kind. (R. at 496–97.) AB interviewed with the Air Force Office of Special Investigations (OSI) shortly thereafter, and worked with them to send Amn Moore a pretext message on Snapchat. (R. at 344.) It was introduced as Prosecution Exhibit 1, and the text follows:

> [AB] I don't understand how you could do that, I fell asleep on the couch, I thought I could trust you nick. Wtf I shouldn't have to worry about you taking my shirt off and putting your hand down my pants.
>
> [AB] I don't understand what you were thinking, I really thought I could trust you nick.
>
> [Amn Moore] I don't know what I was thinking either. I know an apology wouldn't be enough.

(Pros. Ex. 1.) The Government brought charges for sexual assault by digital penetration without consent. (Charge Sheet.)

At Amn Moore's court-martial, AB contends she is a "heavy sleeper."

On direct examination, the Government tried to highlight that AB was "more tired than usual." (R. at 318.) The explanation was that she went ice fishing two days earlier on Sunday and that she engaged in physical training (PT) at 0600 on Monday (the day before). (*Id.*) She acknowledged, however, that she normally wakes up at the same time every day whether she does PT or not. (R. at 323.)

AB claimed she was a "heavy sleeper." (R. at 322.) She said she set three alarms at maximum volume each day, although she did not usually have difficulty waking up. (R. at 323.) She claimed that loud noises in a movie would not wake her but conceded that being shaken would. (R. at 358.) She had no medical conditions or sleep disorders and was not on any medicines or sleep aids on 8 February. (R. at 360.) Her then-boyfriend, Specialist (SPC) CW, confirmed that AB would wake up with a gentle shake of the shoulder, or to bass or noise at the movies. (R. at 518.) She would even wake up when he crawled over her to get to the bathroom, despite him trying to be conscientious and not wake her up. (R. at 519.) To him, AB never seemed to have trouble waking up. (*Id.*)

Lies, Inconsistencies, and Witness Tampering

AB was previously unfaithful to SPC CW. (R. at 368.) In 2021, another Airman named "Casey" kissed AB, and she kissed him back. (*Id.*) On cross-examination, she would not admit that she told SPC CW the kiss was unwanted. (R. at 369.) However, SPC CW made clear that AB *did* tell him Casey's kiss was nonconsensual and unwanted. (R. at 510.) SPC CW explained that he and AB understood that cheating

would likely end their relationship, and that he would be angry if she cheated. (R. at 507.)

Witnesses had differing recollections of AB's story. AB's suitemate, A1C AS heard AB crying that night and leaving the room to go see SrA BM. (R. at 450.) When AB told A1C AS what happened, AB said that she woke to Amn Moore trying to "put *it* in her." (R. at 452 (emphasis added).) AB denied saying this. (R. at 372.) To SrA BM, the initial outcry witness, she claimed she was on the bed, not the couch, when Amn Moore penetrated her. (R. at 422.) SrA BM did not recall AB saying her shirt and bra were off. (R. at 428.) He said that AB told this same version of the story to her flight chief the next day. (R. at 432.)

Finally, AB told the Defense that she rarely texted SPC CW and did not speak to him about the case, communications with her attorneys, or interviews. (R. 373.) However, several weeks before trial, AB sent a message to SPC CW to give him a "heads up," that matters related to Casey might come up at court. (R. at 374.) Thus, AB lied to the Defense about whether she was having substantive conversations about the case with SPC CW. (R. at 374.) AB did not know at the time that the Defense had already interviewed SPC CW. (R. at 378.) Additionally, SPC CW had three interviews with OSI about the case, and in each one gave answers about AB's sleep habits that were not beneficial to her. (R. at 509.) AB later reached out and told SPC CW what she told OSI about her sleep habits. (*Id.*) Two months later, he gave answers that mirrored her answers. (*Id.*)

The members convicted Amn Moore of sexual assault as charged. (R. at 630.)

ARGUMENT

I.

AMN MOORE'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY INSUFFICIENT.

Standard of Review

Neither this Court nor the Court of Appeals for the Armed Forces (CAAF) has set forth the standard of review under the revisions to Article 66, UCMJ, 10 U.S.C. § 866 (2021), applicable to this case.[5] *But see United States v. Harvey*, No. 23-0239, 2024 CAAF LEXIS 13 (10 Jan. 2024) (granting review of a Navy-Marine Corps Court of Criminal Appeals decision on this very issue). Amn Moore asserts the standard of review for factual sufficiency should remain de novo despite these statutory changes explained below. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

1. This Court maintains robust factual sufficiency review despite changes to Article 66, UCMJ.

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ (2021). Upon such showing, this Court may weigh controverted questions of fact with "appropriate deference" to "the fact that the trial court saw and

[5] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, for every offense occurring after the date of the law's enactment, which was 1 January 2021).

heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge." Article 66(d)(1)(B)(ii), UCMJ (2021). This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021).

Amn Moore will make the requisite showing of deficiency below. While Article 66, UCMJ, has changed to require affirmative steps from an accused on appeal, the change does not hollow out factual sufficiency review. However, the statutory changes do raise several questions. The first question relates to the "appropriate deference" to the factfinder. The prior version of factual sufficiency review required CCAs to evaluate the evidence "recognizing that the trial court saw and heard the witnesses." Article 66(d), UCMJ (2018). This is a distinction without a meaningful difference. This Court has always taken into account the fact that it does not hear the witnesses. The statutory revision adds "and other evidence," but this means little because most non-testimonial evidence is fully captured in the record of trial—it is only the nuances of trial testimony that could escape full comprehension on appellate review.

The second question is whether this Court is "clearly convinced that the finding was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021). The prior version of Article 66(d), UCMJ, empowered the Courts of Criminal Appeals (CCAs) to approve findings that are "correct in law and fact and [that it] determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ (2018). The Court of Military Appeals (CMA) interpreted this language to require that

members of a CCA "are themselves convinced of the accused's guilty beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324–25 (C.M.A. 1987). This requirement stems from case law alone; neither the old nor the new statute explicitly requires the CCAs believe the accused's guilt beyond a reasonable doubt. Because the standard is as yet undetermined by the CAAF, this Court should hesitate before interpreting revisions to strip an accused of a key substantive aspect of an appeal. Where this Court is not convinced beyond a reasonable doubt that the evidence is sufficient, this should suffice to clearly convince this Court that the finding was against the weight of the evidence.

In short, the statutory revisions should not meaningfully affect the standard of review in this case except for the requirement that Amn Moore make a specific showing of deficiency. But even if this Court interprets the burden on appellants as greater than under the prior version of Article 66, UCMJ, Amn Moore still prevails.

2. The physical improbability alone precludes the evidence from meeting factual sufficiency.

Despite her claim to be a "heavy sleeper," AB would awaken when gently shaken. (R. at 322, 518.) She would also wake up when her boyfriend carefully climbed over her to use the bathroom. (R. at 519.) To buttress her claim at trial, AB said she used three alarms to wake up, but curiously also stated that she woke up without issue at the same time each day, and SPC CW confirmed she never had trouble waking up. (R. at 323, 519.) Why are her sleep habits important? Because these unexceptional sleep habits make it improbable that the sexual assault occurred as she claims.

On the night in question, AB took no medicines or sleep aids or meaningful quantities of alcohol and had no condition that would explain how a person could sleep through significant movement and undressing. Perhaps recognizing the weakness of its case, the Government tried to portray her as "more tired than normal." (R. at 318.) But its evidence—the not-so-vigorous activity of ice fishing 48 hours earlier and a routine PT session 36 hours before—cannot explain the comatose sleep she describes. (*Id.*) This lack of explanation for her state alone should convince this Court that the conviction is against the weight of the evidence.

A detailed examination of her claim explains why. Amn Moore and AB shared a small loveseat. (Def. Ex. B.) Her positioning at the time she fell asleep, as she tells it, was as follows. She sat on the left side of the loveseat (from the perspective of the viewer in Defense Exhibit B) with perhaps a slight lean towards Amn Moore, but not enough to be touching him with her upper body. (R. at 321, 379.) Her feet were curled up on the loveseat sideways touching him. (R. at 379–80, 382.) She claimed to fall asleep with her head on her hand for support. (R. at 320, 382.) When she awoke, she claimed to be lying down on her right side facing the back of the couch, with Amn Moore's right arm underneath her and his left hand penetrating her vulva from underneath. (R. at 324–25.) No reasonable explanation—short of a significant sleep disorder—can explain how she would remain asleep from her starting to ending position.

For AB's story to be plausible, each of the following things would have had to occur without waking AB—someone who awakens when gently shaken:

- Amn Moore would have had to unbend her legs for her to become horizontal. With her feet up on the couch on her left touching Amn Moore, she could not simply fall to her left and onto Amn Moore unless she has abnormal mobility, of which there is no evidence at trial. And AB conceded she had hip pain from basic exercise, making this more improbable.

- Amn Moore would have had to remove her shirt without waking her up. This includes lifting it over her head. To do so, he would have to pull her away from the couch and lift both hands above her head. And one of those hands was supporting her head.

- After lifting the shirt over her head, Amn Moore would have had to, again, lift her back off the couch and unclasp her bra. For a second time, he would have to lift her arms up to remove the bra. In removing the bra, he would have had to avoid causing any issues with AB's healing breast injury, which may have caused greater sensitivity.

- Amn Moore would then have had to remove her pants that "fit like jeans" and her underwear that rested between her buttocks. How this happens is also hard to imagine. If it occurred while she was sitting with her back to the couch, he would have had to first uncurl her legs and then pull both down, then spin her around and tip her over so that his right arm was underneath her body. If it occurred while AB was lying down, he would have had to later lift her up again to get his right arm under her.

Additionally, AB acknowledged she fell asleep with her head resting on her hand. If her hand moved, her head would have fallen and she would have woken up. And Amn Moore, who does not have a particularly large frame, would have had to maneuver AB, who is 5 feet 8 inches and weighs 145 pounds, through this intricate series of steps without awakening her.

Even if one credits AB's account, Amn Moore stopped immediately when she asked what he was doing. (R. at 387–88.) He said, "[Y]ou're right, you're right." (R. at 388–89.) Query whether that makes any sense if Amn Moore was sexually assaulting a sleeping AB. Instead, it makes much more sense because of what they had just done: each had cheated on their significant others. He placed a blanket on

AB, slowly gathered his things, took the alcohol containers to avoid creating an issue for AB, and asked her if they could talk in the morning. This is precisely the type of conversation that would follow when platonic friends have something more occur.

The sexual assault could not have occurred as AB describes, and Amn Moore's reaction was inconsistent with someone who just committed a crime.

3. AB's lies, inconsistencies, motive to fabricate, and efforts to manipulate witness testimony further diminish her already-improbable testimony.

Beyond the physical improbability, other weaknesses abounded in the Government's case, chief being the complainant. A starting point must be her confirmed lies because this charge rises or falls on her credibility.

Two lies stand out. First is lying to her boyfriend about her previous infidelity. The court-martial made it clear that when AB kissed another Airman, she misrepresented it as nonconsensual to her boyfriend. Why? Because, as he testified, cheating would likely end their relationship. (R. at 507.) So she has a confirmed willingness to lie to protect the same relationship. This provides the motive to fabricate. As with Amn Moore, AB's previous kiss of Casey was a private matter with the potential to become public. And just as with Casey, AB had every motive to, once again, portray what was consensual as nonconsensual to protect her relationship.

This case has echoes of *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). In that case, the military judge excluded evidence of the complaining witness's prior affair and her husband's reaction to that affair. *Id.* at 317. Although the obvious distinction is that the military judge here admitted the evidence, the point is that *Ellerbrock* recognizes the power of such evidence. *Id.* at 319 ("It is a fair inference

that a second consensual sexual event outside a marriage would be more damaging to a marriage than would a single event, assuming the evidence in the record supported that inference."). The CAAF found prejudice from the omission *despite three people witnessing the sexual encounter*, though capacity to consent was the key issue in *Ellerbrock*. *Id.* at 320–21. Like this case, *Ellerbrock* was riven with inconsistencies. *Id.* In this context, a powerful motive to fabricate should weigh heavily in the calculation.

The second lie was to the Defense. AB told the Defense that she did not discuss the substance of the case, or conversations with attorneys, with SPC CW. (R. at 373.) But she did. She directly gave him a "heads up" about the Casey issue. (R. at 374.) And in so doing she reasserted her version of what she said before—that Casey kissed her. She felt comfortable lying because she did not know that the Defense had already spoken with SPC CW. And this was not her only concerning contact with SPC CW. In an episode of witness tampering, AB spoke to SPC CW and altered his testimony from what he said to OSI—that she awoke easily—to more favorable testimony at trial. (R. at 509.) The reason she felt the need to manipulate SPC CW's answers is clear: her story was improbable unless she was an abnormally deep sleeper. This Court should weigh this deceit heavily when assessing AB's credibility.

Beyond the lies, AB told inconsistent versions of her story to others. To SrA BM—the first person she told—she claimed it happened on the bed. Pause to consider this. In her telling, she goes upstairs minutes later and tells her good friend that she

was assaulted on the bed, not the couch. In the version she told SrA BM, and also later to the flight chief, she omitted that her shirt and bra were removed.

She also told her suitemate that Amn Moore tried to put "it" in her. This is meaningful for two reasons. First, she denied ever saying it. There is no reason why her suitemate would lie about this, but AB denies it anyway. Second, it shows more inconsistency. "It" does not refer to a finger. Her story was that it was fingers, plural. "It" would refer to his penis. She is telling yet another version to her suitemate.

Taken together, AB is a confirmed liar who told different versions of the story to different people and was willing to manipulate a witness to make her narrative more plausible. On her credibility a conviction cannot rest.

4. What may have affected the members should not sway this Court.

The two sections above provide a basis for this Court to reverse on factual insufficiency. Still, it is worth noting what may have swayed the panel but should not weigh heavily for this Court.

First is the "confession" in Prosecution Exhibit 1. AB sent two messages. The first loosely described her version of the sexual assault. The second: "I don't understand what you were thinking, I really thought I could trust you nick." (*Id.*) Amn Moore responded in language that echoed the second: "I don't know what I was thinking either. I know an apology wouldn't be enough." (*Id.*) While the Government made the facile argument that this was an irrefutable and total confession, the actual evidence is more nuanced and is only an apology for what happened—the two of them cheating on their significant others.

Second is the weight of the Mil. R. Evid. 413 evidence. As described in AOE II, *infra*, this was weak evidence the military judge should have excluded. Even if this Court were to consider it, the propensity evidence cannot overcome the holes in the Government's case.

Third is the Government's focus on AB's motives for reporting, demeanor, and emotion. The military judge, over objection, allowed the Government to elicit before and after demeanor evidence from AB's flight chief. (R. at 471, 476.) On direct examination, he allowed the Government, again over objection, to bolster AB by asking about her motivation for testifying, allowing her to say, "I didn't want it to happen again to someone else." (R. at 349, 351.) The Government also belabored the point about the difficulty of going through the process of a court-martial as evidence that she was being truthful, focusing on her emotions. (R. at 579–80.) These emotional appeals to the panel should not sway this Court.

Finally, the special trial counsel's (STC's) scientific explanation of sleep (which rested on no scientific evidence), allowed in argument over defense objection, should have zero effect in assessing this case. *See* AOE III, *infra*. But it may well have influenced the members.

5. Conclusion

The perfectly reasonable alternative explanation is that AB consented to the sexual activity but did not want the consequences of her actions. Against this the Government presented a deeply flawed case. This Court, after reviewing all the evidence, should be clearly convinced that Amn Moore's conviction is against the weight of the evidence.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED SEXUAL MISCONDUCT UNDER MIL. R. EVID. 413.

Additional Facts

On 14 December 2021, the Government provided notice under Mil. R. Evid. 413 that Amn Moore continued to touch his then-girlfriend JH's breasts after she tried to remove his hand. (App. Ex. VIII at 9.) This late notice came because JH, despite an earlier interview with OSI on 2 March 2022, had never disclosed this information. (*Id.*) The Defense challenged the second prong of the *Wright*[6] analysis by arguing that JH did not describe a sexual assault, and the third prong of *Wright* by arguing the evidence lacked relevance. (*Id.* at 3–4.) Additionally, the Defense argued that the evidence failed the *Wright* factors used as part of the Mil. R. Evid. 403 analysis. (*Id.* at 4–6.)

JH testified during a motions hearing; however, only part of her cross-examination was captured in the transcript due to a recording error, with the remainder in an agreed-upon summary of her testimony.[7] (R. at 14–17; App. Ex.

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[6] *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). The three prongs are: (1) that the accused is charged with an offense of sexual assault; (2) that the proffered evidence is evidence of another sexual assault offense; and (3) that the evidence is relevant under Mil. R. Evid. 401 and 402. *Id.* at 482.

[7] After the recording failed, the military judge, with the consent of both parties, applied the remedy in R.C.M. 1112(d)(3) to reconstruct the record. (R. at 16.) The

XIX.) Amn Moore and JH met on a dating app and dated from October 2021 to March 2022. (App. Ex. XIX.) JH told Amn Moore that she did not want to have sex before marriage, but they still had a physical relationship. (*Id.*) For instance, they kissed when she was wearing no shirt. (*Id.*)

JH explained that Amn Moore would sometimes sleep at her home on Saturday nights to go to church with her the next day. (*Id.*) When this occurred, JH would have Amn Moore sleep on the couch and she would sleep in her bed. (*Id.*) Yet, on one such night, JH went to the couch in the middle of the night to be with Amn Moore. (*Id.*) She laid down in front of him on the couch; Amn Moore slipped his hand under the front of her shirt. (*Id.*) She claimed that she tried to pull his hand away using force at a 7 out of 10 level, but that he said "stop" and "relax." (*Id.*; R. at 12.) She asserted that he proceeded to grab her right breast, lift up her shirt, and mouth her breast. (App. Ex. XIX.) JH lay in silence until Amn Moore asked if she was uncomfortable. (*Id.*) He then immediately stopped. (*Id.*) They continued to date after this incident. (R. at 6–7.)

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military judge expressed understanding of the then-recent case of *United States v. Tate*, 82 M.J. 291 (C.A.A.F. 2022), which addressed a similar topic under a different version of the Rules for Courts-Martial. (R. at 17.) Under these circumstances, Amn Moore does not claim the omissions were substantial. Nor are the other items the Government could not produce after remand substantial. He notes, however, that the transcript contains another omission on page 26 that is not reconstructed. It appears some portion of the argument on Mil. R. Evid. 413 is lost. (R. at 26.) Nevertheless, it seems the argument resumed near the beginning, and Amn Moore likewise does not claim prejudice. Finally, Amn Moore maintains that the Government's docketing of an incomplete record of trial did not toll the clock under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

With regard to their boundaries on sexual activity, she told Amn Moore that anything "below the belt" was off the table, but for "above the belt" she stated that:

> I don't think we had, like, a super detailed, explicit conversation about it. At one point I did express that I was uncomfortable with that, not necessarily touching, but just, like, I guess him seeing my boobs or touching them. And in the other occasion, I basically asked him to, like, take my shirt off is what I did.

(R. at 8.) When JH interviewed with OSI, she told agents that Amn Moore was always respectful, never pressured her, and did not make her uncomfortable with sexual activity. (App. Ex. XIX.) When OSI informed her of the specifics of AB's allegation, JH became upset and broke up with Amn Moore that same day. (*Id.*) The first time JH ever made her allegation was to the trial counsel in a pretrial interview. (R. at 3.) She claimed she had told close friends; during her court-martial testimony she confirmed that she refused to provide any of those names. (R. at 3–4, 534.)

The military judge denied the Defense motion. (App. Ex. X.) On the second *Wright* prong, he concluded that, despite JH's conflicting statements and motive to fabricate, that a panel could find Amn Moore committed the uncharged sexual offense against JH by a preponderance of the evidence. (*Id.* at 5.) On the third prong, he found the evidence relevant under Mil. R. Evid. 401 and 402. (*Id.*)

In applying the *Wright* factors, the military judge found JH's testimony weighed in favor of admission. (*Id.* at 6.) On the probative weight, he wrote that the "alleged behavior in the charged and uncharged acts involves similar sexual acts, in substantially similar settings, occurring close in time to one another." (*Id.*) He found no potential for less prejudicial evidence, and that limited time and distraction would

result. (*Id*.) He found the temporal proximity of the uncharged offense and the frequency of the acts also weighed in favor of admission. The military judge concluded no significant intervening circumstances existed between the charged and uncharged acts. (*Id*.) Finally, he reasoned that Amn Moore had a "similar relationship" with both alleged victims. Specifically, he wrote that:

> Both alleged victims had a close enough relationship with the Accused to grant him access to their homes and bedrooms without any others present and to engage in some consensual physical contact preceding the assaults. While JH and the Accused had a dating relationship, and AB and the Accused did not, the is difference is not particularly significant given the other similarities in the status of the parties involved.

(*Id.* at 7.)

Standard of Review

A military judge's decision to admit evidence pursuant to Mil. R. Evid. 413 is reviewed for an abuse of discretion. *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016). A military judge abuses his or her discretion when: "(1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts." *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

Law

Mil. R. Evid. 413, an exception to Mil. R. Evid. 404(b)'s general prohibition of propensity evidence, provides a mechanism to admit evidence of similar crimes in sexual assault cases. The military judge must first find: (1) that the accused is

charged with an offense of sexual assault; (2) that the proffered evidence is evidence of another sexual assault offense; and (3) that the evidence is relevant under Mil. R. Evid. 401 and 402. *Wright*, 53 M.J. at 482.

If this threshold is met, evidence is still "subjected to a thorough balancing test under [Mil. R. Evid.] 403." *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005). "The importance of a careful balancing arises from the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *United States v. James*, 63 M.J. 217, 222 (C.A.A.F. 2006). Factors to consider in analyzing evidence under Mil. R. Evid. 403 include:

> [s]trength of proof of the prior act -- conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of [the] factfinder; and time needed for proof of prior conduct . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties.

Wright, 53 M.J. at 482 (citations omitted).

Analysis

1. The military abused his discretion when he admitted evidence from JH under Mil. R. Evid. 413.

Amn Moore concedes the first threshold *Wright* findings is met: he was charged with sexual assault. But the second threshold finding is less clear. What JH describes is not abusive sexual contact but rather a young couple finding the boundaries of their expanding sexual relationship. Amn Moore would have a mistake of fact as to consent defense against this charge. The military judge should have found JH's evidence failed that threshold finding. This underscores why the evidence lacks relevance and fails the third *Wright* requirement. But Amn Moore's strongest

argument rests on the application of the *Wright* factors—this is where the military judge's misunderstanding of the evidence becomes clear.

The overarching flaw in his analysis was to treat what is dissimilar as similar. It begins with the purported probative weight of the evidence. The military judge stated that the "charged and uncharged acts involve[d] similar sexual acts." (App. Ex. X at 6.) But they do not. Amn Moore faced a charge for penetrative sexual assault, and what JH alleged, if it was an offense at all, was abusive sexual contact. The difference in the allegations is critically important, but the military judge seems to have glossed over it. JH described a relationship with some firm boundaries—no sex and nothing below the belt—and some not-so-firm. Regarding "above the belt" sexual behavior, her testimony betrayed the lack of clarity. There was no "super detailed, explicit conversation." (R. at 8.) She elaborated that "[a]t one point I did express that I was uncomfortable with that, not necessarily touching, but just, like, I guess him seeing my boobs or touching them. And in the other occasion, I basically asked him to, like, take my shirt off is what I did." (*Id.*) In a relationship with an undefined boundary, especially one where it was permissible to kiss with no shirts on, it is not a leap for Amn Moore to think he would have consent for touching her breast. She was previously "uncomfortable" with him seeing her breasts, until she wasn't. (*Id.*) If Amn Moore's move to slightly expand their sexual relationship was an offense, it was of a different nature and magnitude from AB's allegation. Moreover, Amn Moore would have a defense against JH's allegation in that she

seemed to relax when he said "shh, relax," and then he continued. When he sensed she was uncomfortable, he stopped immediately.

The contrast with AB is apparent. And it also draws upon the other key error the military judge made: assessing the relationship of the parties involved. AB and JH were not similarly situated. What happens in testing the boundaries in a developing sexual relationship with a significant other is different than sexually assaulting someone while they slept, which is at least how AB lodged her allegation.

To summarize, the differences are many: existing sexual relationship versus none; awake versus asleep; penetration versus touching. But the military judge's analysis glossed over these differences and admitted the evidence. Correctly applying the *Wright* factors, he should have concluded that the evidence, with its marginal probative value, failed a Mil. R. Evid. 403 balancing test. The result was that the Government was able to buttress its weak case with propensity evidence.

2. The erroneous admission prejudiced Amn Moore.

This Court evaluates improperly admitted evidence for prejudice by weighing "(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. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

First, the Government's case had substantial holes. As explained in AOE I, *supra*, AB, who herself has credibility and truthfulness problems and manipulated witnesses to achieve a result, made a physically improbable complaint. Second, the

Defense's case strongly presented the improbability of the offense with cross-examination, photographs, and physical evidence.

Third, the evidence was highly material. It filled gaps in the Government's case by allowing it to conflate charged and uncharged conduct and portray Amn Moore as a serial offender.[8] This powerful argument rested upon evidence of fleeting probative value. Finally, the quality of the evidence was substantial. JH's live testimony allowed the Government to craft a pattern of behavior where none previously existed. The Government's emphasis on JH during argument is further indication of the evidence's quality.

Taken together, the factors weigh in favor of prejudice. The military judge's abuse of discretion injected prejudicial propensity evidence into the trial that should have failed a Mil. R. Evid. 403 balancing test, and ultimately distracted the members from the underlying question of guilt.

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[8] R. at 562 ("And members, frankly, it's a mistake that you know Airman Moore has made before. Just weeks prior to this, he'd done a very similar thing in a very similar situation to another female[.]"); R. at 563 ("So whether it's intentional, 'I'm seeking this out,' or whether it's more just he stops thinking, he lets his hormones take the wheel, he abdicates responsibility and does what he wants, the end result is the same. He sexually assaulted [JH], and weeks later he does the same thing to [AB]."); R. at 575 ("Members, this is a part of his propensity. It's a part of who he is. He is inclined, when a young woman is lying next to him, and perhaps he feels sexually aroused. You know, members, they weren't having sex, him and his girlfriend, so whatever sexual frustrations he has with that. He has two different instances where a young woman is lying next to him, they are not consenting to any kind of sexual activity. One is actually fully asleep. One is just trying to lie next to him and spoon with him, just to be close to him. But he, in those moments, lets his sexual urges get the better of him, and he starts to touch them in ways they don't consent to. Even if they are asleep."); R. at 576 (the STC calling it an "incredible pillar[]" that "JH [came] in here and sa[id], yes, this is just a part of who Airman Moore is").

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

III.

THE SPECIAL TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE OFFERED THE MEMBERS A SCIENTIFIC THEORY OF HIS OWN CREATION AS A BASIS TO BELIEVE AB, AND FURTHER BOLSTERED AB'S TESTIMONY BY HIGHLIGHTING HOW OTHER PEOPLE CREDITED HER STORY.

Additional Facts

The STC as Expert

In addressing the anticipated Defense suggestion of "how impossible it could be that somebody could sleep and move around in their sleep," the STC asked the members to use their "common sense and knowledge of the ways of the world" to understand "different types of sleep." (R. at 566–67.) He launched into what "we learn in high school and basic classes, REM cycles." (R. at 567.) The Defense objected to facts not in evidence, but the military judge overruled the objection. (*Id.*) The STC continued:

> Members, you don't need an expert to tell you that there are different cycles of sleep. This is common knowledge. People go through different cycles of being in a deep sleep, coming up into a light sleep, a deep sleep again. Around this time, presumably, [AB] would have been going into a deep sleep. She's been asleep for about an hour. And when you're in a light sleep, sure, you might wake up easily by someone touching you or rubbing you. When you're in a deep sleep, you may not.

(R. at 567.) For the next two pages of trial transcript, the STC used this light versus deep sleep comparison to explain what AB managed to sleep through. (R. at 567–69.) This included comparing the situation to when a small child is moved from one

location to another while sleeping, including having their clothes changed. (R. at 567–68.) He argued, "In her subconscious state sleeping, she's not going to think that that's strange that her body might be moving around a little bit, as she's rotating from one side of the couch to basically the other side of the couch, or whatever else had happened." (R. at 568.)

He then suggested that because AB was one year removed from being a teenager, this was comparable to people in "the same demographic" who would play pranks on one another involving shaving cream and a feather, or waking up with a writing on the body, or placing someone's hands in water to see if they urinate on themselves. (*Id.*) He argued, "People can sleep through a lot of things if it's a deep sleep that they are in, if they are in that cycle. It's not strange. It's not abnormal." (*Id.*)

Finally, in accounting for how she woke up, he explained that:

> Perhaps it started waking her up already and she started to come out of it, you know, from that deep sleep. This is bringing her into a lighter sleep. Whatever it is, by the time he's actually coming and kissing on the side of her face and putting his finger inside of her vulva, she wakes up. She knows that. That's too much. That's pushed too far, even whatever deep sleep she was in, that has brought her out of it.

(R. at 569.) He closed this section by stating that "[y]ou can be in your sleep and somewhat cognizant of what is physically happening to you, but you're not fully conscious. You don't really know what's going on. And she didn't either." (*Id.*)

Bolstering AB

In the second half of the argument, the STC repeatedly emphasized that AB was telling the truth: he also called her "genuine reaction witnessed by so many

different individuals" one of the "four incredible pillars" of the case. (R. at 576.) In explaining that AB went through a SANE exam, he argued that she did it not for fun, but "because she's just been sexually assaulted, members." (R. at 571.) He called her reaction "exactly how you would hope a victim would. Immediate, clear. Her emotional response is authentic; it is genuine." (*Id.*) The STC argued that what happened in the room was "clear based on all these reactions, not just her own testimony of what happened in that room." (*Id.*)

The STC transitioned to her flight chief's perception: "He, of course, tells you all about the reaction that he's seen, the impressions that he gets that he knows something happened. It's obvious. You can just look at her and [SrA BM]. You know what's happened, something real serious." (*Id.*) He said "you have the reaction of the true victim." (R. at 572.) He again circled back to AB's reactions, telling the members that, besides her testimony, you have "the eyewitnesses of [AB's] genuine emotional response," continuing to argue:

> Again, members, context matters here. The fact that you can see what happened immediately after speaks to her credibility, that you have [SrA BM] -- or [A1C AS] who heard crying. [SrA BM] sees all this, right? Goes through this entire emotional experience with her. [The sexual assault forensic nurse], hours later, still sees that she has puffy eyes. It's clear she's had a very tough, emotional night. [Her flight chief] the next morning even says that he could tell that she had been crying. She has a night full of crying. Why, members? Why? Because she was sexually assaulted.

(R. at 574.) After arguing that the members should believe AB because otherwise she would be committing perjury (R. at 576), he rebutted the anticipated Defense attack on her credibility by arguing:

> This is what happens if you are a victim of sexual assault. You get to then come in here in court and sit before you, members, testify about what happened again for the umpteenth time and then go under cross-examination, have the defense counsel get up there and go after every single possible inconsistency there might be and what you said when this happened a year ago versus now, every little detail, every possible way they might call you a liar. These, members, are the benefits of reporting a sex assault allegation.
>
> So why? Again, that is your question, members: Why is she doing this? She's doing it because it happened, because it's true. You saw her genuine emotion up here. Now, she's not an emotional person. She does not wear her emotions on her sleeve. You heard that from [her flight chief]. That's not who she is. This is difficult for her. But you saw those tears. You know what they meant. This is a real, genuine experience that happened to her, and she's telling the truth.

(R. at 579–80.)

In rebuttal, the STC suggested the Defense tried to "construct [a standard that] would make it an impossibility for anyone to ever be a victim and for anyone to ever be found guilty." (R. at 617.) He contended that AB was "a victim who's told you the truth, and you know she told you the truth because she has no motive to lie, and she's corroborated by the evidence." He told the members, "The gauntlet was laid down, members, that defense could not give you a single reasonable motivation why she went through all this, why she's lying to you. Again, victims can lie, but they need to have a motivation." (R. at 617.)

The Defense did not object to the arguments in this section.

Standard of Review

Where defense counsel objects, this Court reviews improper argument de novo. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). Where the defense fails to object, this Court reviews for plain error. *United States v. Andrews*, 77 M.J. 393, 398

(C.A.A.F. 2018). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law and Analysis

1. The STC leveraged a manufactured scientific principle to explain the inexplicable.

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (cleaned up) (citations omitted). The CMA "has consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'" *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975)). In this case, the Government choose not to call an expert on sleep patterns. Instead of providing a scientific basis in the evidence, it used argument based only on the STC's memory of "high school and basic classes." (R. at 567.) This was improper.

A key issue in the court-martial, and the focus of the Defense's strategy, was to highlight the improbability that AB slept through all the manipulations required for her story to make sense. To help explain the inexplicable, the STC gave the members his own version of sleep science to create a light versus deep sleep dichotomy, then applied it to the facts. This, in short, is the role of an expert. The

Defense appropriately objected, and the military judge overruled the objection, giving judicial imprimatur to the baseless scientific explanation.

He told the members, "presumably," AB was going into "deep sleep" because she has been "asleep for about an hour." (R. at 567.) There is nothing the record that shows that sleep is deep at the one-hour mark, setting aside that when she actually fell asleep was unclear and highly contested. Furthering the scientific analysis, he told the members that "in her subconscious state sleeping, she's not going to think that's strange that her body might be moving around a little bit." (R. at 568.) This is rank speculation.

The STC also used inapplicable examples to argue the plausibility of AB's story, drawing a false parallel to young children. Even when the age was closer, the STC urged the members to think of people in the "same demographic" playing pranks on each other, like drawing on each other. (R. at 568.) But those kinds of pranks are associated with drinking alcohol, not just with the STC's formulation of "deep sleep." This problematic deep versus light sleep construct continued in the STC's explanation of how AB eventually woke up. That, too, was unmoored from any scientific evidence. He closed that portion of the argument by stating, "You can be in your sleep and somewhat cognizant of what is physically happening to you, but you're not fully conscious. You don't really know what's going on. And she didn't either." (R. at 569.)

The STC buttressed the Government's case with a evidence-free scientific explanation for what occurred. This was improper argument.

2. The STC bolstered AB.

The STC sought to bolster AB's testimony throughout the argument. Not only did he personally vouch that her testimony was true, but he called her "genuine reaction witnessed by so many different individuals" one of the "four incredible pillars" of the case. (R. at 576.) Breaking that down demonstrates why the argument is improper. The STC is asking the members to believe AB because other people believed AB. This transforms testimony into human lie detector evidence.

Human lie detector evidence is elicited when a witness provides "an opinion as to whether a person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (cleaned up). Where a witness does not explicitly express a belief about a person's truthfulness, courts examine whether the testimony is the "functional equivalent of" human lie detector testimony. *See United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007). "Testimony is the functional equivalent of human lie detector testimony when it invades the unique province of the court members to determine the credibility of witnesses, and the substance of the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial." *United States v. Martin*, 75 M.J. 321, 324 (C.A.A.F. 2016) (citations omitted). Such evidence is inadmissible because "it is a fundamental premise of our criminal trial system that the panel is the lie detector and determines the weight and credibility of witness testimony." *Id.* (cleaned up) (citing *United States v. Scheffer*, 523 U.S. 303, 313 (1998)).

This issue is obviously about argument, not admissibility of evidence. But the same concerns resonate when the STC puts an impermissible gloss on the evidence. The STC sought to filter the members' credibility determination through other witnesses' perceptions. He asked the members to consider "not just [AB's] testimony of what happened in that room," but "all these reactions" of people she spoke with afterwards. (R. at 571.) The STC argued that the flight chief and the "reaction he's seen" was enough that "you know what's happened, something real serious." (*Id.*) It was, the STC phrased it, the "reaction of the true victim." (R. at 572.) It went beyond the flight chief. It included the sexual assault forensic nurse, SrA BM, even A1C AS—who only heard AB crying but had no idea why at the time. (R. at 574.)

The STC also improperly blamed the Defense for what it takes for a complaining witness to go through a court-martial. After ticking through the supposed indignities AB had to suffer, he rhetorically asked the members, "Why is she doing this?" And he gave the improper answer: "She's doing it because it happened, because it's true." (R. at 579–80.) The STC further blamed the Defense for constructing a standard such that it would be "impossib[le] for anyone to ever be a victim," and then engaged in burden shifting by telling the members that the Defense could not give a single reasonable motivation for why AB would lie. (R. at 617.) As the STC told it, "[V]ictims can lie, but they need to have a motivation." (*Id.*)

The Defense is not responsible for producing anything, nor it is responsible for the difficulties of going through a court-martial. On either point, the STC placed the Defense in the crosshairs for the members, rather than focusing on the evidence and

the Government's burden. The STC's bolstering, burden shifting, and blaming was plain and obvious error.

3. The repeated misstatements prejudiced Amn Moore.

Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher,* 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). The CAAF outlined a balancing approach of three factors for assessing prosecutorial misconduct's prejudicial effect: "(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. This Court considers whether "trial counsel's comments, taken as a whole, were so damaging that [it] cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

The misconduct's severity meets the first *Fletcher* factor. The STC used argument, rather than evidence, to fill an evidentiary hole in the Government's case: How could someone sleep through what AB claims to have slept through? The STC also repeatedly bolstered AB's credibility, largely by focusing on how *others* perceived her reaction. But her credibility is for the members alone to determine, and this was akin to using human lie detector evidence.

On the second *Fletcher* factor, the military judge's curative efforts were non-existent. On the first issue—the STC creating his own scientific explanation—the military judge made it worse when he overruled the objection and allowed the STC to make the argument in the first place. And for the second, while defense counsel should have objected, military judges cannot simply be "figureheads" nor "umpires"

in the "contest between the Government and accused; they too have a *sua sponte* duty to ensure the accused receives a fair trial." *United States v. Voorhees*, 79 M.J. 5, 14 (C.A.A.F. 2019) (cleaned up).

On the third *Fletcher* factor, the weight of the evidence supporting the conviction raises serious doubts about whether the Government met its burden. *See* AOE I, *supra.* Where the Government focused on AB's reaction—rather than the improbability of her story—the argument on "deep sleep" and the witness-assisted bolstering could have made the difference. The members could have filled the gaps in the Government's case with improper argument. In sum, the STC's repeated improper arguments prejudiced Amn Moore, and this warrants setting aside the finding and sentence.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

IV.

THE GOVERNMENT VIOLATED AIRMAN MOORE'S DUE PROCESS RIGHTS BY PURSUING HIS CONVICTION UNDER AN UNCHARGED THEORY OF CRIMINALITY.

Additional Facts

AB testified she was asleep when the penetration occurred. (R. at 324.) It is unclear the precise timing on whether she was fully awake when she alleges Amn Moore removed his fingers. (R. at 324–25.) The military judge instructed the members that a sleeping person cannot consent. (R. at 553.) During closing argument, the STC argued the interaction of sleep and consent as follows:

> But more specifically for our case, 'A sleeping person cannot consent.' Legally, of course, that is an impossibility. So whether, members, [AB] was completely asleep, as she says, or even if defense wants to come up here and say, members, she was half-asleep, she was mumbling, she was sleep talking, is that actually consent? Of course not. You can't consent in that state.

(R. at 572–73.) During rebuttal, he argued that "what you have here, which is someone actually having a wake-up moment in the middle of an actual interaction of a sexual assault. She was asleep before. Something happened that then caused her to, bam, wake up." (R. at 616.)

Standard of Review

Due process challenges to fair notice are reviewed de novo. *See United States v. Ginn*, No. ACM 38551, 2015 CCA LEXIS 334, at *24 (A.F. Ct. Crim. App. 17 Aug. 2015) (unpub. op.). Questions of statutory interpretation are reviewed de novo. *United States v. Sager*, 76 M.J. 158, 161 (2017).

Law and Analysis

The charge sheet alleged sexual assault under a "without consent" theory. But STC urged the members to convict Amn Moore because AB was asleep. Thus, the members may have convicted Amn Moore based on a theory absent from the charge sheet. Even a possibility that this occurred requires reversal. The Government cannot demonstrate this error was harmless beyond a reasonable doubt.

1. Due Process requires that the charging theory align with the theory of conviction.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S.

CONST. amend. V. This precludes the Government from convicting an accused of an offense for which he has not been charged. *See United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Marshall*, 67 M.J. 418, 421 n. 3 (C.A.A.F. 2009)). "Thus, when all of the elements are not included in the definition of the offense of which the defendant is charged, then the defendant's due process rights have in fact been compromised." *Id.* (cleaned up).

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *United States v. Teffeau*, 58 M.J. 62, 67 (C.A.A.F. 2003) (quoting *Dunn v. United States*, 442 U.S. 100, 106–07 (1979)). Due process requires that "[t]o prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added). The CAAF has likewise observed that "the government controls the charge sheet" and "[t]he defense [is] entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

2. Article 120's theories of culpability are not interchangeable.

Article 120, UCMJ, contains multiple theories of culpability for sexual assault. Article 120(b)(2)(A), UCMJ, addresses commission of a sexual act without the other person's consent. A different subsection prohibits the commission of "a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is

occurring[.]" Article 120(b)(2)(B), UCMJ. Article 120 defines the term "consent" and explains that "all the surrounding circumstances" are to be considered in determining whether it existed. Article 120(g)(7), UCMJ. A single paragraph sets forth the categorical situations when an adult cannot, as a matter of law, consent to sexual activity, to include where that person is asleep, or unconscious, or incompetent. *See* Article 120(g)(7)(B), UCMJ.

In *United States v. Riggins*, CAAF noted the difference between the burden to prove facts which establish an individual's "*legal inability to consent*" and the burden to prove that an individual "*did not, in fact, consent*." 75 M.J. 78, 84 (C.A.A.F. 2016) (emphasis in original). One year later, in *Sager*, CAAF held that the words "asleep, unconscious, or otherwise unaware"—also separated by "or"—represent three distinct theories of liability. 76 M.J. at 162. CAAF concluded that to hold otherwise would violate the surplusage canon of construction because it would render language within the same statutory scheme superfluous. *Id.*

The ordinary meaning of the disjunctive "or" separating pertinent portions of the statute "marks an alternative which generally corresponds to the word 'either.'" *Sager*, 76 M.J. at 161 (internal citations and quotations omitted). As in *Sager*, a disjunctive modifier directly separates the "without consent" and "asleep" theories under Article 120(b)(2), UCMJ. Yet here this distinction was ignored.

If Congress understood "without consent" as encompassing the "asleep" theory of criminality, there would have been no reason to draft distinct theories of criminality in separate subsections of the statute. To illustrate the point further,

Congress's decision to include a specific mens rea in Article 120(b)(2)(B), UCMJ, would serve no purpose if the prosecution is free to pursue a "without consent" theory that does not contain such a statutorily set forth mens rea in Article 120(b)(2)(A), UCMJ. As CAAF observed when interpreting the 2012 version of Article 120, UCMJ:

> In Article 120(b)(2) and 120(b)(3) . . . Congress provided an explicit mens rea that the accused "knows or reasonably should know" certain facts: that the victim is unaware of the sexual act or incapable of consenting to it. By contrast, under Article 120(b)(1)(B), it is an offense simply to commit a sexual act without consent. The fact that Congress articulated a specific mens rea with respect to the victim's state of mind elsewhere in the statute further demonstrates that the required mens rea in this case is only the general intent to do the wrongful act itself.

United States v. McDonald, 78 M.J 376, 380 (C.A.A.F. 2019).[9]

Moreover, if the Government is free to argue—as the STC did here—that AB could not consent because she was asleep, this undermines the framework Congress devised. It fails to honor the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted), *superseded by statute as stated in Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020). Put simply, if Congress had intended for the Government to obtain sexual assault convictions on a "without consent" theory by

[9] That the Government could effectively ignore a statutorily prescribed mens rea is cause for concern in and of itself. *See United States v. Wheeler*, 77 M.J. 289, 293 (C.A.A.F. 2018) (noting that the Government may not use Article 134, UCMJ, to lessen its evidentiary burden at trial by circumventing a mens rea or removing a specific vital element from an enumerated offense).

arguing that the victim lacked the legal capacity to consent because she was asleep, then there would have been no point including Article 120(b)(2)(B), UCMJ, within the UCMJ. *Cf. United States v. Pulsifer*, 144 S. Ct. 718, 218 L. Ed. 2d 77, 92 (2024) ("that kind of superfluity, in and of itself, refutes [the contrary] reading").

The Government here could have charged in the alternative. Indeed, "the nuances and complexity of Article 120, UCMJ . . . make charging in the alternative an unexceptional and often prudent decision." *United States v. Elesperu*, 73 M.J. 326, 329–30 (C.A.A.F. 2014). Because the case was not presented in the alternative, there is no way of knowing which of the two theories the panel used to convict Amn Moore: (1) that AB had the capacity to consent but did not consent (as charged); or (2) that Amn Moore knew or reasonably should have known she was asleep (as the Government argued).

Additionally, the military judge's instructions further aggravated this issue when he blended the instructions for an "asleep" or "incapable of consenting" theory with the instructions for a "without consent" theory. This, in turn, created a fundamental error of constitutional magnitude. By allowing the Government to argue a theory of liability that had not been charged, Amn Moore was not provided with notice consistent with the demands of due process. The due process principle of fair notice mandates that "an accused has a right to know what offense *and under what legal theory* he will be convicted[.]" *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (internal citation and quotation omitted) (emphasis added). Based on the military judge's instructions and the Government's arguments, however, it is

entirely possible the panel members convicted Amn Moore because they found that AB was an "incompetent person" due to her claim of being asleep, and thus could not legally consent.

3. Prejudice

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732–33 (1993). Constitutional error is tested for prejudice under the standard of "harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal citation omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (internal quotations and citation omitted). "An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of might have contributed to the conviction." *Hills*, 75 M.J. at 357 (cleaned up). The Government bears this burden. *Riggins*, 75 M.J. at 85. Given the weakness of proof and the STC's argument, this Court cannot be certain, beyond a reasonable doubt, that the error was harmless.

4. Conclusion

Given the military judge's errors and the trial counsel's theory-blending argument, there is a substantial likelihood that Appellant stands convicted under a

different theory than that alleged on the charge sheet. As such, the Government cannot prove beyond a reasonable doubt that the errors were harmless.[10]

WHEREFORE, Amn Moore respectfully request this Honorable Court set aside the finding.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
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[10] Amn Moore recognizes this Court has repeatedly ruled against this issue or variations of it. *See, e.g.*, *United States v. Williams*, No. ACM , 2021 CCA LEXIS 109, at *57–58 (A.F. Ct. Crim. App. 12 Mar. 2021) (unpub. op.). The CAAF has granted review in a case with close parallels, and this Court should address this issue in line with that case. *See United States v. Mendoza*, No. 23-0210/AR, 2023 CAAF LEXIS 699 (C.A.A.F. 10 Oct. 2023).

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 matters:

V.

AIRMAN MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

Amn Moore elected trial by officer and enlisted members. (R. at 22.) Amn Moore's panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty." (R. at 295, 618.) It is unknown whether the members convicted Amn Moore by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following

Ramos, Amn Moore was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's guarantee of equal protection.

There is no way of knowing whether a nonunanimous verdict secured any or all of Amn Moore's convictions. But that is a problem for the Government, not Amn Moore. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . .").

Amn Moore recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

VI.

AS APPLIED TO AIRMAN MOORE, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

Additional Facts

After his conviction, the Government determined that Amn Moore's conviction qualified for a firearms prohibition under 18 U.S.C. § 922, although the specific provision is not listed. (EOJ; Statement of Trial Results (STR), 2 Aug. 2022.)

Standard of Review

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

1. 18 U.S.C. § 922 is unconstitutional as applied to Amn Moore.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2129–30 (citation omitted).

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1,142 S. Ct. 2111, 2130 (2022).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Amn Moore, who stands convicted of sexual assault that, as charged, was not a violent offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id.* at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny],

burglary, and housebreaking." *Id.* at 701 (quotations omitted). Amn Moore was charged with sexual assault, not rape. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *pet. filed*, No. 23-374 (U.S. 5 Oct. 2023).[2] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the

[2] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. 18 Oct. 2023.)

traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal 'felon' disability—barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

This is not the only provision of § 922 to have come under fire since *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution

presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id.* at 460. If the Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed-upon domestic violence restraining order violation, then it similarly does not include barring Amn Moore from *ever* possessing firearms for a nonviolent offense.

In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id.* In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, § 922(g)(1) is unconstitutional as applied to Amn Moore.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 Rules for Courts-Martial (R.C.M.), this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex

offender." 82 M.J. 263, 2022 CAAF LEXIS 182, at *1 n.* (C.A.A.F. 2022) (decision without published opinion). This disposition stands in tension with *Lepore*.[3]

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[4] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the STR and EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32,

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[3] The CAAF is currently reviewing this issue in *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. Jan. 24, 2024) (granting review on application of another § 922 subsection).

[4] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

the STR and EOJ must include whether the offenses trigger a prohibition under § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the Rules for Courts-Martial now require—by incorporation—a determination on whether the firearm prohibition is triggered.[5] Thus, this Court can rule in Amn Moore' favor without taking the case en banc. If this Court disagrees, Amn Moore offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, Amn Moore respectfully requests this Court hold § 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

VII.

AMN MOORE'S SEXUAL ASSAULT CONVICTION IS LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v.*

[5] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpub. op.) (ordering correction of an STR because it incorrectly stated § 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpub. op.) (ordering correction of the STR to change the Section 922(g)(1) designator to "No").

Robinson, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

For the reasons discussed in AOE I, Amn Moore's conviction for sexual assault is legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove his guilt beyond a reasonable doubt. Furthermore, to the degree that the CAAF treated the issue in Assignment of Error IV as one of legal sufficiency rather than due process, Amn Moore asserts that the evidence is legally insufficient because of the mismatch between the charging theory and the evidence.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 April 2024.

MATTHEW L. BLYTH, Maj, USAFR
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[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH A DOCUMENT**
v.	)	Before Panel No. 1
Airman (E-2) **NICHOLAS J. MOORE** United States Air Force *Appellant.*	)	No. ACM 40442 19 April 2024

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully requests to attach the following appendix to this motion:

A. Appendix – Memorandum For Record – *AFCCA Remand of United States v. Nicholas J. Moore (ACM 40442)*, dated 19 April 2024, (1 page)

This Court remanded the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record. (*Order*, dated 21 March 2024.) The remand order specified that the record of trial be returned to this Court no later than 18 April 2024. (Id.) Next, this Court explained that "[s]hould the 18 April 2024 deadline not be met, the Chief Trial Judge, Air Force Trial Judiciary, or his designee, shall provide a memorandum for record not later than 19 April 2024 to the Government Trial and Appellate Operations Division (JAJG) to submit top this court as a motion to attach." (Id.) The record of trial was not returned to this Court by the 18 April 2024 deadline. Therefore, pursuant to this Court's 21 March 2024 remand order, the United States moves to attach the memorandum for record from the Air Force Trial Judiciary.

As noted in the memorandum for record, the Military Justice Law and Policy Division, Appellate Records Branch, forwarded the record of trial to the Court on 19 April 2024.

WHEREFORE, the United States respectfully requests that this Honorable Court grant the motion to attach the document.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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MARY ELLEN PAYNE
Associate Chief
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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 19 April 2024.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION TO**
Appellee	)	**ATTACH DOCUMENTS**
	)	
v.	)	
	)	No. ACM 40442 (f rev)
Airman (E-2)	)	
NICHOLAS J. MOORE	)	Before Special Panel
United States Air Force	)	
Appellant	)	17 May 2024

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman (Amn) Nicholas J. Moore, by and through counsel, hereby moves to attach court member data sheets to the Record of Trial (ROT). The data sheets and associated Single Unit Retrieval Format (SURF) summaries[1] of personnel data are 48 pages and were created on various dates. These data sheets are relevant and necessary to resolve the supplemental assignment of error, which alleges that the convening authority improperly considered gender when selecting the pool of potential members in this case. *See United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023). The original convening authority received these court member data sheets to review before detailing members to the court-martial, thus the data sheets

[1] Although Rule 17.2(d) of this Court's Rules of Practice and Procedure indicates that attachments to filings are not subject to specific redaction requirements, it requires the exclusion of sensitive personal data to the extent practicable. Thus, the court member data sheets attached in the Appendix have been redacted to remove personally identifiable information, including social security numbers, dates of birth, phone numbers, and e-mail addresses.

represent the information about each potential member available to the convening authorities at the time of detailing. In fact, the court member data sheets in the Appendix are listed as attachments to the pretrial advice and the request for additional court members. (Pretrial Advice, 26 May 2022; Request for Release and Nominees for Replacement Members, 3 Jan. 2023). However, the attached data sheets are only associated with the pretrial advice since counsel could not obtain the remaining data sheets.

Attaching these documents is consistent with *United States v. Jessie* because their consideration is required to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). Since the data sheets were an attachment to documents in the record and show the information provided to the convening authority when detailing members to the court-martial, these data sheets are necessary to resolve an issue raised by the record and may be considered by this Court. *Jessie*, 79 M.J. at 444.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion to attach.

Respectfully submitted,

[redacted]

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24 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	OPPOSITION TO MOTION TO ATTACH DOCUMENTS
v.	)	
	)	ACM 40442 (f rev)
Airman (E-2) NICHOLAS J. MOORE, USAF *Appellant*.	)	Special Panel

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach Documents, dated 17 May 2024.

Opposition to Motion to Attach

The United States opposes the attachment of court member data sheets and associated Single Unit Retrieval Format (SURF) summaries because they are matters outside the record and are not "necessary to resolve an issue raised by the record" pursuant to United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

This Court is reviewing this case pursuant to Article 66(d)[1], UCMJ. When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present

[1] References in Jessie to Article 66(c), UCMJ, are to the version of the statue in effect before implementation of the Military Justice Act of 2016, as incorporated into the 2019 Manual for Courts-Martial, United States. The substantive language of the previous Article 66(c) is now found in Article 66(d) and has not materially changed. Therefore, Jessie's references to Article 66(c) should be presumed to apply to the post-2019 Article 66(d).

"regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

The Court may consider matters outside the record where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Id. at 444-45. The default is a rule of exclusion "because the text of Article 66(c), UCMJ, does not permit the [courts of criminal appeals] to consider matters that are outside the entire record." Id. at 445. This rule of exclusion reflects the notion that, for military justice proceedings to be "truly judicial in nature," appellate courts cannot consider information when it "formed no part of the record." *See* United States v. Fagnan, 30 C.M.R. 192, 195 (U.S.C.M.A. 1961).

Here, Appellant asks this Court to attach court member data sheets and the accompanying SURF printouts to the record on the grounds that they are "relevant and necessary to resolve [Appellant's] supplemental assignment of error, which alleges that the convening authority improperly considered gender when selecting the pool of potential members in this case." (App. Mot. at 1, *citing* United States v. Jeter, 84 M.J. 68 (C.A.A.F. 2023)[2].)

The problem for Appellant, however, is that the issue he alleges—impermissible use of gender in court member selection—can only be raised using matters currently outside the record. (*See* generally App. Mot. at 1.) Appellant has not articulated how the issue of improper member selection is raised by any materials currently in the record, such that the attachment of court member data sheets would be necessary to resolve it. Jessie, 79 M.J. at 442. To start, Appellant raised no motions about improper panel constitution at trial, nor were there any related

[2] In Jeter, our superior court held that "[i]t is impermissible to exclude or intentionally include prospective members based on their race." 84 M.J. at 73.

objections at trial. (*See* generally R. at 1-292; *see also* Exhibit Index.) Further, the word "gender" appears only once in the transcript—when the military judge asks for the "gender-neutral reason" for a challenge—and is never invoked in relation to improper panel constitution. (R. at 293.) Appellant cannot—and has not—pointed to anything in the transcript, exhibits, or allied papers that even hints at improper panel constitution.

Appellant, for his part, suggests that the attachment of the court member data sheets to documents provided to the convening authority—such as the pretrial advice, which is included in the record—is sufficient to raise the issue of which he complains.[3] (App. Mot. at 2.) But just as the mere fact of an appellant's sentence to confinement did not "raise[] an issue regarding [the confinement facility's] policies," Jessie, 79 M.J. at 444, the fact that member data was referred to on other pretrial papers within the record does not—without more—raise the issue of improper panel constitution based on race. *Cf.* Jeter, 84 M.J. at 71 (where the trial defense litigated the issue of "systematic exclusion of members based on race and gender" at the trial level); *see also* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("We will not presume improper motives from inclusion of racial…identifiers on lists of nominees for court-martial duty."). The issue of improper panel selection was not "raised by materials in the record," so outside materials are not necessary, and therefore not authorized, to resolve it. Jessie, 79 M.J. at 444-45.

Moreover, as addressed in the Government's Opposition to Appellant's Motion for Leave to File Supplement Assignment of Error, Appellant has failed to show good cause as to why this Court should review Appellant's untimely supplemental assignment of error at all. Accordingly,

[3] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with DAFMAN 51-203, *Records of Trial*.

this Court should deny Appellant's Motion for Leave to File Supplement Assignment of Error, which would then render this instant motion moot.

CONCLUSION

Because there is nothing in the extant record that raises the issue of member nominations based on gender, the court member data sheets are neither necessary nor relevant. *See* Jessie, 79 M.J. at 442. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion to attach court member data sheets.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 24 May 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman (E-2) **NICHOLAS J. MOORE,** United States Air Force *Appellant*	)	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR AND SUPPLEMENTAL ASSIGNMENT OF ERROR** Before Special Panel No. ACM 40442 (f rev) 17 May 2024

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

Pursuant to Rules 18.4 and 23(d) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Nicholas J. Moore, moves for leave to file a supplemental assignment of error.[1] Pursuant to Rule 23(d), Amn Moore's motion for leave to file is combined with the underlying supplemental assignment of error, which is attached as an appendix. As good cause for this motion, Amn Moore only recently became aware, through counsel, of *United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023) and its potential implications on his case. Since Amn Moore became aware of the issue, counsel has encountered delays and difficulty trying to obtain the underlying court member data sheets and was able to obtain only the initial pool of members. Undersigned counsel does not raise this issue; rather, it is Amn Moore, personally,

[1] Amn Moore assigns this error personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). He numbers it as "VIII" to correspond with the matters he raised in his initial brief.

who asks this Court to consider the supplemental assignment of error. Amn Moore also notes that this filing comes less than a month after the initial filing.

Amn Moore further notes that his supplemental assignment of error is 7 pages. When combined with the 11 pages of *Grostefon* matters he initially raised for this Court's consideration, the total page number for his personally raised issues complies with this Court's 30-page limit for *Grostefon* issues. A.F. CT. CRIM. APP. R. 18.2(a).

Amn Moore recognizes that by filing a supplemental assignment of error, it may increase the time necessary for this Court to review his case, to include the time allotted for the Government to provide an answer (if any). Amn Moore understands his right to speedy appellate review and knows that this supplemental assignment of error may count against him for speedy appellate purposes.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his motion and consider his supplemental assignment of error.

Respectfully submitted,

[redacted]

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APPENDIX

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

VIII.

AMN MOORE HAS MADE A PRIMA FACIE CASE THAT THE CONVENING AUTHORITY CONSIDERED GENDER BECAUSE COURT-MEMBER DATA INCLUDED GENDER AND THE CONVENING AUTHORITY TWICE SELECTED FEMALES AT A FAR HIGHER RATE THAN MALES, GIVING RISE TO A PRESUMPTION THAT THE PANEL WAS NOT PROPERLY CONSTITUTED.

Additional Facts

Two convening orders detailed members to this court-martial: Special Order A-13, dated 6 June 2022; and Special Order A-8, dated 5 January 2023. In the First Indorsement to the Pretrial Advice, the first convening authority (CA) made a selection of 16 members for the venire from a pool of 30 potentials. (1st Indorsement to Pretrial Advice, undated, Record of Trial (ROT) Vol. 3.) There were eight females available, of whom six were selected, which equates to 75%. There were 22 males available, of whom ten were selected for a rate of 45%.

On 3 January 2022, the staff judge advocate (SJA) for the successor CA presented a memorandum requesting replacement members. (Request for Release and Nominees for Replacement Members, 3 Jan. 2023, ROT Vol. 3.) The SJA requested replacement of seven members (four males and three females) with nine enlisted members selected from a pool of 18 potential members. (*Id.*) The CA then

selected four out of five females, which equates to 80%. (Ind to Request for Release and Nominees for Replacement Members Memorandum, 5 Jan. 2022, ROT Vol. 3.) The CA also selected six out of 13 male members, which equates to 46%. (*Id.*)

The CA was provided court member data sheets, with attachments that indicate gender, as attachments for both selections.[1] (1st Indorsement to Pretrial Advice; Request for Release and Nominees for Replacement Members.)

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *See United States v. King*, 83 M.J. 115, 120–21 (C.A.A.F. 2023). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). An appellant also "gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

[1] The court member data sheets included in a separate motion to attach only reflect the first selection. They include a data sheet for nominees and a copy of the nominee's Single Unit Retrieval Format (SURF). Counsel has been unable to procure the remaining data sheets, which are not included in the ROT. (The cross reference refers to an outdated version of Air Force Manual (AFMAN) 51-203, *Records of Trial*.) However, if this Court believes review of all the data sheets is required, an order compelling production or a *DuBay* hearing would be appropriate.

Law and Analysis

"[T]he Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). This holds true in military justice as well, even if a CA considers race to create a more diverse panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel-member selection, the Court of Appeals for the Armed Forces (CAAF) held it "impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id.* at 74.

Yet this was not true at the time of Amn Moore's court-martial. *United States v. Crawford* allowed CA's to use race in panel selection if used "in favor of, not against, an accused." 35 C.M.R. 3, 13 (C.M.A. 1964). Thus, reviewing courts did "not presume improper motives from inclusion of racial *and gender* identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (emphasis added). The Court of Military Appeals (CMA) elaborated in *United States v. Smith*, a case about gender, where it wrote:

> As we interpret Article 25 in light of *Crawford*, Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. *Thus, a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels.*

27 M.J. 242, 249 (C.M.A. 1988) (emphasis added). Consequently, the CMA held that "a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id.* As such, at the time of Amn Moore's trial, a CA could permissibly consider both race and gender to create a panel.

Jeter changed this when it held *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race simply is unrelated to his fitness as a juror." 84 M.J. at 73 (cleaned up). *Jeter* did not consider the question of using gender as a basis for member fitness. Still, the same logic that led CAAF to hold *Batson* abrogated *Crawford* necessarily leads to the conclusion that *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994) abrogated *Smith*. *J.E.B.* followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." 511 U.S. at 129. As with race, "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id.* at 130. The Supreme Court wrote:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

Id. at 145. If race is now impermissible for CA consideration, so too is gender. And this is true whether members of certain genders or races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id.* at 142 n.13.

Jeter lays out a process for determining whether impermissible criteria were used in the selection of court-martial members. First, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." 84 M.J. at 70. In *Jeter*, the appellant made such a prima facie showing in large part based on the inclusion of racial identifiers in court member questionnaires. *Id.* at 73–74.

Equivalent identifiers are present here, as the court member data sheets provided the CA with gender information. Although the data sheets accompanying the motion to attach are not all of the data sheets from this case,[2] they clearly show provision of these identifiers to the CA when selecting members, establishing a prima facie showing. The inclusion of gender identifiers on court member data sheets indicates the CA solicited the gender of prospective court members. *See Jeter*, 84 M.J. at 73. The *Jeter* court also noted the understandable belief that *Crawford* was still good law at the time contributed to the prima facie showing, and the same is true

[2] As the court noted in *Jeter*, the record on this issue was not developed at the trial level because neither the trial participants nor the lower court could have anticipated *Jeter*'s change to the legal landscape. 84 M.J. at 74.

here because Amn Moore's court-martial also took place before the court's holding in *Jeter*. *Id.* at 74. Based on these factors, Amn Moore has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.

A closer review of the actual member selection further demonstrates that impermissible criteria influenced member selection. In the CA's initial decision on members for the pool, a female had a 75% selection rate, while males were selected at only a 45% rate. This becomes even more clear when the successor CA was required to replace the members. The composition of the panel then shifted towards an even greater percentage of females as the CA selected women at an 80% rate and men at only a 46% rate. The numbers tell the story. And the consistency between the rates in the two selections only underscores the disparity.[3]

Perhaps the CA sought to provide more representation to the panel. The CA had to replace a disproportionate number of females who were excused after the initial convening order (three out of seven), and thus may have tried to balance by adding a disproportionate number of females. This was permissible at the time under CAAF's precedents. But it is not anymore.

Once a prima facie showing has given rise to the presumption that the panel was not properly constituted, "[t]he government may then seek to rebut that presumption." *Jeter*, 83 M.J. at 70. Here, the documentation regarding the selection

[3] This reflects a broader trend of overrepresentation of females in court-martial detailing in the Air Force. *See* DAC-IPAD, STUDY ON THE RACE, ETHNICITY, AND GENDER OF MILITARY PANEL MEMBERS (forthcoming summer 2024).

of court members cannot rebut this presumption because the CA was aware of gender during member selection and, in fact, selected females at a far higher rate than males. This constitutes clear and obvious error since it is plain at the time of appellate review that a CA cannot consider gender at all. Although the plain error standard normally calls for an assessment of prejudice, this issue differs because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466. This Court should therefore grant the same remedy the court granted in *Jeter* by setting aside the findings of guilty and the sentence. 84 M.J. at 75.

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 May 2024.

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24 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT
v.	)	OF ERROR
Airman (E-2) NICHOLAS J. MOORE, USAF *Appellant*.	)	ACM 40442 (f rev) Special Panel

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Leave to file a Supplemental Assignment of Error, dated 17 May 2024.

STATEMENT OF THE CASE

At his trial, Appellant raised no motions about improper panel constitution, nor were there any related objections. (*See* generally R. at 1-292; *see also* Exhibit Index.)

This Court originally docketed Appellant's case on 4 April 2023. Appellant filed 10 enlargements of time over the course of the next year. This Court remanded the case on 21 March 2024 for correction of the record. The case was re-docketed with this Court on 19 April 2024.

On the same date, Appellant filed his 59-page Assignments of Error brief, raising seven issues. Then, 28 days later, on 17 May 2024, Appellant moved this Court for leave to file a supplemental assignment of error which alleges the convening authority improperly considering gender when selecting Appellant's member panel.

The Government filed its Answer to Appellant's original Assignments of Error brief on 20 May 2024.

ARGUMENT

Over one year after his case was originally docketed with this Court, Appellant now seeks to file a supplemental assignment of error alleging improper member selection, an issue not raised at trial, because he "only recently became aware, through counsel, of United States v. Jeter, 84 M.J. 68 (C.A.A.F. 2023) and its potential implications on his case." (App. Mot. at 1.) Appellant's justification is lacking.

To start, Appellant's case was originally docketed with this Court over 13 months ago, on 4 April 2023, and delays in the case included Appellant seeking 10 enlargements of time. However, despite this vast length of time for Appellant and his appellate counsel to discuss his case, Appellant claims he "only recently" learned of Jeter. However, Appellant's statement is vague as he fails to detail exactly when Appellant learned of Jeter.

If Appellant learned of Jeter *prior* to filing his initial Assignments of Error brief, Appellant has failed to explain why he did not file an 11th motion for an enlargement of time versus opting for his piecemeal approach of filing his initial brief and now filing his supplemental brief. On the other hand, if Appellant only learned of Jeter *after* filing his initial Assignments of Error brief, Appellant fails to explain the delay in his counsel informing him about Jeter at this late date or why this delay in discuss with his counsel on the subject matter, despite his case being docketed for over a year, warrants delaying his case even further by filing his supplemental assignment of error.[1]

Aside from the vagueness of when Appellant actually "became aware" of Jeter, the substance of Appellant's claim also lacks merit. As noted above, Appellant raised no motions about improper panel constitution at trial, nor were there any related objections at trial. Further,

[1] Notably, Appellant has not filed an ineffective assistance of counsel claim against his appellate counsel.

the word "gender" appears only once in Appellant's transcript—when the military judge asks for the "gender- neutral reason" for a challenge—and is never invoked in relation to improper panel constitution. (R. at 293.) Appellant cannot—and has not—pointed to anything in the transcript, exhibits, or allied papers that even hints at improper panel constitution.

Considering he did not raise this claim at trial, Appellant forfeited it. *See* United States v. Shafran, 84 M.J. 548 (C.G.C.C.A. 2024), *citing* R.C.M. 905(e)(1); United States v. King, 83 M.J. 115, 120-21 (C.A.A.F. 2023); United States v. Gray, 51 M.J. 1, 49 (C.A.A.F. 1999). Therefore, Appellant is only entitled to relief if he can establish plain error.

Our sister Court recently addressed a similar claim to Appellant's in Shafran and found no plain error. There, the appellant claimed improper member selection based on race and gender. Our sister Court noted two distinctions in that case from Jeter, both of which apply in Appellant's case. First, the appellant in Jeter challenged the panel selection at trial. Neither the appellant in Shafran nor Appellant here contested the panel selection at trial, meaning both faced a higher hurdle in proving plain error, a standard not present in Jeter. Second, our sister Court highlighted that "Jeter addressed racial, not gender identifiers," before holding, "A plain error setting is not the vehicle for us to extend Jeter's holding, and it is not plain or obvious that the use of gender identifiers in materials available to the convening authority establishes a presumed equal protection violation." Shafran, 84 M.J. at *49.

CONCLUSION

Considering Appellant's vagueness on when he "became aware" of Jeter, his overall delay in this case, and the lack of substance to Appellant's claim, this Court should not allow further delay by granting Appellant's motion for leave to file a supplemental assignment of error.

WHEREFORE, this Court should deny Appellant's motion for leave to file a supplemental assignment of error.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 24 May 2024 via electronic filing.

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20 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40442 (f rev)
Airman (E-2) NICHOLAS J. MOORE, USAF *Appellant*.	)	Special Panel

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his 59-page Assignments of Error brief. Appellant raises a total of seven issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 20 May 2024 via electronic filing.

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20 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40442 (f rev)
Airman (E-2) NICHOLAS J. MOORE, USAF *Appellant*.	)	Special Panel

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ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40442 (f rev)
Airman (E-2) NICHOLAS J. MOORE, USAF *Appellant*.	)	Special Panel

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT'S] SEXUAL ASSAULT CONVICTION IS FACTUALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED SEXUAL MISCONDUCT UNDER MIL. R. EVID. 413.

III.

WHETHER THE SPECIAL TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE OFFERED THE MEMBERS A SCIENTIFIC THEORY OF HIS OWN CREATION AS A BASIS TO BELIEVE AB, AND FURTHER BOLSTERED [redacted] AB'S TESTIMONY BY HIGHLIGHTING HOW OTHER PEOPLE CREDITED HER STORY.

IV.

WHETHER THE GOVERNMENT VIOLATED AIRMAN MOORE'S DUE PROCESS RIGHTS BY PURSUING HIS CONVICTION UNDER AN UNCHARGED THEORY OF CRIMINALITY.

V. [1]

WHETHER AIRMAN MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

VI. [2]

WHETHER, AS APPLIED TO [APPELLANT], 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

VII. [3]

WHETHER AIRMAN MOORE'S SEXUAL ASSAULT CONVICTION IS LEGALLY SUFFICIENT.

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

[redacted]AB met Appellant soon after arriving at Hill Air Force Base in the summer of 2021. (R. at 308.) [redacted]AB described Appellant as a "mutual friend" and "one of the people in our group." (Id.) [redacted]AB said this group, which included A1C KA and SrA BM, would make dinner multiple times a week and try to have barbecues on the weekends. (R. at 309.) Appellant, A1C KA and SrA BM were all male, and [redacted]AB said she was closest with SrA BM.

On 8 February 2022, a Tuesday, the group decided to make dinner together in [redacted]AB's dorm room. [redacted]AB said her dorm was the group's usual gathering place. (R. at 363.) [redacted]

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] This issue is raised in the appendix pursuant to Grostefon.
[3] This issue is raised in the appendix pursuant to Grostefon.

AB explained that her dorm room had a common area that she shared with her roommate that had a kitchen area. (R. at 311-12.) A1C AB's bedroom was off the common area.

The group arrived around 2000 hours. (R. at 312.) A1C KA cooked in the kitchen while the rest of the group watched the television in A1C AB's bedroom. (R. at 311-12.) [redacted] AB said the boys were drinking wine and that A1C KA also had a few beers. [redacted] AB said she had a taste of wine, but did not have her own glass. (R. at 311.) The four ate and watched television in [redacted] AB's bedroom for an hour or so until everyone started to leave around 2200 hours. [redacted] AB and Appellant sat on [redacted] AB's couch while SrA BM sat on her bed. [redacted] AB could not remember where A1C KA sat. (R. at 313.)

A1C KA left first to Facetime his girlfriend. (R. at 313.) SrA BM then left because he was falling asleep on [redacted] AB's bed. [redacted] AB and Appellant continued to watch the television. (R. at 314.)

[redacted] AB testified that she and Appellant had been alone before, though [redacted] AB said, "He'd never really stay super long or anything when we were alone." (Id.) [redacted] AB detailed one instance where Appellant had previously fallen asleep on her couch. [redacted] AB said the majority of the time the two had be alone had been when Appellant would stay later than the rest of the group after the group had been together. (R. at 315.) She said the other times were when Appellant had stopped by to have a conversation with her. [redacted] AB said it was not unusual for her to be alone with Appellant and that nothing had ever happened romantically or flirtatiously between the two. (Id.) [redacted] AB said the same was true for A1C KA and SrA BM. (R. at 316.)

[redacted] AB said she was sitting on the right side of the couch, with Appellant on the left. [redacted] AB said her couch was small so her feet were "like, touching his leg a little bit" as they sat that night. (Id.) [redacted] AB said Appellant "eventually ended up throwing his legs over me on the

couch and went over onto where the armrest was on my side." (Id.) [redacted] AB said this was not strange to her because she grew up with a bunch of brothers, she considered her friends the same way, and that A1C KA had thrown his feet over people in the past. (R. at 317.) [redacted] AB said, "So it wasn't super unusual." (Id.) She did not consider it as any sort of flirtation or sexual advance.

Not wanting Appellant's feet in her face, [redacted] AB leaned over toward Appellant. (R. at 317-19.) A1C AB said her "hand was under my head, just kind of holding it up," and that she was trying to stay awake, but eventually fell asleep. (R. at 320, 354.) When she fell asleep, [redacted] AB said she was not pressing up against Appellant, but instead was leaning back on the couch. (R. at 320-21.) When asked if there was any sort of cuddling or holding on to each other between the two, [redacted] AB said, "No. I wasn't, like, spooning him or anything." (R. at 321.)

[redacted] AB said she was wearing sweatpants, a tank top, bra and green underwear, which she said was normal attire for when she and her friends would get together for dinner. (R. at 321-22.) She stated she considered herself a heavy sleeper because she grew up in a big household with a lot of kids running and jumping around, so she was used to sleeping through noise. (R. at 322.) She added she would normally set three alarms clocks to be sure she woke up. (R. at 323.) On cross-examination, she said that "just moving" would not wake her up. (R. at 358.) Instead, it would take "being shooken" to wake her. (Id.)

When [redacted] AB next woke up, she initially though she needed to urinate, but quickly realized the sensation she was feeling was Appellant "inside of me," adding that Appellant's finger was "[i]nside of my vaginal area." (R. at 324, 354.) She continued, "I realized that my top was removed as well as my bra, and my sweatpants had been adjusted further down my body." (Id.) [redacted] AB said her body position was also different, explaining that she was now

fully horizontal and, "I had rolled over onto my opposite side, so when I had woken up, I was facing the back couch cushions." (R. at 324-25.) [redacted] AB said Appellant was behind her and that he "had his right arm kind of wrapped around my chest area, and his left arm was more behind me." (R. at 325.) [redacted] AB added that Appellant's left hand was the one inside of her and that this hand was coming from behind and underneath her between her legs. [redacted] AB said Appellant was also either biting or kissing her left ear as she woke up. (Id.)

Once she realized what was happening, [redacted] AB said she pushed him off, and yelled at him, "What the fuck are you doing?" (R. at 326.) Appellant responded by saying, "You're right, you're right." (R. at 327.) [redacted] AB told him to leave and Appellant asked if they could "talk about it in the morning, and I said to go, and he had grabbed the wine bottle and left." (Id.) [redacted] AB also noticed as this was happening that Appellant had his pants off but his underwear was still on. [redacted] AB said her bra and tank top were on the floor and that her sweatpants were moved onto her thigh area. (R. at 328.)

[redacted] AB said she pulled her pants up, threw on a hoodie and called SrA BM. At the same time, [redacted] AB was running up the stairs and down the hall to SrA BM's room. (Id.) She did not take the time to put on shoes or socks. (R. at 339.) A1C BM said she was upset, confused, very emotional, and crying at this point, so much so that SrA BM could not understand her on the phone. (R. at 329.) When SrA BM answered the door, he hugged [redacted] AB and asked her what was wrong. [redacted] AB told him that "I had fallen asleep on the couch and I'd woken up to my shirt and bra being off and being touched by [Appellant]." (R. at 338.) [redacted] AB said she could not remember verbatim what she told SrA BM in terms of what "touched" meant. (Id.)

SrA BM immediately called Sexual Assault Prevention Response (SAPR), which [redacted] AB said was SrA BM's idea, and he served as a middleman between SAPR and [redacted] AB, who was in the bathroom trying to calm down. (Id.) It was a bit before midnight at this point.

[redacted] AB estimated she and SrA BM were in his room for, at most, 20 minutes, before going back to her room to grab some extra clothes and then SrA BM drove the two to the clinic. (R. at 339.) After the sexual assault examination, which included taking swabs of various parts of [redacted] AB's body, she went back to her dorm room around 0300 hours where she sat on her bed to think about what happened. (R. at 340-41.) [redacted] AB said she had not yet decided whether her report would be restricted or unrestricted. She tried to call her boyfriend, an Army Specialist (SPC), a few times and tried to sleep, but was not successful.

Instead, [redacted] AB got up around 0530 hours and reported to work around 0715. Within minutes of arriving, [redacted] AB went to speak with MSgt RS, her flight chief. (R. at 342.) At this point, [redacted] AB had decided to make an unrestricted report. When she and SrA BM went in to MSgt RS office, [redacted] AB told him she had gone to the SAPR the night before. MSgt RS stopped her and said, "Before you say anything else, let me stop you. If you tell me what happened, you know it does have to go to an unrestricted report." (R. at 343.) [redacted] AB said she understood this and MSgt RS left to get the first sergeant.

[redacted] AB's first sergeant got her a room at lodging so she would not have to go back to her room and so she could get some rest. (Id.) [redacted] AB said Appellant lived in the same hallway as her. (R. at 344.) However, before she could go there, she went to the Air Force Office of Special Investigations (AFOSI). There, [redacted] AB told AFOSI everything that had occurred the night before. (Id.)

While there, [redacted] AB sent a Snapchat message to Appellant. (R. at 345; *see also* Pros. Ex. 1.) The message said, "I don't understand how you could do that, I fell asleep on the couch, I thought I could trust you [Appellant's first name]. Wtf I shouldn't have to worry about you taking my shirt off and putting your hand down my pants I don't understand what you were thinking, I really thought I could trust you [Appellant's first name]." (Pros. Ex. 1.) The message was sent at around 1600 hours. (R. at 346.)

By the time Appellant responded at 1811 hours, [redacted] AB was in base lodging and no longer at the AFOSI office. Appellant responded, "I don't know that I was thinking either. I know an apology won't be enough." (Pros. Ex. 1.) [redacted] AB never spoke or communicated with Appellant again. (R. at 348.)

A1C AB said she requested an expedited transfer from Hill Air Force Base to Nellis Air Force Base because she kept seeing Appellant at places like the commissary or BX, or near the dorms walking outside, which made things "really hard." (R. at 350.) She said she "very much enjoyed" Hill Air Force Base, did not want to leave, had a good friend base there, it was closer to home, and that she liked it more than Nellis Air Force Base. (R. at 350-51.)

On cross-examination, [redacted] AB acknowledged there were times in the past when she had conversations with people when she was half-asleep, and she did not remember those conversations the next day. (R. at 355.) When asked, "It's possible that on the night in question you had a conversation with [Appellant] in a half-asleep state," [redacted] AB said, "Yes, ma'am." (R. at 357.) When Appellant's trial defense counsel then asked, "It's possible that during that conversation, he asked for consent," [redacted] AB responded, "I was sleeping, ma'am." (R. at 394.)

[redacted] AB also testified that she and her boyfriend, SPC CW, had been dating since high school, but were stationed eight hours apart when she was a Hill Air Force Base. (R. at 365-66.)

Though [redacted] AB said the distance "sucked," she said it "wasn't the worst thing." (R. at 366.) [redacted] AB acknowledged that Nellis Air Force Base, where she was transferred, was two hours away from her boyfriend. (R. at 367.)

[redacted] AB also stated that in June 2021 she told her boyfriend about another guy, an Airman named Casey, kissing her without her permission. (R. at 368.) [redacted] AB acknowledged kissing the guy back. (R. at 368.) When asked what she told her boyfriend about the incident, [redacted] AB said, "I don't recall whether or not I told him it was unwanted or not, but I remember telling him about the kiss and I remember telling him that I had kissed him back. Right after it had happened." (R. at 369.) [redacted] AB said she told her boyfriend about the incident immediately after it happened and that it placed no strain on their relationship. (R. at 408-09.) [redacted] AB said she and her boyfriend talked about it, worked through it, and they had "gotten over it." (R. at 409.) [redacted] AB said her boyfriend did not hang the incident over her head and that it was not brought up again. She said "no" when asked if that incident was on her mind when she reported Appellant's assault to SrA BM, SAPR, her flight chief, and AFOSI. (Id.)

[redacted] AB was also asked what she told her roommate about this kiss. [redacted] AB said, "I don't necessarily remember what I did and did not tell her other than telling my boyfriend at the time about it, and then just telling her about the kiss." (R. at 370.) She said she did not go to her roommate after Appellant's sexual assault on her because she was not a close friend. (R. at 371.)

[redacted] AB acknowledged sending her boyfriend text messages in December 2022, including one that read "For your heads up." (R. at 377.) However, when asked if she sent the text to "warn" her boyfriend about possibly being interviewed about the case, [redacted] AB said, "No, ma'am." (R. at 376.) When asked again by Appellant's defense counsel, [redacted] AB said,

"my intentions were not to warn him about it coming up, ma'am." (R. at 377.) Instead, [redacted] AB said she sent the texts because she was "frustrated" and was "venting." (R. at 374.)

The texts in question read as follows:

> [redacted] AB: So apparently my old roommate got interviewed and brought up Casey. My lawyer called me today about it. He said that she said she saw me and him kiss in my room and that I never told you and it should be brought up. I was like he did kiss me before but it wasn't I my room. Wtf. And I told him that when Casey did kiss me I told you about it literally right after it happened.
>
> [redacted] AB: He just said okay its not relevant then and he'll try to dismiss it but it could possibly still come up. for your heads up. idk why she would say that
>
> SPC CW: Ok thank you for the heads up
>
> [redacted] AB: You're welcome. kinda irritated about it. Merry Christmas

(Def. Ex. A.)

SrA BM testified that he had never seen [redacted] AB flirt with Appellant or seen any sort of romantic relationship between them. (R. at 419.) On the night in question, SrA BM said the group was watching the Mandalorian in [redacted] AB's dorm room. (R. at 419-20.) SrA BM said when he left, he went straight to his dorm room and went to sleep. (R. at 421.) The next thing he knew, SrA BM woke up to a panicked and out of breath [redacted] AB on the phone. He said he could not make out much because of her panicked state but she eventually formed the sentence, "I'm coming up there." (Id.)

When he let [redacted] AB into his room, SrA BM said she was "very flustered," her face was red and he could tell "she had been crying." (R. at 422.) SrA BM said [redacted] AB told him the following:

> She had told me that whenever it happened, that she was on her bed and he was on the couch, [Appellant] was on the couch, and that she had fell asleep, and when she woke up, she was on the bed and that he was also on the bed. She had her pants down but not off, and he had his fingers inside of her is what she told me.

(Id.) SrA BM told A1C AB they could either call SAPR or the first sergeant and that they decided to call the SAPR hotline. (R. at 423.) SrA BM said he drove [redacted] AB to the clinic and then back to the dorms. (R. at 424.) The next morning, SrA BM drove [redacted] AB to work and the two went to the flight chief's office. (R. at 425.)

On redirect examination, SrA BM answered, "Yes, sir," when asked if he remembered telling AFOSI that [redacted] AB had fallen asleep on the couch. (R. at 437.) He also stated that while he told AFOSI that [redacted] AB's pants were removed, he said the word "completely" was not used. (R. at 438.)

A1C AS, [redacted] AB's roommate, testified that she was woken on the night of 8 February by [redacted] AB crying. (R. at 450.) A1C AS said, "I woke up to the sound of [[redacted] AB] crying, and I heard her leave. I heard the front door open." (Id.) A few days later, A1C AS said [redacted] AB told her that she had fallen asleep on the couch in her room and that she woke up to Appellant trying to "put it in her while she was sleeping." (R. at 452.) A1C AS said [redacted] AB did not clarify whether "it" meant Appellant's penis or fingers.

MSgt RS testified that on the morning of 9 February, [redacted] AB and SrA BM came to his office. (R. at 473.) He said that both were "visibly distraught," and that [redacted] AB looked "as if she had been crying in the past." (Id.) Once he realized what the two were talking about may be a sexual assault, he stopped them and made sure they knew the difference between a restricted and unrestricted report. Once [redacted] AB wanted to continue, MSgt RS went to get the first sergeant so that [redacted] AB did not have to "recount it multiple times." (R. at 474.)

MSgt RS said [redacted] AB stated that she was in her dorm room, that she fell asleep, and woke up with Appellant on top of her. MSgt RS said he did not pry for details. (Id.)

Regarding the expedited transfer, MSgt RS said the idea was "something that the first shirt and myself discussed" and that he did not believe [redacted] AB wanted to do it initially. (R. at 475.) However, MSgt RS said that after [redacted] AB kept seeing Appellant around the base, she "started to see the value of that." (Id.) However, MSgt RS answered "No," when asked if [redacted] AB seemed excited about the PCS and said she was not happy about it at first. (R. at 480.)

SPC CW, [redacted] AB's boyfriend, said he missed multiple phone calls from [redacted] AB in the early morning hours of 9 February. (R. at 504.) When they did talk, SPC CW said [redacted] AB told him that "she woke up to someone touching her inappropriately and proceeding to try to do more." (Id.) SPC CW said the couple were not having any relationship problems at the time. (Id.) Though the couple was broken up at the time of Appellant's court-martial, SPC CW said it had nothing to do with the case. (R. at 505.)

On cross-examination, SPC CW agreed that [redacted] AB would talk and mumble when she was close to falling asleep. (R. at 507.) In his initial interview with AFOSI, SPC CW agreed that he told AFOSI that [redacted] AB would wake up when there was movement, when shaken at a movie theater, and shaken on her shoulder, and that she would randomly wake up during the night. (R. at 509.) Appellant's counsel and SPC CW then had the following exchange:

> DC: Now, around the time, you don't know exactly when, [[redacted] AB] talked to you and told you what she had told OSI about her sleeping habits?
>
> SPC CW: Correct.
>
> DC: And then two months later you gave answers that mirrored her answers?

SPC CW: Correct.

(Id.)

SPC CW said that he spoke to [redacted] AB and she told him that she had told AFOSI about her sleeping habits. SPC CW then agreed that he later gave answers to AFOSI that mirrored her answers. (Id.)

On redirect examination, SPC CW was asked, "when you say you changed your testimony, what do you mean by that?" (R. at 520.) SPC CW said, "I have thought more about the questions over the course of time after I was asked about them." (Id.) SPC CW and the trial counsel then had the following exchange:

> TC: [SPC CW], when you say that you changed your testimony, what do you mean by that?
>
> SPC CW: I have thought more about the questions over the course of time after I was asked about them.
>
> TC: So in your first interview with OSI, did you think that you were going to be talking about her sleep habits?
>
> SPC CW: I personally did not think about, like, that hard about them, no. And of course, over time, I thought about it more and more.
>
> TC: So when you spoke to OSI the first time, were you trying your best to tell the truth?
>
> SPC CW: Yes, I was.
>
> TC: And any change, is that because you thought more about it later and you thought of other circumstances?
>
> SPC CW: Yes.

(Id.)

When asked on redirect examination about [redacted] AB's sleeping habits, SPC CW said she was a "heavy sleeper," adding that he would play heavy metal music very loud because he was hard of hearing, and she would not wake up. (R. at 516.) At movie theaters, SPC CW said [redacted] AB would "sleep through entire movies." (Id.) He said that during his initial AFOSI interview, he told AFOSI that [redacted] AB would fall asleep in movie theaters. He said that while he did tell AFOSI that she would sometimes wake up during the movie, he also told AFOSI that she would usually fall right back asleep in the movie theater. (Id.)

About her sleeping habits, SPC CW continued,

> Like, flashing lights from movies, again, she won't wake up to that normally. I could be, like, on social media on my phone with us cuddling and she won't wake up. And I'll have to, like, move to use the restroom and she'll do, like, a little, like, groggy wake up, and then fall back asleep immediately.

(Id.) Regarding her talking as she falls asleep, SPC CW said, "I won't say sleep talking, but, like, as she's falling asleep, she'll talk to me and not remember what she's talking about in the morning." (R. at 517.) When asked if he had ever had any real important or substantive conversations about something and then [redacted] AB would not remember in the morning, SPC CW said, "No." (Id.) He said the kinds of things [redacted] AB would talk about included "like, lovey-dovey stuff, like going on dates and such, and ideas, and then I'd be showing her memes and other funny videos on my phone, and she would not remember at all." (Id.) SPC CW agreed that this talk would all occur as she was going to sleep, but responded, "No," when asked "Has she ever actually in her sleep, that you know of, sleep talked to you?" (R. at 518.)

SPC CW also agreed that [redacted] AB initially told him the kissing incident with "Casey" was unwanted and not consensual. (R. at 510.) SPC CW acknowledged that he initially told Appellant's trial defense counsel if he knew anyone by the name of "Casey" and SPC CW said

no. (R. at 511.) SPC CW explained this was "because at the time I had forgotten about him." (Id.) SPC CW also stated that [redacted] AB called him immediately after that incident, and that the two "had talking it over and got over it and over the course of time I had forgotten about it." (R. at 514.) SPC CW said the couple talked about the incident one time and then never again. (R. at 515.) SPC CW said when he got the "heads up" text from [redacted] AB about "Casey," she never "told me anything of what to say." (Id.)

[redacted] JH, a former girlfriend of Appellant's, testified about an incident one Sunday morning where she went to the couch and spooned up to Appellant. (R. at 525-26.) [redacted] JH said Appellant, "started out with just reaching, like, underneath my shirt, and I did try to pull him away, and then it did progress from there to, like, feeling my breasts, pulling my shirt up and, like, putting his mouth all over my right side of my chest." (R. at 526.) Even though [redacted] JH told him to stop and push him away from her breasts, Appellant continued to touch her chest and put his mouth on her chest. (R. at 527-28.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR SEXUAL ASSAULT, ASSAULT CONSUMMATED BY BATTERY AND AGGRAVATED ASSAULT ARE FACTUALLY SUFFICIENT.

Standard of Review and Law

This Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ. *See* United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024).

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> >
> > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
> >
> > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > >
> > > (II) appropriate deference to findings of fact entered into the record by the military judge.
> >
> > (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

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

Pending before the Court of Appeals for the Armed Forces (CAAF) is the impact of the new Article 66 on this Courts' review of factual sufficiency. That is, they have granted review of the issue of whether, as the Navy-Marine Court of Criminal Appeals (NMCCA) held, there is a rebuttable presumption of guilt on appeal:

> We find that the revised statute requires a departure from the prior practice, and the standard for factual sufficiency has become harder for an appellant to meet. It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty.

United States v. Harvey, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 23 May 2023), rev. granted, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). *But see* United States v. Scott, 83 M.J. 778, 780-81 (A. Ct. Crim. App. 27 Oct. 2023) (rejecting Harvey's creation of rebuttable presumption of guilt on appeal).

This Court, in Csiti, declined to apply Harvey's rebuttable presumption standard just as the Army Court of Criminal Appeals did in Scott. However, this Court did "agree with our CCA counterparts to the extent that Congress intended this new statutory standard to "make it more difficult for [an appellant] to prevail on appeal." Csiti, at *21 (*quoting* Scott, 83 M.J. at 780; Harvey, 83 M.J. at 693 ("[T]his [c]ourt will weigh the evidence in a deferential manner to the result at trial.")

This Court also agreed with Harvey in that the "specific showing of a deficiency of proof" provision "does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review," but rather, "the statute requires Appellant 'identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on

balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.'" Csiti, at *18 (*citing* Harvey, 83 M.J. at 691).

Though the new language states that after an appellant makes this showing a CCA "may consider whether the finding is correct in fact," this Court declined to decide whether it might properly decline to proceed further with a factual sufficiency analysis. Id., at *18-19.

As to the "weighing the evidence and determining controverted questions of fact" provision, this Court noted the term "appropriate deference" was not defined, but broadly agreed with the NMCCA that "appropriate deference" is a "more deferential standard than 'recognizing,'[4] but not one which deprives the CCA of the power to determine the credibility of witnesses." Id. at *19-20 (*quoting* Harvey, 83 M.J. at 692). This Court added that the significance of the credibility of particular witnesses or testimony will vary depending on the circumstances of the case. Id.

Regarding the "Clearly convinced that the finding of guilty was against the weight of the evidence" provision, this Court inferred that "Congress intended the beyond a reasonable doubt standard to continue to apply in questions of factual sufficiency," but also recognized that "Congress has overlaid the requirement that the CCA be 'clearly convinced' the evidence is insufficient before granting relief." Id. at *22. This Court then held that "in order to set aside a finding of guilty, we must not only find the weight of the evidence does not support the conviction; we must be clearly convinced this is the case," adding, "Put another way, in order to set aside a finding of guilty we must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." Id. at *22-23.

[4] The prior version of Article 66(d)(1) required CCAs to "recognize that the trial court saw and heard the witnesses."

The military judge instruction the members as to the elements of the sole specification and charge in this case, pursuant to Article 120, UCMJ, are as follows:

> One, that on or about 8 February 2022, at or near Hill Air Force Base, Utah, [Appellant] committed a sexual act upon [A1C AB] by penetrating her vulva with his finger, with an intent to gratify his sexual desire; and
>
> Two, that the accused did so without the consent of [A1C AB].

(R. at 552-53.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual assault, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the weight of the evidence does not support Appellant's conviction beyond a reasonable doubt.

As detailed above, [redacted] AB and her three friends had dinner on the night in question and were watching her television in her room, like they had all done many times before. (R. at 309-11.) Just like on other occasions as well, A1C KA and SrA BM left, leaving [redacted] AB and SrA BM alone, which was not a big deal because, as they all thought, everyone was just friends. [redacted] AB felt safe with Appellant, as well as A1C KA and SrA BM, even thinking of them as something close to brothers. (R. at 317.) Thus, when we fell asleep on the couch next to [redacted] AB, she had no concerns. As she said, "it wasn't super unusual." (R. at 317.)

However, A1C AB's security in that friendship was shattered when she awoke to her bra and tank top on the floors, her pants pulled down to her thighs, and Appellant's finger inside of her. (R. at 324-25.) Once she recognized what was happening to her, she immediately told Appellant to get off of her, said, "What the fuck are you doing," and told him to leave. (R. at 326-27.) Appellant responded by saying, "You're right, you're right," and asking her if they could talk about it in the morning. Once Appellant left, [redacted] AB immediately ran to SrA BM's room, without even taking time to put on socks or shoes, and told him what happened. (R. at 327-29.) SAPR was immediately called, the two went to the clinic for a sexual assault exam, and then, the next morning, she made an unrestricted report to MSgt RS. (R. at 339-43.)

Then, that afternoon, when [redacted] AB sent a message to Appellant saying she thought she could trust him, that she "shouldn't have to worry about you taking my shirt off and putting your hand down my pants," and saying, "I don't understand what you were thinking," Appellant did not respond by denying [redacted] AB's statements. Instead, Appellant said, "I don't know what I was thinking either," and "I know an apology won't be enough." (Pros. Ex. 1.)

SrA BM confirmed that [redacted] AB came to his room crying and panicked, and confirmed that A1C AB told him she had woken up to Appellant's finger inside of her. (R. at 422-25, 437.) A1C AS, [redacted] AB's roommate, confirmed that [redacted] AB left the room that night crying and, in fact, was crying so hard that it awoke her. A1C AS also testified that [redacted] AB. later told her that Appellant tried to "put it in her while she was sleeping." (R. at 450-52.) MSgt RS confirmed that [redacted] AB was "visibly distraught" when he saw he the following morning and that [redacted] AB told him she went to sleep in her dorm room and woke up with Appellant on top of her. (R. at 474.)

This mountain of evidence provided the panel at Appellant's trial significant proof of Appellant's guilt beyond a reasonable doubt that Appellant penetrated [redacted] AB's vulva with his finger and did so without her consent. Still, Appellant finds fault.

First, Appellant claims [redacted] AB's version of events amounted to a "physical improbability." (App. Br. at 11.) Appellant first takes aim at [redacted] AB's sleeping habits and cites to small snippets of SPC CW's cross-examination testimony to claim she was not a heavy sleeper. (Id.) However, a review of SPC CW's full testimony, when read in context, corroborates [redacted] AB's testimony that she was a heavy sleeper. SPC CW described her as a "heavy sleeper," who would "sleep through entire movies" and through him listening to loud heavy metal music. (R. at 516.) The record also shows [redacted] AB was already exhausted on the night in question due to her activities the weekend and day prior. (R. at 318.)

Above all, however, is the fact that Appellant essentially argues, "How could [redacted] AB sleep through this?" Yet, the evidence clearly shows she did not – she did wake up once Appellant placed his finger into her vulva, which is the very crime he stands convicted of committing against [redacted] AB.

Next, Appellant takes issue with the physical seating arrangement of Appellant and [redacted] AB on her couch. However, Appellant seemingly misunderstands [redacted] AB's testimony about the position in which she fell asleep. Appellant claims [redacted] AB fell sleep with her "feet curled up on the loveseat sideways touching [Appellant]." (App. Br. at 12, *citing* R. at 379-80, 82.) Appellant claims that he would have then "had to unbend her legs for her to become horizontal," because "[w]ith her feet up on the couch on her left touching [Appellant], she could not simply fall to her left and onto [Appellant] unless she has abnormal mobility." (Id.) Appellant's recantation of [redacted] AB's testimony is incorrect.

To orient the Court, [redacted] AB sat on the right side of the couch and Appellant on the left. [redacted] AB's testimony shows that her feet were initially touching Appellant's leg "a little bit" when they first sat down. (R. at 316.) However, Appellant then threw his legs over [redacted] AB's lap, leaned to his left on the left armrest, and put his feet on the right armrest next to [redacted] AB. (R. at 316, 319.)

Not wanting his feet in her face, [redacted] AB then leaned to the left towards Appellant and curled her feet on the couch. (R. at 319.) [redacted] AB said she was kind of lying down toward Appellant on her left side, but supporting her head on her hand, and that her torso was leaning towards the middle of the couch. (R. at 379.)

Given this scenario, it is clear that Appellant's head was lying on the left armrest and his body was stretched across the couch with his legs across [redacted] AB and his feet on the right armrest. Because of this, [redacted] AB then also leaned left toward Appellant and curled her legs up to her chest, which would have put her feet near the middle of the couch, but pointed towards the right side of the couch just like Appellant's feet. Considering this scenario, it is not "physically improbable" at all that [redacted] AB could wake up on her right side facing the couch (which would only involve her turning over) with her legs straightened.

Appellant's other arguments about the removal of [redacted] AB's shirt, bra and pants mirror those given by his trial defense counsel at trial. (*See* R. at 591-93.) Notably, the record shows [redacted] AB demonstrated both her and Appellant's movements on the couch that evening to the members, who upon hearing all the evidence and arguments of counsel, still convicted Appellant of the sole offense. (R. at 320.) As noted earlier this Court must give "appropriate deference to the fact that the trial court saw and heard" [redacted] AB's demonstration and testimony and convicted Appellant beyond a reasonable doubt of the offense.

Appellant next states, "Even if one credits [redacted] AB's account, [Appellant] stopped immediately when she asked what he was doing." (App. Br. at 13.) However, by this point, Appellant was already engaged in his act against his victim.

He then seems to insinuate his "Your right, you're right" statement was because he and [redacted] AB "each had cheated on their significant others," therein implying that the whole incident was consensual where "platonic friends have something more occur." (Id.)

However, [redacted] AB's testimony, and her immediate reaction to Appellant's actions, show this was no consensual activity. [redacted] AB's testimony shows she considered the group, including Appellant, as brothers and that her relationship with the group, including Appellant, was purely as friends. Further, Appellant had fallen asleep on her couch before, so this whole situation was not uncommon. In short, there was nothing prior to her falling asleep that would give Appellant any indication that [redacted] AB was sexually interested in Appellant or that she consented to his actions. Then, while she was asleep, Appellant placed his fingers inside of her. Then, after waking up, [redacted] AB immediately pushed him off of her, asked him what the fuck was he doing, and told him to leave.

Then, SrA BM corroborated [redacted] AB's testimony that she was immediately crying and panicking about what had just happened to her. Her roommate also corroborated that [redacted] AB left the dorm room crying, and reenforced [redacted] AB's panicked response by adding that [redacted] AB was crying hard enough as she left the room to wake A1C AS up. Moreover, the next day when [redacted] AB wrote to Appellant about him of taking off her shirt and pants while she was sleeping, Appellant did not deny it or claim that the whole thing was consensual. Instead, he simply said, "I don't know what I was thinking either. I know an apology won't be enough." (Pros. Ex. 1.) Finally, the immediacy of [redacted] AB going directly to SrA SM's room right after this occurred

showed [redacted] AB had no time to concoct a supposed false allegation of sexual assault, not to mention somehow faking hysterical emotions, panic, and crying that she showed upon immediately calling and showing up at SrA BM's doorstep. The evidence clearly shows this was no consensual encounter.

Next, Appellant turns to calling [redacted] AB a liar because she "l[ied] to her boyfriend about her previous infidelity." (App. Br. at 14.) However, SPC CW explained the entire situation to the member panel, including the fact that [redacted] AB called him immediately after the kissing incident happened, that he and [redacted] AB talked it over that night, and that the incident was never mentioned again. (R. at 511-15.) Despite Appellant's claims, [redacted] AB had no reason to fabricate her allegations. Further, Appellant's line of reasoning here is based on his implication that his actions with [redacted] AB were consensual. However, as repeatedly shown already, including his own words to [redacted] AB in the SnapChat message, Appellant's actions were not consensual.

Appellant next claims [redacted] AB lied to the defense when she denied speaking to SPC CW about interviews or interactions with attorneys for the case. (Ap. Br. at 15.) This relates to the "heads up" text she sent SPC CW, which Appellant claims amounted to "witness tampering." However, [redacted] AB said the reason she texted SPC CW was not to "warn" him about anything, but was simply to vent her frustration. (R. at 374, 376.) Moreover, SPC CW specifically testified about this issue, saying [redacted] AB "never told me anything of what to say." (R. at 515.)

As to Appellant's insinuation that [redacted] AB tried to influence SPC CW's testimony by telling him what she told AFOSI about her sleep habits, SPC CW's testimony dispels that claim as well. SPC CW explained that he changed his answers because he had more time to think about his answers, while also noting that the first time he spoke with AFOSI, he had not thought

about her sleep habits. Regarding that first AFOSI interview, SPC CW said, "I personally did not think about, like, that hard about them, no. And of course, over time, I thought about it more and more." (R. at 520.) SPC CW agreed that any change to his initial statement was because he had thought more about the subject. Moreover, SPC CW specifically testified that even in his initial AFOSI interview, he told AFOSI that [redacted] AB fell asleep in theaters, that she might wake up, but would then fall right back to sleep. (R. at 516.) In sum, SPC CW never testified that [redacted] AB's discussions with SPC CW were either intended to influence SPC CW's testimony or did, in fact, influence his testimony, and there is no other evidence or testimony that supports Appellant's claim.

Notably, each of these instances was raised squarely before the panel at Appellant's trial. Again, this must give "appropriate deference to the fact that the trial court saw and heard" [redacted] AB's testimony and demeanor, as well as SPC CW's testimony and demeanor, and convicted Appellant beyond a reasonable doubt of the offense.

Next, Appellant claims [redacted] AB was inconsistent in her story. For instance, he states that SrA BM testified that [redacted] AB told him she fell asleep on the bed. (App. Br. at 15.) However, Appellant fails to note that SrA BM acknowledged on redirect examination that he told AFOSI that [redacted] AB had fallen asleep on the couch. (R. at 437.) Again, each of Appellant's alleged inconsistencies were squarely before the members and proved unpersuasive.

Appellant next claims his message in Prosecution Exhibit 1 was not a confession, but rather an "apology for what happened - the two of them cheating on their significant others." (App. Br. at 16.) However, as detailed above, Appellant's claim is again unpersuasive. Notably, [redacted] AB accused him of taking off her clothes and putting his hands down her pants while she slept. (Pros. Ex. 1.) Appellant did not refute she was asleep, did not refute he did all those

actions while she slept, or in any way pushed back on the clear insinuation in [redacted] AB's message that the actions were not consensual. If Appellant truly believed this was a consensual incident, his response would have included more than just saying, "I don't know what I was thinking either. I know an apology wouldn't be enough."

Appellant also claims the Government sought to garner "emotional appeals" to the panel and that those "emotional appeals . . . should not sway this Court," when the trial counsel asked MSgt RS about [redacted] AB's demeanor before and after her sexual assault report and asked about [redacted] AB's motivation to testify. (App. Br. at 17.) However, while Appellant's counsel did object to this testimony at trial, Appellant raised no separate issue in his brief related this testimony or claim the military judge erred by overruling his objection.

Appellant also restates claims he later makes in Issue II and III below. Those issues will be discussed in-depth within those respective issues below.

Appellant then concludes by stating that the "perfectly reasonable alternative explanation is that [redacted] AB consented to the sexual activity but did not want the consequences of her actions." (App. Br. at 17.) In doing so, however, Appellant simply repeats the same unpersuasive theory he presented the members at his court-martial that the entire incident was consensual. As continually shown above, the evidence shows it was not.

Here, the evidence shows Appellant sexually assaulted [redacted] AB in her own dorm room without [redacted] AB's consent. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing [redacted] AB testify and demonstrate her and Appellant's positioning on the couch both before she fell asleep and when she awoke, this Court should *not* be clearly convinced that the weight of the evidence

does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's claim must fail.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING EVIDENCE UNDER MIL. R. EVID. 413.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Hamilton, 78 M.J. 335, 340 (C.A.A.F. 2019).

Law

Mil. R. Evid. 413(a) provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense," and that such evidence "may be considered on any matter to which it is relevant." For purposes of the rule, a "sexual offense" includes "*any* conduct prohibited by Article 120." Mil. R. Evid. 413(d)(1) (emphasis added). Thus, evidence of an uncharged sexual assault can be used "to prove that an accused has a propensity to commit sexual assault." United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016) (citation omitted). "[I]nherent in M.R.E. 413 is a general presumption in favor of admission." United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (*citing* United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000)).

Prior to admitting evidence under Mil. R. Evid. 413, the military judge must make three threshold findings: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. Wright, 53 M.J. at 482.

The military judge must then apply a balancing test under Mil. R. Evid. 403. Id. Some of the factors to be considered during the balancing test are the strength of proof of prior act; the probative weight of evidence; the potential for less prejudicial evidence; distraction of factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties. Id.

Finally, the Mil. R. Evid. 413 analysis requires a determination that the factfinder "could find by preponderance of the evidence that the offenses occurred." Id. (*citing* Huddleston v. United States, 485 U.S. 681, 689-90 (1988)).

Additional Facts

Prior to trial, the Government notified the defense that it intended to introduce evidence pursuant to Mil. R. Evid. 413 that Appellant sexually assaulted [redacted] JH. (App. Ex. VIII at Atch. 1.) Specifically, the Government sought to introduce evidence that in approximately January 2022, Appellant and [redacted] JH were "spooning" on a pull-out bed when Appellant put his right hand up [redacted] JH's shirt between her breast. (Id.) [redacted] JH tried to move Appellant's hand, but Appellant said, "no, no, no, no, no, just relax," and began touching [redacted] JH's nipples. (Id.) Once her protest was ignored, [redacted] JH froze. Appellant then lifted her shirt and began to kiss and suck on [redacted] JH's right nipple for an extended time. [redacted] JH did not reciprocate and was so noticeably uncomfortable that Appellant finally asked, "is this uncomfortable, do you want me to stop?" When [redacted] JH said, "Yes," Appellant stopped. (Id.) The defense moved to exclude the evidence. (App. Ex. VIII.)

After receiving testimony from [redacted] JH, the military judge denied Appellant's motion. (App. Ex. X.) The military judge found the following as fact:

- [redacted] JH and Appellant were previously involved in a dating relationship
- After spending the night in [redacted] JH's house, Appellant and [redacted] JH laid together on a pull-out bed and, at some point, Appellant put his and up [redacted] JH's shirt and between her breasts
- [redacted] JH did not consent to this activity and demonstrated her lack of consent by grabbing Appellant's wrist, attempting to pull his arm away from her breasts, and said, "no"
- [redacted] JH estimated the amount of force she used to move Appellant's hand was a seven out of 10
- When [redacted] JH was only able to move Appellant's hand down to her rib cage, Appellant said, "no, no, just relax, it's ok" and put his hand back on her breasts
- [redacted] JH froze after her request to stop was ignored and Appellant then lifted [redacted] JH's shirt up and began kissing and sucking her right nipple
- [redacted] JH did not reciprocate and displayed external indications of discomfort
- When Appellant noticed her discomfort, Appellant asked, "is this comfortable, do you want me to stop," to which [redacted] JH replied, "Yes;" Appellant then stopped.

(App. Ex. X at 2.)

Applying the Wright test, the military judge found Appellant was charged with sexual assault, which met the first Wright factor. (Id. at 4.)

As to the second factor, the military judge found the proffered evidence was evidence of Appellant's commission of another uncharged sexual offense under Article 120, UCMJ, "specifically abusive or aggravated sexual contact against [redacted] JH." (Id.) The judge detailed how Appellant touched and placed his mouth on [redacted] JH's mouth without her consent, which was expressed by her saying, "no," and attempting to move Appellant's hand. (Id. at 5.) Based on [redacted] JH's testimony, the military judge found "by a preponderance of the evidence, that [Appellant] committed an uncharged offense of abusive or aggravated sexual contact against [redacted] JH," and that based on the context of Appellant's and [redacted] JH's relationship and the

surrounding circumstances, that Appellant "carried out this activity to gratify his sexual desire." (Id.)

The military judge then specifically highlighted that he considered "facts presented during the hearing that [redacted] JH initially told investigators [Appellant] did not commit any non-consensual sexual acts against her, then changed that statement after learning that the charged conduct occurred while she was dating [Appellant]." (Id.) The military judge also "considered [redacted] JH's explanation for giving the conflicting statements." (Id.) The military judge, again noting the preponderance of the evidence standard, continued, "While [redacted] JH's prior inconsistent statement and her potential motive to fabricate are certainly fair grounds for cross-examination, they are not significant enough to warrant exclusion of the evidence."

As to the third Wright factor, the military judge held that the evidence that Appellant carried out another sexual offense "meets the relatively low threshold" under Mil. R. Evid. 401 and 402, adding, "the evidence has some tendency to make a fact of consequence more probable, namely that [Appellant] had a propensity to commit sexual offenses." (Id.)

Finally, the military judge conducted a multi-page Mil. R. Evid. 403 balancing test review that analyzed: (1) the strength of proof of the prior acts; (2) the probative weight of the evidence; (3) the potential for less prejudicial evidence; (4) the distraction of the factfinder; (5) the time needed to present the evidence; (6) the temporal proximity of the prior conduct to the charge offense; (7) the frequency of the acts; (8) the presence or absence of intervening circumstances between the charged and uncharged acts; and (9) the relationship between the persons involved. (Id. at 5-7.)

Notably, the military judge stated, that "while [redacted] JH may be impeached by her prior inconsistent statement, that impeachment does not diminish the strength of her testimony to

warrant exclusion," adding that after having the opportunity to evaluate [redacted] JH's in-court testimony, "this Court finds [redacted] JH to be a credible witness." (Id. at 6.) The military judge continued that [redacted] JH's answers "were generally direct, responsive, and candid," "she did not appear to fabricate or guess at details," and "she readily admitted her previous inconsistent statement, and provided a credible explanation for having provided it." (Id.) The military judge also noted that the two acts "involve[] similar acts, in substantially similar settings, occurring close in time to one another." (Id.)

Analysis

Here, the military judge did not abuse his discretion. In his written ruling, the military judge appropriately applied Mil. R. Evid. 413 and Wright to find the three initial threshold requirements were met. *See* Wright, 53 M.J. at 482. First, as Appellant concedes in his brief, Appellant was charged with an offense in violation of Article 120, UCMJ. (*See* App. Br. at 22.)

Next, [redacted] JH's testimony provided evidence of another, uncharged sexual offense. Specifically, as the military judge determined based on the facts, the evidence tended to show that Appellant either committed an abusive or aggravated sexual contact offense upon [redacted] JH. Both of these offenses are in violation of Article 120, UCMJ, and qualify as "sexual offenses." *See* Mil. R. Evid. 413(d). In his brief, Appellant attempts to argue that "[w]hat [redacted] JH describes is not abusive sexual contact but rather a young couple finding the boundaries of their expanding sexual relationship." (App. Br. at 22.) While Appellant may believe his girlfriend grabbing his wrist, attempting to move his hand away from her breasts, and telling him "no" was somehow only a test of "boundaries," a rationale and reasonable factfinder would plainly see by a preponderance of the evidence that [redacted] JH's actions were clear indications that she did not consent to Appellant's actions. Appellant's argument here that either an abusive or aggravated

sexual contact offense did not occur is unpersuasive and does not show an abuse of discretion from the military judge in finding that this Wright factor was met.

Appellant also states the military judge erred because Appellant "would have a mistake of fact as to consent defense against this charge." (App. Br. at 22.) However, Appellant makes no attempt to explain how a potential mistake of fact defense to this uncharged act would overcome the lower "preponderance of the evidence" standard that the offenses occurred. Again, Appellant has failed to show the military judge erred in finding the second Wright factor was met.

Third, [redacted] JH's testimony was relevant under Mil. R. Evid. 401 and 402. Notably, as the military judge recognized, relevance is a low threshold. *See* United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010). Viewed in light of Mil. R. Evid. 413's presumption in favor of admission, this Court should find no abuse of discretion as the military judge could reasonably find the evidence that Appellant's abusive or aggravated sexual contact against [redacted] JH had some logical relevance to the charged sexual offenses; specifically, that Appellant may have had the propensity to commit the charged sexual offense upon [redacted] AB. *See* Berry, 61 M.J. at 95 (citation omitted). Here, Appellant's willingness to ignore [redacted] JH's clear lack of consent to his actions tends to make it more likely that he ignored the fact that [redacted] AB was not consenting as well.

In his brief, Appellant appears to argue the third factor was not met because the second Wright factor was not met. However, as detailed above, the military judge did not abuse his discretion in finding the second factor was met. Thus, Appellant has also failed to show an abuse of discretion in the military judge's finding that the third Wright factor was met.

Having met all the Wright factors, the military judge then performed a very thorough Mil. R. Evid. 413 test by balancing of the probative value of [redacted] JH's testimony against any countervailing interests, specifically in light of the factors enumerated in Wright. As the military judge analyzed these factors in his written ruling, this Court should review his ruling for a "clear abuse of discretion." United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000) ("When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'") (*quoting* United States v. Ruppel, 49 M.J. 247, 250 (C.A.A.F. 1998)).

Here, the military judge's written analysis spans multiple pages and discusses eight different factors in determining the probative value of the testimony outweighed any prejudice. Considering this thorough analysis, which is directly tied to the evidence at hand, there is no clear abusive of discretion.

Still, Appellant finds fault because the military judge found the charged and uncharged acts involved similar acts. (App. Br. at 23.) Appellant claims the charged act was a penetrative offense while the uncharged act was a contact offense. However, Appellant seemingly forgets the standard is that the acts are "similar," not the "same." The military judge's ruling describes in detail why these offenses were similar: (1) both involved another female; (2) both involved a sexual offense; (3) both occurred when the two were alone in the victim's bedroom; and (4) the acts occurred within one month of each other. Another similar factor is that in one, Appellant pulled up Ms. JH's shirt to expose her breasts, and in the other, Appellant removed [redacted] AB's shirt and bra, therein also exposing her breasts. Appellant's arguments here that the offenses are not similar are unpersuasive, and do not rise to the level of a *clear* abuse of discretion by the military judge.

Next, Appellant attempt to again argue that relationship "boundaries" somehow differentiated his acts against [redacted] JH from his acts against [redacted] AB. Yet, as detailed throughout this brief, Appellant's and [redacted] AB's relationship had "boundaries" as well, namely that they were close friends who acted like siblings. Yet, with both [redacted] JH and [redacted] AB, Appellant willfully exceed those boundaries by committing sexual offenses against both [redacted] JH and [redacted] AB without their consent.

All told, recognizing the presumption in favor of admitting Mil. R. Evid. 413 evidence and the deference afforded a military judge's detailed Mil. R. Evid. 403 analysis, this Court should find the military judge did not abuse his discretion by admitting [redacted] JH's testimony regarding uncharged sexual offenses committed by Appellant.

Yet, even if this Court were to agree with Appellant that the military judge abused his discretion in admitting the evidence (including a clear abuse of discretion with respect to the military judge's Mil. R. Evid. 413 balancing test), this Court must still address prejudice. Whether prejudice results in the context of an erroneous evidentiary ruling is determined by weighing "(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. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999), *citing* United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

Here, the first two factors strongly favor the Government. As detailed in Issue I above, the Government provided overwhelming evidence of Appellant's guilt outside of any testimony from Ms. JH.[5] Issue I also highlights the overall weakness of Appellant's defense case, namely

[5] To highlight this fact, the Government's answer in Issue I detailing why Appellant's conviction is factually sufficient does not rely on [redacted] JH's testimony at all.

his unpersuasive attacks against [redacted] AB's credibility and the supposed "improbability" of the offense.

Next, while Appellant claims [redacted] JH's testimony was "highly material" and that "the quality of the evidence was substantial," he conversely refers to this same Mil. R. Evid. 413 evidence in Issue I as "weak evidence." (*See* App. Br. at 17, 25.) Appellant's conflicting statements about how even he regards [redacted] JH's testimony hampers his argument on both fronts.

However, irrespective of Appellant's conflicting arguments, while [redacted] JH's testimony certainly strengthened the Government's case against Appellant, it did not solely rely on her testimony. Again, as displayed within Issue I above, the overwhelming majority of the Government's case and argument relied on the testimonies of [redacted] AB, SrA BM, MSgt RS, and SPC CW. Further, while Appellant argues that the Government relied heavily on [redacted] JH's testimony in its closing argument, he then cites to only four pages of the trial counsel's 21-page closing argument. (R. at 559-580.)

All told, the military judge's ruling was not based on an incorrect analysis of the law and was not clearly unreasonable. As a result, he did not abuse his discretion. Moreover, even if the military judge did abuse his discretion, Appellant has failed to show prejudice in this case. Thus, this Court should deny Appellant's claim.

III.

APPELLANT HAS NOT DEMONSTRATED ERROR IN TRIAL COUNSEL'S FINDINGS ARGUMENT.

Standard of Review and Law

This Court reviews "prosecutorial misconduct and improper argument de novo and where . . . no objection is made, [] review[s] for plain error." 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), where our superior Court stated it will "continue to review unobjected to prosecutorial misconduct and improper argument for plain error.). Id. The burden of proof under a plain error review is on the appellant. Id.

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). For prejudice, the test is 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). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Notably, a plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

Additionally, trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States

v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

Analysis

- ***Alleged Expert Testimony by Trial Counsel***

Appellant first claims the trial counsel committed prosecutorial misconduct because "the Government choose [sic] not to call an expert on sleep patterns," but instead "used argument based only on the STC's memory of 'high school and basic classes.'" (App. Br. at 30.) Appellant describes the trial counsel's argument as a "scientific analysis" and that he provided "inapplicable examples to argue the plausibility of [redacted] AB's story." (App. Br. at 31.) Appellant notably provides no case law or comparative cases to support his claim.

Here, the trial counsel's argument did not rise to the level of improper testimony. To start, the trial counsel prefaced this portion of his argument by stating, "members, you can use your common sense and knowledge of the ways of the word to understand that there are different types of sleep." (R. at 567.) When Appellant's counsel objected, the military judge overruled

the object but also provided the following instruction, "As counsel indicated, as the instructions I'm going to give you, you can use your own common sense and knowledge of human nature and the ways of the world to assess the evidence you have received." (Id.) This instruction reiterated the same instruction the military judge told the members just moments earlier while providing findings instructions. (R at 558.) Then, the trial counsel again reiterated this sentiment, stating, "Members, you don't need an expert to tell you that there are different cycles of sleep. This is common knowledge. People go through different cycles of being in a deep sleep, coming up into a light sleep, a deep sleep again." (R. at 567.)

The trial counsel then further prefaced his argument by stating that [redacted] AB was "presumably" going into a deep sleep during this time. (Id.) Thus, the trial counsel never argued as fact that [redacted] AB was in a deep sleep, only that she presumably was. The trial counsel used other non-specific words like "potentially," "perhaps," and maybe so" to highlight the trial counsel's words were, in fact, merely argument, not set-in-stone expert testimony as to what does or does not happen in deep sleep. In fact, within his brief, Appellant calls the trial counsel's argument "speculation," which only further highlights the trial counsel's statements were not expert testimony.

The trial counsel then again told the members, "you can use your common sense and knowledge of the ways of the world." (R. at 568.)

Still, Appellant claims error first by misconstruing the trial counsel's argument. He states the trial counsel argued based "only on the STC's memory of 'high school and basic classes.'" (App. Br. at 30.) Except that is not what the trial counsel said. Instead, the trial counsel argued, "And again, members, you can use your common sense and knowledge of the ways of the world to understand that there are different types of sleep. There are, you know, we learn in high

school and basic classes, REM cycles . . . ." (R. at 566-67.) Here, as opposed to Appellant's insinuation that this statement was tied only to the trial counsel's memory (and hence, attempt to further Appellant's argument that the trial counsel was testifying), the trial counsel was actually asking the panel members to use their own common sense and knowledge of the ways of the world based on what they had learned in high school and basic classes about REM cycles and the different types of sleep. When placed in context, this portion of the argument was not based on the trial counsel's own knowledge, but instead invited the members to use their own knowledge and ways of the world.

Next, Appellant complains about the trial counsel providing various examples of when people are asleep and do not wake up despite what is going on around them. (App. Br. at 31.) Again, these examples were framed by telling the members to use their own common sense and knowledge of the ways of the world. The relevant passage reads as follows:

> And defense wants to talk a lot about, you know, this sleep and how impossible it could be that somebody could sleep and move around in their sleep. *Members, you can use your common sense and knowledge of the ways of the world to understand how sleep works.* Why is it crazy that someone falls down, asleep on one side, and they roll over onto the other side? Do people not roll around in their sleep in the bed at night and they don't wake up?
>
> What matters, right, is what kind of sleep you're in. *And again, members, you can use your common sense and knowledge of the ways of the world to understand that there are different types of sleep.* There are, you know, we learn in high school and basic classes, REM cycles –
>
> . . .
>
> Members, you don't need an expert to tell you that there are different cycles of sleep. *This is common knowledge.* People go through different cycles of being in a deep sleep, coming up into a light sleep, a deep sleep again. Around this time, presumably, [[redacted] AB] would have been going into a deep sleep. She's been asleep for about an

hour. And when you're in a light sleep, sure, you might wake up easily by someone touching you or rubbing you. When you're in a deep sleep, you may not. There might be times, right, for all of us ourselves, you might recall, you know, speaking to a spouse the next day, "Hey, did you hear this thing that happened? Did you remember me doing this thing to you?"

"No. I don't."

There are times that we are in deep sleep. And members, the idea that it's so absurd that there could be any kind of movement happening, just think about it practically and that she might not wake up. How often does a parent -- anyone who is a parent here -- go and take their child out of the car, and they throw them over their shoulder and they walk them into the house, and they take their shoes off, they take their coat off arm by arm, and they go and they throw them in the bed. And there may have been some grogginess. They don't know what happened.

I mean, you could potentially even take your child's clothes off and put on their jammies and they still stay asleep through all of that. And why, members? They're in a deep sleep. They're in a place that they feel trust. They won't think anything of it. There might be some movement, jostling around, while they're sleeping.

Nor would [[redacted] AB], lying down on another person. That's how she falls asleep, lying down on her friend, on her brother. In her subconscious state sleeping, she's not going to think that that's strange that her body might be moving around a little bit, as she's rotating from one side of the couch to basically the other side of the couch, or whatever else had happened.

And, members, I understand, you know, one example is a child. Children perhaps may sleep heavier than adults. Maybe so. But also remember this, that [[redacted] AB] was 20 years old at that time. She was one year removed from being a teenager. *Again, members, you can use your common sense and knowledge of the ways of the world.* Can teenagers sleep hard? Absolutely, members.

This is the same demographic, right, you're at a group of friends falling asleep, you may get some pranks played on you if you're the first one. You may get that shaving cream in your hand and a feather on your face so you wipe it on yourself. You may wake up with a mustache or whatever other writing on you. Members, they've got these pranks so well known that people can even fall asleep, right,

> and you can grab a friend's hand and put it in water, right, to see if they're going to urinate themselves. People can sleep through a lot of things if it's a deep sleep that they are in, if they are in that cycle. It's not strange. It's not abnormal.
>
> And when it comes to the clothing being removed, members, think about that. You saw the clothes presented in front of you. You have a spaghetti strap tank top. To take that off, all that would be required is an arm behind, grab it, pull it up over her head and down her arms. It would require virtually no manipulation of the body. The bra, you unclasp the bra, pull it off the front, down the arms. Again, virtually no manipulation of the body required there. The pants and then the underwear, right, even easier, of course . As he is sticking his hand down her pants, that is naturally, with that loose waistband, just going to slide down. It's not hard to understand what happened here, members.
>
> And most importantly, to defense's, you know, point and argument of how could you sleep through this, how could you sleep through this: She didn't. She woke up. She did wake up.

(R. at 566-69.) (emphasis added.)

Here, the trial counsel in this section was not providing expert testimony, but instead rebutting Appellant's attempts to paint [redacted] AB as a liar who could not have possibly slept through Appellant's actions. So, in response, the trial counsel was appealing to the members' common sense to discuss common occurrences in the world where people sleep through various circumstances and was detailing how the particular clothes [redacted] AB was wearing could be removed while she slept.

In sum, the trial counsel was not providing expert testimony on these topics, but instead was "appealing to the common sense of the court-martial." *See* United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983).

- ***Claimed Bolstering of [redacted] AB***

Appellant next claims the trial counsel "sought to bolster [redacted] AB's testimony throughout the argument." (App. Br. at 32.) Yet, Appellant is forced to acknowledge that neither he nor his counsel objected to any of this supposed bolstering. There is no plain error here.

First, Appellant complains that the trial counsel "personally vouch[ed] that [[redacted] AB's] testimony was true," and argued [redacted] AB had a "genuine reaction witnessed by so many different individuals." (Id.) Here, the context of the trial counsel's arguments shows the trial counsel was again rebuffing an argument Appellant made throughout trial and still to this Court – that [redacted] AB is a liar. In his closing argument, Appellant's counsel said she lied about a prior romantic encounter and lied about talking to SPC CW (R. at 595.) Then, to this Court, Appellant continues his attack on [redacted] AB by entitling a section of his brief with the word "lies," claiming she lied about to the defense and lied about a previous kissing incident, alleging she engaged in witness tampering, and characterizing [redacted] AB and her actions with words such as "manipulate," "deceit," "fabricate," and "liar." (*See* App. Br. at 7, 14-16.)

Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (*quoting* United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1994)). This could occur, for example, by a prosecutor saying that the government would not call a witness to the witness stand who was lying. However, a trial counsel is allowed to argue that a witness should be found to be credible and explain why an appellant's attacks against that witness's credibility are unpersuasive. *See* United States v. Blackburn, 2024 CCA LEXIS 129 (A.F. Ct. Crim. App. 4 April 2024) (finding a trial counsel did not vouch for a victim's

credibility when the trial counsel argued in general that the victim was a credible witness, highlighted the evidence and testimony supporting this conclusion, and the argument was in direct response to the trial defense counsel's focused attacks against the victim's credibility).

Here, when reading in context and as a whole, the trial counsel was doing just that. When placed in context, the trial counsel throughout the argument is explaining why Ms. BE was a credible witness and explaining why, based on the testimonies of [redacted] AB, MSgt RS, SrA BM, and Ms. DM, [redacted] AB's reaction to Appellant's actions was "genuine." Again, Appellant's argument is that [redacted] AB made the whole situation up, which would entail her faking her crying, emotions, and state of panic that she expressed to other witnesses. Thus, Appellant made the "genuineness" of her reaction an issue – accordingly, the trial counsel was allowed to highlight evidence and testimony supporting the conclusion that the emotions displayed by [redacted] AB in the aftermath of Appellant's attack were not fake. This argument was in direct response to the trial defense counsel's focused attacks on [redacted] AB's credibility. Thus, there is no error, let alone plain error. *See* Blackburn, at *40.

Further, this argument does not amount to human lie detector testimony as Appellant claims. Human lie detector testimony is "an opinion as to whether a person was truthful in making a specific statement regarding a fact at issue in the case." United States v. Kasper, 58 M.J. 314, 315 (C.A.A.F. 2003) (citations omitted). Again, the trial counsel was not personally vouching for [redacted] AB, but instead was rebutting Appellant's continual attacks against [redacted] AB's credibility.

Though indirectly, the trial counsel also highlighted here that the credibility determination is to be made by the panel by stating, "*You* have absolutely all *you* need, members, to be completely, firmly convinced that *you* know what happened in that room, that *you* know

[Appellant] sexually assaulted [redacted AB]." (R. at 576.) (emphasis added.) The trial counsel then directly addressed the members' duty as it related to credibility by stating the following:

> Because you, panel members, are instructed by the judge that it is your duty, "You have the duty to determine the believability of witnesses." That's why you're here. That's why we have panel members. We can't have a machine do this. You have to determine the credibility. And in doing so, you must consider each witness's intelligence, ability to observe, and accurately remember, their sincerity, their conduct in court and prejudices and character for truthfulness. Consider all of these things and determine whether [redacted AB] came up here and told you the truth.

(R. at 576.) Here, the trial counsel did not say that the prosecution had already determined redacted AB was credible, so the members should agree. Instead, the trial counsel made clear that the credibility determination was the members' own decision and duty, and that it was their duty to determine whether redacted AB told the truth.

The military judge had also instructed on this sentiment moments earlier when he instructed the members, "The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you." (R .at 558.)

Here, Appellant seems to want to bar prosecutors from ever arguing that a witness is credible. But such a rule would completely hamstring the prosecution; especially when the defense is free to (and often does) argue that a witness is a liar. While always keeping in mind the duty to seek justice, the prosecutor's job is generally to persuade the members to accept the government's view of the evidence. When witness credibility is a lynchpin of the government's case, as Appellant argues it is here (*See* App. Br. at 14, "this charge rises or falls on her credibility"), the prosecutor must explain to the trier of fact why they should judge a government witness to be credible. Thus, it is hardly a revelation that, in a particular case, a prosecutor would argue that the government's primary witness was credible. The impermissible argument

is for a prosecutor to convey that the members should believe a witness *because* the prosecutor is saying she is credible. But that is not what trial counsel did in this case. He tied his arguments about [redacted] AB's credibility to the evidence and the fact that the evidence revealed no reasons for [redacted] AB to lie. And he made clear that it was the members' – not trial counsels' – duty to determine the believability of the witnesses. As a result, there was no plain error.

Next, Appellant claims the trial counsel "improperly blamed the Defense for what it takes for a complaining witness to go through a court-martial." (App. Br. at 33.) Appellant references a passage when the trial counsel discusses the various events [redacted] AB went through after reporting the sexual assault, including the rape exam, investigative interviews, public exposition of privacy, attorney interviews with the Government and defense, and testifying multiple times. (R. at 579.)

However, a review of the context of the argument shows the trial counsel was in the midst of rebutting Appellant's own argument that [redacted] AB had made up the allegations against Appellant. The trial counsel here was explaining why Appellant's claim was unsupported based on the overall circumstances of the case. The arguments certainly were not directed or insinuated to blame the defense for putting on a defense, but were instead rebutting Appellant's theory by arguing that Ms. BE would not go through the entire litigation process, including interviews, testimony, etc., simply to keep a supposed consensual act between her and Appellant from being discovered. Appellant again has failed to show plain error on this claim.

Appellant next takes issue with the trial counsel's argument that the "standard that the defense is trying to construct here would make it an impossibility for anyone to ever be a victim and for anyone to ever be found guilty." (R. at 617.) However, a review of passages at issue shows the trial counsel was focused on explaining why Appellant's theory (which essentially

boiled down to that if [redacted] AB had any inconsistencies or motives, then she was lying) was illogical. These statements were a fair comment on the burden of proof as the government was not required to present evidence that overcame all possible doubt. Here, the trial counsel correctly observed that if every inconsistent statement equated to reasonable doubt, the government would almost never secure a conviction.

Appellant next claims the trial counsel "engaged in burden shifting by telling the members the Defense could not give a single reasonable motivation for why [redacted] AB would lie." (App. Br. at 33, *citing* R. at 617.) Here, Appellant cites to where the trial counsel argued that the "defense could not give you a single reasonable motivation why she went through all this, why she's lying to you." (R. at 617.) In that passage, the trial counsel continued, "Again, victims can lie, but they need to have a motivation. There is not one single reasonable motivation for why she would have made this entire thing up, why she's chosen to lie and go through this entire terrible process for no gain to herself. That doesn't add up. That doesn't make sense. It's not reasonable." (Id.)

Yet, when read in context, the trial counsel was not "burden shifting" or "plac[ing] the Defense in the crosshairs of the members," as Appellant alleges. (App. Br. at 33.) In fact, the trial counsel never mentioned any elements of any specifications or charges in this passage, the burden of proof, or any insinuation that Appellant carried the burden of proof on the issue of guilt. Instead, the trial counsel was focused solely on the defense's whole theory of the case – that [redacted] AB was a liar – and detailed why this theory was not persuasive and how, even though they had continually called her a liar, the defense had not fully fleshed out their theory as to *why* [redacted] AB would be lying about every aspect of her testimony. While pointing out the vast

number of holes in Appellant's theory may have highlighted the deficiencies in that theory, the argument here never distorted the ultimate burden of proof as to guilt in this case.

Here, the trial counsel's comment was in the context of "a fair response to the defense's theory of the case." United States v. Roberts, No. ACM 40139, 2023 CCA LEXIS 17, at *26 (A.F. Ct. Crim. App. 20 January 2023). While the defense was entitled to—and did—attack [redacted] AB's credibility, trial counsel was similarly entitled to refute the defense's theory by asserting the defense was trying to distract the members by blaming [redacted] AB. This unobjected-to argument does not amount to plain error. United States v. Leach, No. ACM 39563, 2020 CCA LEXIS 230, at *67 (A.F. Ct. Crim. App. July 8, 2020).

- ***No Prejudice***

Here, the trial counsel's closing argument was not in error for Appellant's initial claims, or plain error for his latter claims. However, even if this Court assumes error, Appellant fails to show how any of his complaints resulted in prejudice against him.

While he does cite Fletcher and its prejudice test, Appellant's justification that he was actually prejudiced is lacking. Looking at those factors, any severity of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to the majority of Appellant's numerous newfound complaints in his brief.[6] This lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (*quoting* United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). Moreover, even though Appellant objected to the trial counsel's argument involving sleep, any severity of that argument

[6] Appellant did not raise an ineffective assistance of counsel claim against his trial defense counsel..

is lessened by the trial counsel stating five times over the course of this portion of the argument that the members were to use their own common sense and knowledge of the ways of the world when deliberating on the issue of [redacted] AB's sleep. As to Appellant's bolstering claims, he correctly states that "credibility is for the members alone to determine,"[7] which is also exactly what the trial counsel told the members numerous times throughout the course of his argument when accessing [redacted] AB's credibility. Considering these circumstances, this factor should weigh in the Government's favor.

Next, while Appellant complains "the military judge's curative efforts were non-existent," Appellant is forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel regarding his alleged bolstering claim. More importantly, Appellant seemingly overlooks the following instruction made by the military judge immediately following closing arguments:

> Panel members, to the extent you think in either counsel's argument you may have heard a comment by counsel that expressed a personal opinion about a witness's credibility or vouch for a witness telling the truth, I'm going to ask you to please disregard that portion, any portion of their argument. Counsel are not permitted to vouch for particular witnesses or express personal opinions about any witness's credibility. To the extent you believe you heard any argument like that, I'm going to ask you to please disregard it.

(R. at 617-18.) Here, despite no objection by Appellant, the military judge still provided a curative instruction relating to witness credibility. Appellant's claim that the judge's curative efforts were "non-existent" and his comparison of the military judge to simply a "figurehead" is unsupported by the record. (*See* App. Br. at 34.)

[7] *See* App. Br. at 34.

Further, as mentioned earlier, the members were told repeatedly that it was their duty, and their duty alone, to determine which witnesses were credible and which witnesses were not. The military judge instructed, "You have the duty to determine the believability of the witnesses," "The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you," that "arguments made by counsel are not evidence," and that the members "must base the determination of the issues . . . in this case on the evidence as you remember it and apply the laws I instructed you." (R. at 555, 559.) The trial counsel then repeatedly told the members that the issue of accessing [redacted] AB's credibility was their duty.

As to Appellant's first claims, the military judge, after Appellant objected, properly re-instructed the panel that "you can use your own common sense and knowledge of human nature and the ways of the world to assess the evidence you have received." (R. at 567.) This instruction was also not in error. Considering the instructions provided by the military judge, this factor also weighs in favor of the Government.

Finally, as shown in the factual sufficiency issue within this brief, the "weight of the evidence supporting" Appellant's convictions involving [redacted] AB was very strong. While Appellant claims "weight of the evidence supporting the conviction raises serious doubts about whether the Government met its burden," Appellant simply renews the same unpersuasive arguments he raised in Issue I above. For the same reasons discussed there, Appellant fails to show prejudice here.

Accordingly, even if the trial counsel's arguments regarding [redacted] AB were error or plain error, Appellant has suffered no prejudice. Therefore, this claim must fail.

IV.

APPELLANT WAS ON NOTICE OF THE CHARGE FOR WHICH HE WAS CONVICTED AND HIS DUE PROCESS RIGHTS WERE NOT VIOLATED.

Standard of Review

Whether an appellant was convicted of a theory other than what was charged is question of law reviewed de novo. *See generally* United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013).

Law

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." Tunstall, 72 M.J. at 192. A specification tried by court-martial will not pass constitutional scrutiny unless it both gives the accused notice of the charge he or she must defend against and shields him or her from being placed in double jeopardy. United States v. Turner, 79 M.J. 401, 404 (C.A.A.F. 2020) (citations omitted). The military is a notice-pleading jurisdiction. United States v. Gallo, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000). A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." Id.

Additionally, Article 120(b)(2)(A), UCMJ, Sexual Assault, prohibits the commission of a sexual act "without the consent of the other person." Article 120(b)(2)(B), UCMJ, addresses sexual acts committed by a person who "knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring."

In order to find Appellant guilty of sexual assault under Article 120(b)(2)(A), UCMJ, as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant committed a sexual act with another person; and (2) he did so without A1C AB's consent. *See* Manual for Courts-Martial, United States (2019 ed.) (MCM), pt. IV, ¶ 60.b.(2)(d). "Consent" is defined as follows:

> (7) CONSENT.—
>
> > (A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
> >
> > (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).
> >
> > (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

Additional Facts

On 9 February 2022, [redacted] AB provided AFOSI an oral statement that she was asleep when Appellant took off her shirt and bra and when she awoke felt Appellant's fingers inside of her. (ROT, Vol. III, AFOSI Report of Investigation (ROI).) These statements are contained in the AFOSI ROI that was provided to Appellant prior to his trial.

On 9 February 2022, during her sexual assault examination, [redacted] AB told Ms. DM that she was asleep and woke up with Appellant's fingers in her vagina. (App. Ex. XXIX.) This

statement is contained in Ms. DM's report of the examination that was provided to Appellant prior to trial.

On 9 February 2022, [redacted] AB sent Appellant a SnapChat message that read, "I don't understand how you could do that, I fell asleep on the couch, I thought I could trust you [Appellant's first name]. Wtf I shouldn't have to worry about you taking my shirt off and putting your hand down my pants I don't understand what you were thinking, I really though I could trust you [Appellant's first name]." (Pros. Ex. 1.) Appellant responded that day to the message, saying, "I don't know that I was thinking either. I know an apology won't be enough." (Id.)

On 9 January 2023, Appellant was arraigned and the general nature of the charge was announced. (R. at 22.) Appellant also waived the full reading of the charge. (Id.)

During voir dire, one question asked of the members read, "Does anyone think that simply because she was alone with someone of the opposite sex at night watching television, that this inherently must mean that she was consenting to sexual activity that night?" (R. at 120.)

At the start of Appellant's trial, the trial counsel began his opening statement by quoting [redacted] AB's Snapchat message that said she "fell asleep on the couch." (R. at 298.) The trial counsel stated, "She was woken up. Specifically, she woke up to a feeling, a sensation, somewhere near her genitals, in her genitals, in her vagina. (R. at 299.)

During her testimony, when asked if she consented to Appellant putting his fingers inside of her, [redacted] AB said, "No, sir." (R. at 351.) During [redacted] AB's cross-examination, Appellant's trial defense counsel asked about consent multiple times. (R. at 368, 394-95.) Then on redirect examination, [redacted] AB again said she did not consent to the sexual activity. (R. at 411.)

When discussing findings instructions, the military judge stated, "I intend to give the following instructions. Instructions on the elements of the charged offense and applicable definitions for that charged offense. That will include an instruction on *mistake of fact as to consent*, as previously discussed." (R. at 546.) (emphasis added.)

During findings instructions, the military judge instructed that one of the elements of the offense involved Appellant committing his act "with the consent" of [redacted] AB. (R. at 553.) The military judge also provided instructions on the term "consent" as well as the defense of mistake of fact as to consent. (Id.) The definition of "consent" provided by the military judge matched that MCM's definition detailed above. Neither Appellant nor his counsel objected to this instruction.

During the Government's closing argument, the trial counsel highlighted the "backdrop" of the whole incident, noting that the "three men were like brothers" to [redacted] AB, that they were "her family out here," and that [redacted] AB was "particularly tired" that night. (R. at 564.) The trial counsel highlighted the anger [redacted] AB showed when she awoke as evidence she did not consent. The trial counsel stated [redacted] AB "completely freaks out," "crying, right, completely freaking out, melting down because of what happened to her." (R. at 569-70.) The trial counsel continued, "It's clear based on all these reactions, not just her own testimony, of what happened in that room." (R. at 571.) The trial counsel also noted how Appellant grabbed a blanket and threw it to [redacted] AB to cover up, arguing that Appellant knew he was not supposed to be seeing her naked and "[h]e doesn't have consent to do that." (R. at 570.)

The trial counsel then reiterated the military judge's instructions on consent, which included the phrase, "A sleeping person cannot consent," adding, "You can't consent in that state." (R. at 572-73.)

At trial, Appellant's trial defense counsel made no objection on any notice or due process basis. Appellant's trial defense counsel also never stated they were not prepared to defend against Appellant committing a sexual act without [redacted] AB's consent. Appellant at no time, including during his trial, raised a due process or notice claim regarding the sole specification in this case. Appellant also never filed a Bill of Particulars requesting additional specificity on the specification.

Argument

For the first time on appeal, Appellant now claims he was convicted of an offense for which he was not on notice and not charged. (App. Br. at 35). He claims that the trial counsel "urged the member to convict [Appellant] because [redacted] AB was asleep," when he was charged "under a 'without consent' theory." (Id. at 36.) Appellant believes there is a "substantial likelihood that Appellant stands convicted under a different theory than that alleged on the charge sheet." (Id. at 41-42.) Appellant is incorrect.

- ***Appellant was on notice of the charged offense.***

To begin, Appellant notably takes no issue with the specification language itself nor does he allege that the specification in and of itself is in anyway deficient. Indeed, a review of the specific language of the specification shows Appellant was properly put on notice that he was charged with committing sexual assault under Article 120(b), UCMJ. The specification expressly alleged every required element, and Appellant was fairly informed that he must defend against committing a sexual act without consent.

- ***Appellant was convicted on the charged theory.***

Further, Appellant was not convicted on a theory that was not charged; therefore, he is not entitled to relief. Here, Appellant's argument that he was prosecuted under the theory that he committed sexual assault because she was asleep is incorrect.

To start, there is no question that [redacted] AB being asleep played a part in the Government's case. However, there is a distinction between her being asleep playing *a part* in showing Appellant committed a sexual act without consent, which is what Appellant was charged, and her being asleep *being the sole reason* for liability.

Importantly, [redacted] AB being asleep was not the sole evidence presented that [redacted] AB did not consent and is not the sole reason why Appellant is guilty. The Government presented multiple pieces of evidence showing [redacted] AB did not consent to sexual assault that are in addition to her being asleep. [redacted] AB testified that Appellant, like the two other friends she had over that night, were only friends and that she considered them brothers. Appellant had even fallen asleep in her room before. This group were all only friends who got together often and it was not "super unusual" for them to all pile up together to watch television. It was clear Appellant was only in [redacted] AB's room as a friend. Thus, even before she fell asleep, there was ample evidence showing [redacted] AB had no interest in anything sexual with Appellant and that Appellant knew she had no interest.

Further, [redacted] AB specifically testified that she did not consent to Appellant's actions because they were only friends and because she was sleeping.

Perhaps most important was [redacted] AB's testimony that Appellant's act of inserted his fingers into her vulva was *still occurring* when she woke up. Indeed, Appellant's act did not just occur while [redacted] AB was asleep, but also was still occurring when she woke up, and only

stopped once [redacted] AB pushed him off of her and said, "What the fuck are you doing." This was a verbal manifestation of [redacted] AB lack of consent to the sexual act that was occurring.

Moreover, evidence shows when she awoke, [redacted] AB told Appellant "What the fuck are you doing," and began panicking, started crying loud enough to wake up her roommate, and was so emotional she was unable to speak. Overall, the fact that [redacted] AB was asleep when the act first began is but part of the overall equation of whether Appellant committed a sexual act without her consent. Further, the fact that evidence shows the act was still occurring once [redacted] AB woke up shows the Government's theory did not rely solely on [redacted] AB being asleep.

Here, the Government did not merely present evidence that [redacted] AB was asleep and nothing more. Such evidence would be all that is required to prove a charge alleged under the Article 120(b)(2)(B), UCMJ. However, when, as charged here, the charge is sexual assault without consent under Article 120(b)(2)(A), UCMJ, more is needed. The Government must affirmatively prove the act was done without the consent of the other person. Further, the Government in this case proved much more than the plain fact that [redacted] AB was asleep.

Moreover, trial counsel's closing argument continually tied all of the evidence, and not just her being asleep, to the ultimate fact that Appellant committed his acts against [redacted] AB without her consent. The trial counsel noted the prior relationship between Appellant and [redacted] AB, how the two, along with the rest of the group, where like family, and how the situation that night of [redacted] AB and Appellant being alone was not unusual. (R. at 564.) The trial counsel also highlighted [redacted] AB's reaction when she woke up, including her emotion state and her telling Appellant, "What the fuck are you doing" and telling him to leave.

Further, the military judge did not instruct on the elements for the theory of sexual assault of a victim who was sleeping. Instead, the only instruction for the specification was that the

offense was committed without consent, a sentiment reinforced by the trial counsel repeatedly in closing argument. The military judge correctly stated that to find Appellant guilty of sexual assault, the members had to be convinced beyond a reasonable doubt that Appellant committed the sexual contact without the consent of [redacted] AB. (R. at 553.) The plain language of the instructions required the members to find Appellant committed the acts without the consent of [redacted] AB and did not allow them to find Appellant guilty of sexual assault simply because she was asleep. Absent evidence to the contrary, this Court presumes members follow a military judge's instructions. United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994).

This Honorable Court has reviewed similar claims in United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. 12 March 2021), and United States v. Horne, No. ACM 39717, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. 27 May 2021), and most recently in United States v. Johnson, ACM 40257, 2023 CCA LEXIS 330 (A.F. Crim. App. 9 August 2023). In Williams, a sexual assault under a theory of bodily harm was charged and the victim "had no recollection of whether she did or did not consent," likely because of intoxication. Williams at *53-54. Notably, the victim in that case "never testified she did not consent, and she said she had no recollection of whether she did or did not consent." Id.

This Court noted that the Government was required to prove beyond a reasonable doubt that the victim did not consent to the sexual conduct and that the trial counsel sought to do so by presenting the improbability that an apparently non-responsive AM actually did consent. This Court cited to United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015), for the proposition that requesting members to draw inferences from such circumstantial evidence is a common aspect of court-martial practice, and highlighted that Article 120(g)(8)(C), UCMJ, specifically

notes "[l]ack of consent may be inferred based on the circumstances of the offense" and "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent."

This Court ultimately held as follows:

> We see no reason why the Government may not use evidence of inability to consent—ordinarily the focal point of a prosecution under Article 120(b)(3), UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under Article 120(b)(1)(B), UCMJ. Therefore, we conclude evidence tending to show a person could not consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person did not consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial.

Id. at *57-58. This Court found the trial counsel's argument did not mislead the members or ask them to convict the appellant of any offense other than the one charged and that the military judge corrected instructed the members that they were required to determine the victim had not consented. This Court faced a similar scenario in Horne and came to a similar conclusion.[8]

Just last year in Johnson, an appellant alleged a due process error "by allowing the Government to argue a different theory of liability than charged." Johnson, at *25. Specifically, that appellant asserted the error "could have led the court members to improperly find him guilty of sexual contact with [the victim] while she was incapable of consent because she was asleep, instead of finding that Appellant acted without [the victim's] consent as the specification alleged." Id. at *25-26.

This Court disagreed, finding that the military judge properly advised the panel on the elements of the offense, including the Government's obligation to prove beyond a reasonable

[8] Our superior Court affirmed both Williams and Horne after granting review in each case on issues unrelated to Appellant's instant claim. *See* United States v. Williams, 81 M.J. 450 (C.A.A.F. 2021); United States v. Horne, 82 M.J. 283 (C.A.A.F. 2022).

doubt that the victim did not consent to the sexual contact. Id. at *34-35. Further, this Court held, "We see no reason why the Government may not use evidence that [the victim] was asleep—ordinarily the focal point of a prosecution under the theory of while asleep—as circumstantial evidence of the lack of actual consent in a prosecution under a theory of without consent." Id. (*citing* Horne, at *69-70, and Williams, at *53-54). This Court continued, "Given the express language that '[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent,' the rule against surplusage does not pose any barrier to Appellant's conviction." Id. (*citing* Article 120(g)(7)(c), UCMJ).

Similar to both Williams, Horne, and Johnson, the Government here was required to prove beyond a reasonable doubt that Appellant committed his act without the consent of [redacted] AB and did so, in part, by presenting evidence that she was asleep.[9] This Court should draw a similar conclusion that the Government may use evidence of sleep—ordinarily the focal point of a prosecution under the abusive sexual assault equivalent to Article 120(b)(2)(B), UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under Article 120(b)(2)(A), UCMJ.

Next, this Court's holdings in Williams, Horne and Johnson quell Appellant's surplusage argument. (See App. Br. at 38-39.) As discussed previously, the offense of sexual assault without consent stands on its own. Where evidence of someone being asleep is all that is needed to prove a charge alleged under Article 120(b)(2)(B), UCMJ, the charge of sexual assault without consent under Article 120(b)(2)(A), UCMJ, and which is charged here, requires the Government

[9] One notable difference is that the victim in Williams never testified she did not consent, and she said she had no recollection of whether she did or did not consent. In contrast here, A1C AB testified she did not consent to having Appellant's fingers in her vulva while she slept and provided an explanation as to why she did not consent.

to affirmatively prove the act was done without the consent of the other person. Appellant's hypothesis that "if Congress had intended for the Government to obtain sexual assault convictions on a 'without consent' theory by arguing that the victim lacked the legal capacity to consent because she was asleep, then there would have been no point including Article 120(b)(2)(B), UCMJ, within the UCMJ," is incorrect. (*See* App. Br. at 40.)

As this Court has shown in Williams, Horne, and Johnson, the issue of whether a person could not consent (in Williams and Horne due to impairment, in Johnson due to sleep) is but a factor that can be considered in determining whether, overall, an act was done without consent.

Finally, Appellant takes issue with the military judge reading the full definition of "consent" within the military judge's findings instructions. (App. Br. at 40.) However, Appellant fails to note that neither he nor his counsel objected to these instructions at trial and that his counsel affirmatively stated, "no" when asked if there were any objections to the instructions and also stated, "no" when asked if any additional instructions were being requested. (R. at 547.) Thus, Appellant affirmatively waived any issue related to the military judge's instructions on consent. *See* United States v. Davis, 79 M.J. 329, 331-32 (C.A.A.F. 2020) (where an appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions.); *see also* United States v. Cunningham, 83 M.J 367, 374 (C.A.A.F. 2023) (at the conclusion of sentencing arguments, the trial defense counsel answered "no" when the military judge asked if either party had any objections; CAAF held the response constituted an express waiver as the response "did not just fail to object," but "affirmatively declined to object."); United States v. Kitchen, ACM 40155,

2023 CCA LEXIS 58 (A.F. Ct. Crim. App. 3 February 2023) (relying on Davis, this Court did not pierce the waiver where the military judge involved counsel in drafting and tailoring instructions, the military judge solicited objections to and requests for additional instructions, defense counsel did not offer additional instructions, and, when asked by the military judge, counsel did not object to the final instructions provided to the members).

Notably, Appellant does not cite to either Horne or Johnson in his brief, let alone attempt to differentiate his case from the outcomes in those cases that counteract his current claims. Further, while he does cite to Williams, Appellant only does so to highlight this Court "has repeatedly ruled against this issue or variations of it." (App. Br. at 42.)

Appellant then states this Court should address this issue in line with a case granted for review by our superior Court – United States v. Mendoza, No. 230210/AR, 2023 CAAF LEXIS 699 (C.A.A.F. 10 October 2023). However, Appellant fails to explain how this case impacts his case. In that case, the victim had no memory of the sexual assault offense due to intoxication. *See* United States v. Mendoza, ARMY 202106447, 2023 CCA LEXIS 198 (8 May 2023). Our sister Court still found the sexual assault without consent specification was factually sufficient despite the victim's lack of memory of the offense based on several factors, including but not limited to: the victim's high level of intoxication, appellant's statement to CID, eyewitness testimony, and closed-circuit television footage. *See* Mendoza, at *8.

Here though, Appellant's case is much different, mainly because [redacted] AB has a clear memory of the sexual assault occurring because Appellant continued to sexually assault her even after she was awake. Any issue being reviewed by CAAF involving a victim with no memory of the offense has no bearing on Appellant's case.

In short, the record shows that the Government did not try Appellant on the theory that [redacted] AB was merely asleep and the members did not convict him on such a theory. Rather, the record shows that the members convicted Appellant on a theory of sexual assault without consent. While the Government did argue that [redacted] AB being asleep certainly played a part in whether Appellant committed his act without her consent, her being asleep was not the sole evidence presented or argued as to why Appellant sexually assaulted [redacted] AB without her consent. Therefore, Appellant's due process rights were not violated, and he is not entitled to relief.

V.[10]

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the

[10] This issue is raised in the appendix pursuant to Grostefon.

Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court recently denied certiorari in Anderson. *See* Order List, 601 U.S. __ (Feb. 20, 2024) (available at https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf); *see also* United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), Supreme Court certiorari denied by Cunningham v. United States, 2024 U.S. LEXIS 1430 (U.S., Mar. 25, 2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict and Appellant's claim must fail.

VI.[11]

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.

Law and Analysis

This Court has repeatedly rejected the same claim Appellant raises now. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet, Appellant argues here that because our superior Court in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Appendix at 8-9).

[11] This issue is raised in the appendix pursuant to Grostefon.

In doing so, Appellant repeats similar arguments this Court rejected in multiple cases. In United States v. Maymi, ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. 5 October 2023), this Court summarily dispatched this issue by stating, "As recognized in United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement."

In United States v. Casillas, ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. 15 December 2023), this Court denied Appellant's claim, stating that it did not require discussion or warrant relief.

In United States v. Saul, ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. 29 December 2023), this Court summarily dispatched this issue by stating, "consistent with our reasoning in United States v. Lepore, we find this court lacks authority under Article 66, UCMJ, 10 U.S.C. § 866, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition in the staff judge advocate's indorsement to the STR."

In United States v. Fernandez, ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. 9 January 2024), this Court again denied the claim, finding that no aspect of that appellant's case "cause us to revisit or overrule the decision in Lepore."

In United States v. Jackson, ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. 11 January 2024), this Court cited Lepore and held, "this court lacks authority under Article 66, UCMJ, to direct modification of that portion of the staff judge advocate's indorsement to the Statement of Trial Results." This Court continued, "We do not read United States v. Lemire, 82 M.J. 263 n* (C.A.A.F. 2022) (unpub. op.), to provide a basis to consider Appellant's claim, as

Appellant suggests, when in that case the CAAF merely directed the court-martial promulgating order 'be corrected.'"

Finally, in United States v. Denney, ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024), this Court denied Appellant's claim, stating that it did not require discussion or warrant relief.

Here, Appellant reiterates the same argument from these cases that an asterisk footnote in a summary decision provides this Court jurisdiction to review his claim. However, as this Court has repeated stated over the last six months, it does not. Consistent with those decisions, this Court should continue to follow Lepore and find that it lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. Accordingly, Appellant's claim must fail.

VII.[12]

APPELLANT'S CONVICTION IS LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the

[12] This issue is raised in the appendix pursuant to Grostefon.

record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

The elements of the charged offense are discussed in Issue I above.

Analysis

As discussed in Issue I above, the panel at Appellant's court-martial correctly found Appellant guilty of sexual assault, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction.

The same reasons detailed in Issue I above for factual sufficiency are the same reasons why Appellant's conviction is also legally sufficient. [redacted] AB testified that she was asleep and awoke to Appellant's fingers inside of her without her consent. Considering this evidence, when considered in the light most favorable to the prosecution and drawing every reasonable inference from the evidence in favor of the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Appellant notably makes no new arguments in this issue, instead relying on the same reasons discussed in Issue I above. As shown in Issue I, however, those reasons are unpersuasive. Appellant also states that his claims in Issue IV may be seen as a legal sufficiency

issue rather than a due process one. Either way, however, Issue IV above shows Appellant's claim is unsupported.

In sum, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 20 May 2024 via electronic filing.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman (E-2) **NICHOLAS J. MOORE,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S REPLY BRIEF** Before Special Panel No. ACM 40442 (f rev) 30 May 2024

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

Appellant, Airman (Amn) Nicholas J. Moore, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 20 May 2024 (Ans.). In addition to the arguments in his opening brief, filed on 19 April 2024 (App. Br.), Amn Moore submits the following arguments.

I.

AMN MOORE'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY INSUFFICIENT.

1. This Court retains robust factual sufficiency review powers, despite the Government's urging that it defer to the members' determination.

In *United States v. Csiti*, this Court held that "we infer Congress intended the beyond reasonable doubt standard to continue to apply in questions of factual sufficiency" and that the requirement for a court of criminal appeals (CCA) to show "appropriate deference" to the factfinder does not strip the power to weigh credibility. No. ACM 40386, 2024 CCA LEXIS 160, at *19–20, 22 (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.) (citations omitted). Thus, "in order to set aside a finding of guilty [this Court] must be clearly convinced that the weight of the evidence does not

support the conviction beyond a reasonable doubt." *Id.* at *23. While Amn Moore maintains that the standard should remain even higher (App. Br. at 9–11), the Government's briefing instead suggests this Court apply a toothless standard.

In the Government's telling, where evidence or a defense theory is presented at trial, but a conviction nevertheless results, "appropriate deference" means respecting the ultimate determination of the members. (Ans. at 18, 21, 24 (twice), 25 (twice).) If this type of argument prevails, there is very little for this Court to do on factual sufficiency. Of course, *every* members case that comes before this Court for factual sufficiency review involves the members convicting the accused. This is not the trump card the Government imagines. As this Court recognized in *Csiti*, it still retains the power and responsibility to judge credibility and determine whether it is clearly convinced the weight of the evidence does not support a conviction beyond a reasonable doubt. This Court should retain its critical evaluation of witness testimony in this case, rather than the Government's wholesale adoption of the evidence, no matter how flawed.

2. The Government cannot overcome the physical improbability of AB's account or her glaring credibility problems.

AB, without alcohol or sleep aids, claims she slept through significant maneuvering and disrobing. Moreover, she demonstrated a willingness to lie and manipulate witnesses prior to trial. But the Government repeatedly asks this Corut to credit dubious testimony and ignore inconvenient facts. This brief will examine several of the examples.

First is AB's contention that she was a heavy sleeper who was unusually tired that night. The Government leans into the farfetched explanation that she was "exhausted" on the night in question because of ice fishing two days before and a completely routine PT session one day before. (Ans. at 20 (citing R. at 318).) The trial counsel drew out these unconvincing facts, and the Government asks this Court to accept them as persuasive, but they are not. It also minimizes SPC CW's testimony that AB would awaken when he carefully climbed over her to use the bathroom and, crucially, he changed his answers to make them more helpful to AB's story *after* she spoke to him. (R. at 518–20.) This flimsy explanation cannot reasonably support AB's claim that she slept through all of the movement that she asserts.

Second, the Government focuses on one of six points Amn Moore made in his initial brief about the improbability of AB's account, specifically how her feet were pointed when she fell asleep. (Ans. at 20–21; App. Br. at 12–13.) Amn Moore argued that AB testified they were curled up to her left on the couch, making it difficult to fall over the way she described. (App. Br. at 13.) The Government, instead, says that AB curled her legs "to her chest." (Ans. at 21.) But AB never said that is how she curled up her legs. The Government reads facts into an ambiguous record. Of note, the trial counsel failed to explain whatever physical motions AB performed on the stand. This Court reviews the record as it is, and "appropriate deference" is not a mechanism to ignore evidentiary deficiencies.

Third, the Government discounts AB's previous willingness to lie to her boyfriend, SPC CW, about cheating on him with "Casey," and her willingness to

influence SPC CW's testimony in a favorable direction. (Ans. at 23–24.) On the first point, it claims that AB "had no reason to fabricate her allegations," reasoning that SPC CW "explained the entire situation to the member panel." (Ans. at 23.) But this misses the nuance. When AB called SPC CW, she misrepresented a consensual encounter with "Casey" as *non*consensual. (R. at 510.) That is the critical difference that the Government breezes past. Regarding AB's willingness to influence SPC CW's testimony, the Government asks this Court to accept SPC CW's contention that he changed his story because he "had more time to think about his answers." (Ans. at 23–24.) It is worth pausing to consider this point. SPC CW spoke to law enforcement *three times* and gave answers that were unfavorable to AB; then he spoke to AB, and at trial he gave different answers. Yet the Government still asks this Court to ignore the import of AB's actions both on her credibility and on the value of SPC CW's testimony. This Court should not.

Fourth, the Government downplays the importance of AB's initial "outcry," where she told her friend SrA BM the incident happened on the bed, not the couch. On the one hand, the Government asks this Court to credit that AB came "crying and panicked" to SrA BM's room. (Ans. at 19.) But when addressing the fact that AB told SrA BM a different location than her trial testimony, it instead turns the argument back on Amn Moore, claiming that "Appellant fails to note that SrA BM acknowledged on redirect examination that he told AFOSI that A1C AB had fallen asleep on the couch." (Ans. at 24 (citing R. at 437).) That is an inconsistent statement; it is not substantive evidence that AB actually said it happened on the couch. *See United*

States v. Damatta-Olivera, 37 M.J. 474, 477–78 (C.M.A. 1993) (discussing impeachment by prior inconsistent statement as affecting credibility unless admitted for substantive purposes). Perhaps the members, like the Government, were confused about how to use this evidence. In focusing on the Government's impeachment of its own witness, the Government misses the central importance that AB, mere minutes after an alleged assault, went straight to her friend and told a different story than the one she told at trial.

In sum, Amn Moore raised numerous deficiencies in the evidence that, collectively, should leave this Court clearly convinced the weight of the evidence does not support the conviction beyond a reasonable doubt.

3. What the Government does not address highlights the evidentiary weakness.

The section above focused on where the Government's rationalizations fall short. But it is also noteworthy where the Government does not, or cannot, offer a response. This includes: (1) how AB—unaffected by alcohol or drugs—slept through her shirt and bra coming completely off and her pants and underwear coming down to her thighs; (2) how Amn Moore was able to maneuver her around despite her head resting on her hand to stay up; (3) that, in addition to telling a different story to SrA BM, she told that same divergent story to MSgt RS and then yet another story to her roommate; and (4) more generally how Amn Moore, who is not of large frame, was able to maneuver the 145 lb. AB through the mechanics required to move from pointing one way and supporting herself on the couch to pointing the other way with half of her clothes missing, all while sleeping. This Court may, like the Government,

find there are no clear answers to these questions. And that is why the evidence is factually insufficient.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED SEXUAL MISCONDUCT UNDER MIL. R. EVID. 413.

1. The military judge's misapplied two Wright *factors when admitting the evidence.*

JH and AB presented significantly different scenarios. JH was Amn Moore's girlfriend who had amorphous boundaries regarding what Amn Moore was allowed to do with her breasts. AB, at least as she alleges it, was digitally penetrated while sleeping. Amn Moore's chief claim was that the military judge overestimated the probative value and failed to appreciate the significant differences between the two. (App. Br. at 22–24.) The Government does not meaningfully analyze the issue beyond pointing to the military judge's written ruling. But this does not resolve the errors in the military judge's analysis.

Of note, the Government does not engage with JH's explanation of what was permissible and impermissible with regard to "above the belt" contact:

> At one point I did express that I was uncomfortable with that, not necessarily touching, but just, like, I guess him seeing my boobs or touching them. And in the other occasion, I basically asked him to, like, take my shirt off is what I did.

(R. at 8.) Context matters, especially in relationships. And the context shows why JH's delayed allegation is fundamentally different than AB's. JH's allegation that Amn Moore pushed an uncertain boundary in their relationship and touched her breast is fundamentally different and has little probative value. And since the probative value and the relationship between the parties were tightly related, the military judge severely missed the mark on both.

2. The erroneous admission prejudiced Amn Moore.

The Constitution requires that courts subject Mil. R. Evid. 413 evidence to "a thorough balancing test." *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (citation omitted). The military judge's improper application of the balancing test led to the significant use of propensity evidence (and resulting argument) before the members.

The Government asks this Court to find no prejudice from any error, congratulating itself for not even mentioning Mil. R. Evid. 413 in the answer to factual sufficiency. (Ans. at 33 n.5.) But this says too much. It is precisely because the evidence had little probative value that it provided the Government no ammunition to argue factual sufficiency.

Yet things were different at trial before members, where the special trial counsel (STC) made the propensity argument repeatedly during closing argument. (App. Br. at 25 n.8.) The Government rejects the claim that the STC relied on the propensity evidence because it was only cited on 4 of 21 pages (Ans. at 34), yet the

Government on appeal is out of sync with the Government at trial, where the STC called the Mil. R. Evid. 413 evidence an "incredible pillar" of the case. (R. at 576.)

The Government also claims confusion on Amn Moore's part because he called the evidence "weak" during factual sufficiency analysis but "highly material" during the prejudice analysis. (Ans. at 34.) It was weak evidence in that it had low probative value and should have been excluded. But it was also highly material—meaning that it has "some logical connection with the facts of the case or the legal issues presented"—because it was propensity evidence in a sexual assault case. *See United States v. Cunningham*, 83 M.J. 367, 372 & n.5 (C.A.A.F. 2023) (citing BLACK'S LAW DICTIONARY 701 (11th ed. 2019)); *see also State v. Bowen*, 299 Kan. 339, 349 (Kan. 2014) ("In sex offense cases, propensity evidence is material, i.e., has a 'legitimate and effective bearing' on defendants' guilt." (citations omitted)). There is no confusion. This evidence should both play no role in this Court's factual sufficiency review, and the admission of it (and resulting argument) yielded prejudice in the form of Amn Moore's conviction.

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

III.

THE SPECIAL TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE OFFERED THE MEMBERS A SCIENTIFIC THEORY OF HIS OWN CREATION AS A BASIS TO BELIEVE AB, AND FURTHER BOLSTERED AB'S TESTIMONY BY HIGHLIGHTING HOW OTHER PEOPLE CREDITED HER STORY.

1. "Common sense and ways of the world" is not a mantra to validate otherwise-improper argument.

Instead of presenting expert testimony, the STC argued as though the Government had, concocting his own version of the science and explaining the case through that lens. But "common sense and knowledge of the ways of the world" does not authorize applying science to the facts of the case. The existence of sleep cycles, including their timing, depth, and frequency, is not a matter of common knowledge. Query whether eight members of the panel had the same understanding of when certain sleep cycles kick in and what the characteristics are of a sleeper in each stage. They could not, did not, and that is why this argument is a problem. Yet the Government would excuse the argument—indeed it says no error occurred at all—by repeatedly emphasizing the STC's invocation of "common sense and ways of the world." (Ans. at 36, 37 (thrice), 38 (five times), 39.)

The argument went beyond merely invoking common sense and ways of the world. The STC went into detail about what his conjured version of "deep sleep" meant for the facts. In his telling, a deep sleep is "a place that [children] feel trust." (R. at 568.) The STC spoke with certainty about what AB would understand "in her subconscious state sleeping." (*Id.*) And he described how the charged offense and the

preceding touching brought AB from "deep sleep" into "lighter sleep," but that the charged sexual assault "pushed too far, even whatever deep sleep she was in." (R. at 569.) He explained that "You can be in your sleep and somewhat cognizant of what is physically happening to you, but you're not fully conscious. You don't really know what's going on. And she didn't either." (R. at 569.)[1] None of this was based in the record, and it invited the members to overlook AB's implausible story in the name of "science" concocted by trial counsel.

2. Calling the argument rebuttal does not excuse the improper argument.

The STC argued that AB showed a genuine reaction, and that how *others* perceived that reaction supported the genuineness of her story. Stated differently, what happened in the room was "clear based on all these reactions, not just her own testimony of what happened in that room." (R. at 571.) So, if other people thought she was genuine, she must have been genuine. This was improper. But the Government suggests this was permissible as rebuttal to the implication that AB lied. (Ans. at 41–42.) The STC made the key objectionable arguments during the initial closing, not actually on rebuttal. But the Government's view of rebuttal is broad enough to include the not-yet-made defense argument at closing (Ans. at 41 (citing R. at 595)) and, curiously, arguments that Amn Moore made 463 days later in his

[1] The Government also argues that because the STC said "presumably" on page 567 of the record when beginning the discussion of deep sleep, that he did not actually argue she was in deep sleep. (Ans. at 37.) This is not a serious contention in light of the full text of the STC's argument.

opening brief. (Ans. at 41 (citing App. Br.).) Simply stating it was rebuttal does not change the problematic character of what occurred.[2]

This was not simply rebuttal. This was another of the STC's four "incredible pillars" of the case: AB's "genuine reaction *witnessed by so many different individuals*." (R. at 576.) The STC dwelled on the whether her flight chief, or friend, or roommate, or the forensic nurse thought something emotional had occurred. (R. at 574.) Again, the Government on appeal is disconnected from how the STC wanted the members to view the evidence. The argument was improper.

3. The improper argument prejudiced Amn Moore.

Regarding prejudice, the Government points to the military judge's instruction that counsel cannot express an opinion regarding witness credibility. (Ans. at 47 (citing R. at 617–18).) This is true, but that does not address a key point: the STC asked the members to assess AB's credibility in light of what others thought, not just what he thought. This was not the only failed curative step. In fact, the military judge's blessing of the STC's sleep science argument—the military judge overruled the Defense objection before the members, thus giving credence to the argument—magnified the prejudice. The STC's argument injected improper facts not in evidence

[2] The Government cites *United States v. Blackburn*, No. ACM 40303 (f rev), 2024 CCA LEXIS 129 (A.F. Ct. Crim. App. 4 Apr. 2024) for the proposition that highlighting witness testimony supporting the victim's credibility was not error. (Ans. at 41–42.) But, importantly, the witnesses at issue in *Blackburn* were character for truthfulness witnesses, so of course they would have bearing on the complaining witness's credibility. *Blackburn*, 2024 CCA LEXIS 129, at *39. Understandably, nobody testified that AB had a character for truthfulness.

and urged the members to find AB credible on an improper basis; these dual errors yielded prejudice and this Court should reverse.

WHEREFORE, Amn Moore respectfully requests this Honorable Court set aside the finding and sentence.

IV.

THE GOVERNMENT VIOLATED AIRMAN MOORE'S DUE PROCESS RIGHTS BY PURSUING HIS CONVICTION UNDER AN UNCHARGED THEORY OF CRIMINALITY.

Amn Moore largely stands on the opening brief for this issue. However, the Government claims that in "without consent" charging under Article 120(b)(2)(A), UCMJ, it "must affirmatively prove the act is done without the consent of the other person." (Ans. at 55.) While the Government asserts that it proved more than just that AB was asleep (Ans. at 54–56), the problem underlying this Assignment of Error is that it did not have to. The most problematic demonstration of the issue—quoted in the opening brief (App. Br. at 36) but glossed over in the Answer (Ans. at 52)—is where the STC tells the members that AB cannot consent in the sleep state. That may be true. But if that was the Government's theory of the case, the proper way to pursue it would be to actually charge the theory that she could not have consented because she was asleep. It did not, and that is the problem.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the finding.

Respectfully submitted,

[redacted]

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[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 May 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**ACM 40442 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas J. MOORE	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 17 May 2024, Appellant properly filed a Motion for Leave to File Supplemental Assignment of Error and Supplemental Assignment of Error. *See* JT. CT. CRIM. APP. R. 23(d). Specifically, Appellant's supplemental assignment of error claims the court-martial panel in his case was not properly constituted and cites to our superior court's decision in *United States v. Jeter,* 84 M.J. 68 (C.A.A.F. 2023). On this same date, Appellant's counsel filed a Motion to Attach Documents in support of Appellant's supplemental assignment of error. Appellant requests this court attach court member data sheets to the record of trial.

On 24 May 2024, the Government opposed Appellant's motions, arguing Appellant has not shown good cause for why this assignment of error could not have been filed in his initial brief.

Appellant's case was docketed with this court on 4 April 2023; on 21 March 2024, we remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, to account for defective and missing items in the record. On 19 April 2024, Appellant's case was re-docketed with the court. On this same date, Appellant filed his initial assignments of error. After the Government filed its answer, Appellant filed a reply brief on 30 May 2024. Our superior court issued its decision in *Jeter* on 25 September 2023—approximately seven months before Appellant filed his initial brief. As reason for failing to address *Jeter* in his 19 April 2024 brief, Appellant states: "Since [Appellant] became aware of the issue, [Appellant's] counsel has encountered delays and difficulty trying to obtain the underlying court member data sheets and was able to obtain only the initial pool of members."

We have considered Appellant's motions, the Government's opposition, the law, and the Joint Rules of Appellate Procedure for Appellate Courts of Criminal Appeals, and agree Appellant fails to provide good cause why the *Jeter*

case was not briefed earlier. Therefore, we deny Appellant's supplemental assignment of error and attachments.

Accordingly, it is by the court on this 31st day of May, 2024,

ORDERED:

Appellant's motion for leave to file supplemental assignment of error is **GRANTED**.

Appellant's motion to file supplemental assignment of error is **DENIED**.

Appellant's motion attach is **DENIED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court