IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40335 28 October 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **5 January 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 28 October 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

31 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 October 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40335 27 December 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **4 February 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 27 December 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

27 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 December 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force	)	No. ACM 40335
Appellant	)	25 January 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **6 March 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 25 January 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

26 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 January 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40335 24 February 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **5 April 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

Counsel is currently assigned 24 cases, with 9 pending initial brief before this Court. Counsel has not yet begun review in this case. Four cases at the Air Force Court have priority over this case:

1. *United States v. Lozoria*, S32723. The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. Counsel has completed the AOE and will file shortly.
2. *United States v. Zimmermann*, ACM 40267. The record of trial consists of 31 prosecution exhibits, 18 defense exhibits, 68 appellate exhibits, and 2 court exhibits. The transcript is 1662 pages. Counsel has begun review of this record.
3. *United States v. Wilson*, ACM 40274. The record of trial consists of 2 prosecution exhibits, 15 defense exhibits, and 8 appellate exhibits. The transcript is 90 pages. Counsel has drafted the AOE and will file upon client approval.

4. *United States v. Kroetz*, ACM 40301. The record of trial consists of 20 prosecution exhibits, 13 defense exhibits, and 5 appellate exhibits. The transcript is 90 pages. Counsel has not yet begun review of this record.

Through no fault of SSgt Cornwell, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Cornwell was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Cornwell's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 24 February 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 February 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force	)	No. ACM 40335
Appellant	)	27 March 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **5 May 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun. 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

Counsel is currently assigned 25 cases, with 9 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at the Air Force Court have priority over this case:

1. *United States v. Zimmermann*, ACM 40267. The record of trial consists of 31 prosecution exhibits, 18 defense exhibits, 68 appellate exhibits, and 2 court exhibits. The transcript is 1662 pages. Counsel has completed review of the record and begun drafting the assignments of error.
2. *United States v. Kroetz*, ACM 40301. The record of trial consists of 20 prosecution exhibits, 13 defense exhibits, and 5 appellate exhibits. The transcript is 90 pages. Counsel has not yet begun review of this record.

Through no fault of SSgt Cornwell, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Cornwell was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Cornwell's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 27 March 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

27 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 March 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40335**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Julian L. CORNWELL	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 28th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **5 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force	)	No. ACM 40335
Appellant	)	26 April 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **4 June 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun. 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

Counsel is currently assigned 26 cases, with 10 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at the Air Force Court have priority over this case:

1. *United States v. Zimmermann*, ACM 40267. The record of trial consists of 31 prosecution exhibits, 18 defense exhibits, 68 appellate exhibits, and 2 court exhibits. The transcript is 1662 pages. Counsel has completed the AOE and will file shortly upon client approval.
2. *United States v. Kroetz*, ACM 40301. The record of trial consists of 20 prosecution exhibits, 13 defense exhibits, and 5 appellate exhibits. The transcript is 90 pages. Counsel has not yet begun review of this record.

Additionally, counsel has two petitions for grant of review due in early May for *United States v. Rodriguez* (14 May) and *United States v. Souders* (3 May).

Through no fault of SSgt Cornwell, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Cornwell was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Cornwell's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 26 April 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

26 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 April 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force	)	No. ACM 40335
Appellant	)	23 May 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **4 July 2023.** The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). (*Id.*) The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without

confinement, reduction to the grade of E-3, and a reprimand. (*Id.*) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action ROT Vol. 1, 13 Jun. 2022.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 22 appellate exhibits, and 1 court exhibit. The transcript is 338 pages. SSgt Cornwell is not currently confined.

Counsel is currently assigned 25 cases, with 9 pending initial brief before this Court. Counsel has not yet begun review in this case. One case at this Court has priority over this case:

1. *United States v. Kroetz*, ACM 40301. The record of trial consists of 20 prosecution exhibits, 13 defense exhibits, and 5 appellate exhibits. The transcript is 90 pages. Counsel has completed the AOE and will file after coordination with the client.

Through no fault of SSgt Cornwell, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Cornwell was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Cornwell's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Appellate Government Division on 23 May 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

24 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40335 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 May 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40335 7 June 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following:

- Appellate Exhibits II and III: Defense Notice and Motion to Admit Evidence Under Mil. R. Evid. 412 and Government response. They are not sealed in the record and the military judge does not indicate they should be sealed. This is strange, however, given that the closed sessions about these documents is sealed. Counsel includes these documents out of an abundance of caution.

- Transcript pages 14-17: A closed session to discuss the filed Mil. R. Evid. 412 motions. Counsel notes that these pages are available in the version of the transcript available on Webdocs.[1]

- Transcript pages 234–39: A closed session to address a Mil. R. Evid. 412 session that occurred mid-trial. This session is not on the Webdocs version of the transcript.

[1] The Webdocs version is much longer than it should be because it duplicates the transcript from the opening session through voir dire.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether the military judge erred in allowing, or disallowing, evidence under Mil. R. Evid. 412. All parties to the trial had access to the appellate exhibits and were present during the closed sessions.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine "the entire record."

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

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing these exhibits and related transcript portions.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his motion.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
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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 Appellate Government Division on 7 June 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
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8 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JULIAN L.L. CORNWELL, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40335 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion –which appear to have been available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has first determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 June 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40335**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Julian L. CORNWELL	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 June 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Appellate Exhibits II and III, and transcript pages 14–17 and 234–239.

Appellant's motion states "[a]ll parties to the trial had access to the appellate exhibits and were present during the closed sessions." Appellant's counsel avers that viewing the sealed materials is reasonably necessary to fulfill his duty of representation, since counsel cannot perform his duty of representation without first reviewing the complete record of trial.

The Government responded to the motion on 8 June 2023. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial, as long as the Government can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.). The court finds Appellant's counsel has made a colorable showing that review of transcript pages 14–17 and 234–239, is necessary to fulfill counsel's duties of representation to Appellant. This court's order permits counsel for both parties to examine these sealed transcript pages.

As to Appellate Exhibits II and III, these materials are not sealed in the record of trial. Appellant's motion states Appellate Exhibits II and III are not sealed in the record, however counsel included them to its motion out of an abundance of caution, as both exhibits are Mil. R. Evid. 412 matters and the motion sessions addressing these documents were closed. However, in the sealed portion of the transcript, the military judge ruled the exhibits need not

to be sealed in the record, all parties to the proceeding (including victim's counsel) concurred with the military judge.

Appellant's motion also notes transcript pages 14–17 are unsealed in the electronic version of the transcript available on WebDocs.

Accordingly, it is by the court on this 14th day of June, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials, as to transcript pages 14–17 and 234–239, is **GRANTED**, subject to the conditions provided below. To view the sealed materials, counsel will coordinate with the court.

As to Appellate Exhibits II and III, Appellant's motion is **MOOT**.

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

It is further ordered:

The Government shall take all steps necessary to ensure sealed transcript pages 14–17 in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy (such as in WebDocs).*

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

* The base legal office may maintain a sealed copy in accordance with Department of the Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

3 July 2023

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

JULIAN L. L. CORNWELL
Staff Sergeant, USAF
Appellant

Before Panel No. 2

No. ACM 40335

BRIEF ON BEHALF OF APPELLANT

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ASSIGNMENTS OF ERROR

I.

WHETHER SSGT CORNWELL'S SEXUAL ASSAULT CONVICTION IS FACTUALLY INSUFFICIENT.

II.

WHETHER SSGT CORNWELL'S ABUSIVE SEXUAL CONTACT CONVICTION IS FACTUALLY INSUFFICIENT.

III.[1]

WHETHER SSGT CORNWELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

IV.

WHETHER SSGT CORNWELL'S SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT CONVICTIONS ARE LEGALLY INSUFFICIENT.

STATEMENT OF THE CASE

On 9-11 May 2022, at a general court-martial at Hill Air Force Base (AFB), Utah, a panel of officer and enlisted members convicted SSgt Julian L. L. Cornwell of one specification of sexual assault and one specification of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] (Record (R.) at 8, 9, 298; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 4 July 2022.) The panel acquitted him of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928). (R. at 298; EOJ.)

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[1] Assignments of error (AOE) III and IV are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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

The panel sentenced SSgt Cornwell to a dishonorable discharge, three months' hard labor without confinement, reduction to the grade of E-3, and a reprimand. (R. at 336; EOJ.) The convening authority disapproved the hard labor without confinement. (Convening Authority Decision on Action, ROT Vol. 1, 13 Jun. 2022.)

STATEMENT OF FACTS

Background

SSgt Cornwell met HC in high school in Louisiana. (R. at 124–25.) He asked her to be his girlfriend on the day she gave birth to a son from a previous relationship. (R. at 125.) They wed in 2016 when SSgt Cornwell received orders to Spangdahlem Air Base, Germany, but were diverted from Spangdahlem because HC, then pregnant with SSgt Cornwell's child, had a high-risk pregnancy. (*Id.*) Instead, they were assigned to Hill AFB. (*Id.*) HC explained that, from the time they moved to Utah, the marriage was not "good." (R. at 128.) In 2018, HC left with the children for Louisiana and told SSgt Cornwell that she was not returning. (R. at 129.) She eventually came back, although she testified things were still "rocky." (*Id.*) Still, they had a "very healthy sex life." (*Id.*)

Alleged Sexual Assault in November 2019

HC visited a therapist to help with recurrent sleeping difficulty. (R. at 130–31.) She received a prescription on 23 October 2019 for Trazodone, an antidepressant commonly used as a sleep aid. (R. at 130–31, 216–17; Prosecution Exhibit (PE) 2.) Maj AC, a pharmacist, explained that Trazodone was far weaker than other common sleep aid prescriptions like Ambien. (R. at 217.) Ambien acts more like a "hypnotic," leading to reports of people waking up somewhere and not remembering how they got

there. (R. at 218.) By contrast, Trazodone works like Benadryl, and there were zero reports in the literature of a patient knocked out in the middle of the night doing something. (*Id.*) For instance, if someone threw water on a person under the influence of Trazodone, one would expect them to wake up. (R. at 221.) Trazodone's effect peaks at 30 minutes after ingestion, although this can extend up to 120 minutes when the patient has eaten recently. (R. at 219.) A person's maximum level of "tiredness" would come soon after taking it, rather than in the middle of the night. (R. at 220.)

During this same timeframe, HC started on other depression medications. (R. at 164.) One of the members asked Maj AC what would happen if a patient mixed Trazodone with another antidepressant. (Appellate Exhibit (AE) XI; R. at 221–22.) Maj AC explained that it would have an additive effect in one of two ways, depending on whether it was the same type of antidepressant as Trazodone. (R. at 221–22.) If the second antidepressant operated the same as Trazodone, it could "either have an additive effect or it could have zero additional effect." (*Id.*) Additionally, if the other antidepressant operated through a different neurological pathway, the second antidepressant is "probably going to have an additive effect." (*Id.*)

Although the exact date of her allegation is unclear, the trial counsel framed it as either "October or November" of 2019, or in the "fall." (R. at 129, 133.) HC started the medication on 23 October 2019 with a dosage of 50 milligrams (mg), which she continued for several weeks before concluding that it had no effect. (R. at 242.) Her therapist increased the dosage to 100 mg. (*Id.*) The incident occurred "probably a

week" after she switched dosage. (R. at 165.) She claimed "we have learned that it was so strong that it would put me to sleep." (R. at 133.) On the night in question, HC claimed that she told SSgt Crowell, "Hey, I've taken my medication. You know, it will kick in in, like, 30 minutes." (R. at 135.) She was not tired at the time. (*Id.*) Approximately ten minutes later, SSgt Cornwell came to their bedroom and began giving her a back rub. (R. at 134.) She claimed that when he started to remove her shorts that she said "no" and slapped his hand. (R. at 135.) She testified that he got upset and left, then she fell asleep five or ten minutes later lying on her stomach. (R. at 136.)

Her next memory is waking up "in the middle of the night" on her stomach with SSgt Cornwell on top of her, with his penis inside her vagina, pinning her hands above her head. (*Id.*) She claimed that she fell back asleep in the middle of the intercourse. (*Id.*) During this brief period, she claimed to feel "buzzed, like a drunk level. Not like blackout level." (R. at 137.) She testified that she awoke again, this time on her back, with SSgt Cornwell using a towel to wipe her leg and vagina. (*Id.*) When SSgt Cornwell tried to pull up her shorts, she testified that she grabbed them and pulled them on herself, that he left, and that she started crying. (R. at 137–38.) When she confronted SSgt Cornwell the next day, she claimed he said that "I thought that you were pretending to be asleep, but whenever I realized that you weren't pretending, I stopped." (R. at 139.) He said that he would never sexually assault her, as he had been sexually assaulted himself as a child. (R. at 170.) HC testified that the alleged sexual assault "completely destroyed me." (R. at 139.) She continued

having sex with SSgt Cornwell for another year. (R. at 171.) HC stated that "all of the things that I've said up here, I'm 100 percent certain about." (R. at 152.)

During her cross-examination, the Defense pressed HC on a number of issues with her narrative:

- On one instance while on 100 milligrams of Trazodone, she was able to go to her daughter's room, give her a bottle, and return to bed. (R. at 166.)
- Regarding her shirt, she testified that it was on, but maybe she took it off, and that "possibly" she told Air Force Office of Special Investigations (OSI) that she took her shirt off. (*Id.*)
- She claimed she was incorrect when she told OSI she fell asleep during the backrub; she testified that she fell asleep after he left the room. (R. at 136, 167.)
- She claimed she was incorrect when she told OSI that *she* pulled her shorts up herself, rather than that she pulled them up only after SSgt Cornwell began pulling them up. (R. at 168.)

Other potential issues arose through another witness. HC's best friend at the time of the allegation, AC, said that the two had discussed the alleged sexual assault five to ten times over the previous year. (R. at 197.) The story was consistent every time, and HC never mentioned that she woke up to SSgt Cornwell having sex with her. (*Id.*) HC also never mentioned that her wrists were held down. (R. at 198.) The story she told AC also differed on how the allegation ended. According to AC, after SSgt Cornwell cleaned up HC, he then cleaned himself with the towel. (R. at 199.) She asked SSgt Cornwell "Did we just have sex?" to which he responded, "yes." (*Id.*)

Abusive Sexual Contact Allegation in May 2020

SSgt Cornwell and HC took a vacation to the Virgin Islands in December 2020; when they returned, she claimed there was no hope of reconciliation. (R. at 142.) She

"filed" for divorce in March 2021, although she acknowledged that she had never filed actual paperwork with a court. (R. at 143, 173.) On 1 May 2021, SSgt Cornwell brought a number of heavier items over to HC's new home. (R. at 144.) She claimed that after he carried a chair up the stairs, he proceeded to hug her and pin her hands against her body for about "five minutes total," at which point he threw her on the bed and she ran downstairs. (R. at 145–46.) The members acquitted SSgt Cornwell of assault based on the hug. (R. at 298.)

However, she also claimed that after they went downstairs and were walking to SSgt Cornwell's truck, he took both hands and slapped her on the buttocks, saying "Oh, the things I'd do to you." (R. at 147.) Later that afternoon SSgt Cornwell texted her to apologize for hugging her. (PE 1.) HC expanded the subject:

> It was everything. You completely betrayed me and my requests. I was saying "No. please don't. Jay stop. No" and you wouldn't let me go, and that's just a trigger for me from crying when I was being held down crying. Or the night I told you no and you took it as me "playing" and had your way with me when I fell asleep because of my medication. It's the fact that you slapped my ass and said "oh the things I'd do to you". It's everything. It was disrespectful.

(*Id.*) SSgt Cornwell responded: "I apologize for all of it. It shouldn't have happened and it won't happen again. I pinky promise. I'm very sorry and I know how much that hurts you. I'm sorry." (*Id.*)

When HC reached out to her friend TH that same day, she told a different version of the story. HC's then-account involved SSgt Cornwell grabbing her buttocks, after which HC told him to stop. (R. at 204.) When TH later informed HC that she was going to meet with "Jay's lawyers," HC, for the first time, told TH that SSgt Cornwell also picked her up, hugged her, and threw her on the bed. (R. at 205–

06.) A member asked a question on this point—when HC reported the allegation of buttocks touching and hugging. (R. at 207; AE IX.) HC told TH about the buttocks touching in 2021, but told TH about the hug was only the previous week. (R. at 207.) During her testimony, HC was adamant that she did not speak to any witnesses before trial. (R. at 175.)

HC gave her therapist permission to contact the First Sergeant, which began the investigation that led to his conviction. (R. at 172.)

ARGUMENT

I.

SSGT CORNWELL'S SEXUAL ASSAULT CONVICTION IS FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564,

568 (A.F. Ct. Crim. App. 2017) (internal punctuation omitted) (quoting *Washington*, 57 M.J. at 399). This Court exercises an "awesome, plenary, *de novo* power of review" under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993) (citation omitted).

The elements of sexual assault, as charged, are as follows: (i) that SSgt Cornwell committed a sexual act upon HC; and (ii) that HC was asleep; and (iii) that he knew, or reasonably should have known, that she was asleep. *See MCM*, pt. IV, ¶ 60.b.(2)(e); Charge Sheet, ROT Vol. 1. A "sexual act" includes "penetration, however slight, of the penis into the vulva." Article 120(g)(1)(A), UCMJ.

Analysis

This assignment of error turns on whether SSgt Cornwell knew, or reasonably should have known, that she was asleep. In making this assessment, this Court should regard many of HC's dubious details and additions with skepticism. Properly viewed, the credible evidence cannot demonstrate, beyond a reasonable doubt, that SSgt Cornwell either knew, or reasonably should have known, that HC was asleep.

The problems begin with HC's testimony about her use of Trazodone and what SSgt Cornwell should have known about the impact of the drug. The way HC tells it, the drug has an almost incapacitating impact such that she cannot function once it takes effect. (R. at 133.) And she claimed that she and SSgt Cornwell "learned that it was so strong." (*Id.*) But closer scrutiny makes her testimony questionable. According to her, she had begun taking Trazodone at the 100 mg level only the week before her allegation. (R. at 165.) Prior to that, she acknowledged the drug had

effectively no impact. (R. at 242.) Her testimony suggests a long-established pattern and practice regarding when she takes her Trazodone and what they expect to happen. But it was only a matter of days between her increasing the dosage and the allegation. As an example, she claims she told SSgt Cornwell "you know, it will kick in in, like, 30 minutes." (R. at 135.) Why would a spouse tell another spouse this if it was a known commodity? Thus, it stretches the facts to conclude SSgt Cornwell should have *expected* that the trazodone would have such an impact that she would fall asleep *in the middle of having sex*. This may strike this Court as reminiscent of sexual assault cases involving extreme intoxication, not what Maj AC classified as a relatively mild sleep aid. (R. at 217.)

This brings up a second point: How could this sleep aid have had the powerful effect that HC claimed? Her testimony on the effects—including waking up in the middle of sexual activity and then falling back asleep—cannot square with Maj AC's uncontradicted expert testimony about the drug. So what explains the difference? It very well could be the effects of HC's additional antidepressant. At the exact same timeframe as she and her therapist are experimenting with different doses of trazodone, she is beginning to take other antidepressant medications. (R. at 164.)[3] She had attempted suicide just months earlier. (R. at 164.) Maj AC explained that other antidepressants can have an additive effect with trazodone. (R. at 221–22.) There is no evidence that SSgt Cornwell would have known, or reasonably should

[3] HC elaborated in her OSI interview that she was on "max doses" of antidepressants. (Preliminary Hearing Officer (PHO) Exhibit 5 at 2:30:45-2:31:00, ROT Vol. 3.)

have known, that HC was also taking other antidepressants that might have magnified the effects of Trazodone. To summarize, SSgt Cornwell would not have reason to believe that HC would be essentially incapacitated by a routine sleep aid.

In addition to what SSgt Cornwell would *not* know about trazodone, this Court should consider what the evidence does show about his knowledge. SSgt Cornwell's actions and statements are inconsistent with the requisite knowledge. SSgt Cornwell repeatedly tried to speak with HC the next day, asking her what was wrong. (R. at 138.) When she asked him what happened that night, he said "I thought that you were pretending to be asleep, but whenever I realized that you weren't pretending, I stopped." (R. at 138–39.) This indicates the sexual activity began when she was awake or, at the very least, a mistake of fact as to his knowledge of her sleep state when he started. And this is corroborated by what HC first told OSI—that she fell asleep during the backrub; at trial, she contradicted herself on this point. (R. at 167.)

This Court should consider the HC's poor credibility when assessing her suggestion that SSgt Cornwell should have known she was asleep. If, as HC testified, SSgt Cornwell somehow snuck in to assault her while she was already asleep, the mechanics of what happened are difficult to fathom. HC claimed her first memory, after going to sleep on her stomach, was waking up still on her stomach with SSgt Cornwell on top of her penetrating her vagina. While perhaps SSgt Cornwell could have slipped off her shorts, the question of her shirt is important. On the stand she hedged and was evasive, but it seems she told OSI that the shirt was off. (*Id.*)[4] If so,

[4] She did. (PHO Exhibit 5, 2:09:44-2:10:15.)

it makes no sense that SSgt Cornwell would sneak in and remove her shirt to sexually assault her. Additionally, it makes little sense that SSgt Cornwell would pin her arms above her head if he knew she was asleep. (R. at 168–69.)

There are numerous other issues with HC's credibility—despite her assertion that "all of the things I've said up here, I'm 100 percent certain about"—that should give this Court pause before concluding that her narrative was accurate. (R. at 152.) First, the things she told OSI much closer in time to the allegation that she claimed were incorrect by the date of trial. This includes whether she fell asleep during the backrub; whether her shirt was on; whether she pulled up the shorts, or whether it was SSgt Cornwell; whether she woke up once, or twice; whether SSgt Cornwell pinned her hands above or head, or if instead they were at her side. (R. at 166–69.)

Second, she made divergent statements, also closer in time to the incident, to her friend AC. This includes *never* telling AC, despite recounting the story five to ten times, that she woke up during intercourse. (R. at 197.) Third is the consistency of her behavior with her allegation. She testified that this sexual assault "completely destroyed me." (R. at 139.) But they continued having sex for more than a year. (R. at 171.) It was only much later, during divorce proceedings, that she reported her allegation.

The crux of this specification is whether SSgt Cornwell knew, or should have known, that HC was asleep. Given that a routine sleep aid would not produce the powerful effect HC testified to here, SSgt Cornwell did not know, nor should he

reasonably have known, that HC was asleep.[5] The evidence, and common sense, lines up with his statement that he thought she was pretending to sleep, and stopped when he realized she was, in fact, asleep. They began by having sex while she was facing away from him on the bed; when he turned her over onto her back he realized she was asleep. By contrast, HC's testimony is filled with inconsistencies on key issues—her statements to a best friend and OSI cannot square with her testimony. And these narratives are not on equal footing. It is the Government's burden to prove SSgt Cornwell either knew or should have known HC was asleep beyond a reasonable doubt. It failed to meet that burden here, and this Honorable Court should set aside the conviction.

WHEREFORE, SSgt Cornwell respectfully requests this Honorable Court set aside the finding for Specification 1 of Charge I and the sentence.

II.

SSGT CORNWELL'S ABUSIVE SEXUAL CONTACT CONVICTION IS FACTUALLY INSUFFICIENT.

Standard of Review

The standard of review is the same as AOE I, *supra*.

Law

The law for factual sufficiency is identical to AOE I, *supra*.

[5] The assistant trial counsel, in closing argument, focused extensively on SSgt Cornwell's apology by text message as a sort of "smoking gun" that essentially foreclosed the possibility of acquittal. (R. at 265–75.) While the members may have been swayed by this facile argument, this Court should not.

The elements of abusive sexual contact, as charged, are as follows: (i) that SSgt Cornwell committed sexual contact upon HC; and (ii) that SSgt Cornwell did so without HC's consent. *See MCM*, pt. IV, ¶ 60.b.(4)(d); Charge Sheet, ROT Vol. 1. "Sexual contact" includes "touching . . . either directly or through the clothing, the . . . buttocks of any person, with an intent . . . to arouse or gratify the sexual desire of any person." Article 120(g)(2), UCMJ. "Consent" means "a freely given agreement to the conduct at issue by a competent person"; "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." Article 120(g)(7), UCMJ. Ignorance or mistake of fact is a defense when "the accused held, as a result of . . . mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). If the ignorance or mistake goes to any element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. *Id.*

Analysis

Much like the previous specification, the facts at issue are limited. The question is whether HC consented, or SSgt Cornwell had a reasonable mistake of fact as to whether she consented. And the background matters. HC makes it seem as though there was an unequivocal break in the relationship in November 2020, with no possibility of reconciliation. (R. at 142.) And yet the next month they took a trip to the Virgin Islands to try again. (*Id.*) Then, she claims, there was no hope. But

SSgt Cornwell had seen this before. HC had left with the children in 2018 and returned home to Louisiana. (R. at 129.) She said she was not coming back, but she did. (*Id.*) With this backdrop, SSgt Cornwell would have every reason to believe they could rekindle their relationship. At that point, they had not filed any paperwork for the divorce. (R. at 173.) They had discussed divorce numerous times and reconnected. (R. at 172.)

SSgt Cornwell incorporates all the arguments on HC's credibility raised in AOE I; her credibility matters because her consent, or any indications of consent, turn this innocent butt touch between husband and wife into a crime. And this Court can draw from the members' acquittal on the assault charges from the same evening. It became clear that HC had not told her friend TH about the allegedly offensive hug until just before trial. (R. at 207.) Moreover, once HC knew her friend TH was going to speak with SSgt Cornwell's lawyer, HC felt the need to influence her statement by telling her—for the first time—that he had hugged her, picked her up, and threw her on the bed. (R. at 206–07.) Importantly, HC adamantly denied speaking to witnesses. (R. at 175.)

HC also exaggerated the nonconsensual nature of the offense to her friend. She told HC that SSgt Cornwell touched her buttocks, that she told him to stop, and he refused. (R. at 204.) That certainly sounds nonconsensual, but it diverges significantly from her trial testimony, where she alleges a single slap of her buttocks. (R. at 147.) In fact, HC even reversed the order of events to make it seem worse. At trial, she claims the hug happened upstairs, then the buttocks slap came while

walking out. (R. at 145, 147.) Yet to TH, HC claimed that he *first* slapped her buttocks and then later hugged her against her will. (R. at 204.)

In sum, the evidence does not prove, beyond a reasonable doubt, either that HC did not consent to the touching, or that SSgt Cornwell did not have a reasonable mistake of fact that a playful touch with his then-wife was unwanted.

WHEREFORE, SSgt Cornwell respectfully requests this Honorable Court set aside Specification 2 of Charge I and the sentence.

Respectfully submitted,

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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 requests that this Court consider the following matters:

III.

SSGT CORNWELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

During arraignment, the military judge advised SSgt Cornwell that he had the right to be tried by a panel and that a three-fourths quorum was necessary to return a guilty verdict. (R. at 7.) He elected trial by a panel of officer and enlisted members. (R. at 8.) The Defense moved for appropriate relief, requesting the military judge require a unanimous panel verdict. (AE IV.) The military judge denied the motion. (AE VI.)

SSgt Cornwell'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 110, 290.) It is unknown whether the members convicted SSgt Cornwell 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).

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*, SSgt Cornwell 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 Equal Protection Clause.

There is no way of knowing whether a nonunanimous verdict secured any or all of SSgt Cornwell convictions. But that is a problem for the Government, not SSgt Cornwell. 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 . . . .").

SSgt Cornwell recognizes that the CAAF's recent decision in *United States v. Anderson*, __ M.J. __, 2023 CAAF LEXIS 439 (C.A.A.F. 29 Jun. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter.

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

IV.

SSGT CORNWELL'S SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT SPECIFICATIONS ARE 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

"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. 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)).

Analysis

For the reasons discussed in the main brief in Assignments of Error I and II, SSgt Cornwell's convictions for sexual assault of and abusive sexual contact upon HC are legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt.

WHEREFORE, SSgt Cornwell 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 Appellate Government Division on 3 July 2023.

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2 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40335
Staff Sergeant (E-5) JULIAN L. CORNWELL, USAF *Appellant.*	)	Panel No. 2

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 INSUFFICIENT.

II.

WHETHER [APPELLANT'S] ABUSIVE SEXUAL CONTACT CONVICTION IS FACTUALLY INSUFFICIENT.

III.[1]

WHETHER [APPELLANT] WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

IV.[2]

WHETHER [APPELLANT'S] SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT CONVICTIONS ARE LEGALLY INSUFFICIENT.

STATEMENT OF THE CASE

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

[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, 12 M.J. 431.

STATEMENT OF FACTS

Ms. HC and Appellant graduated from the same high school in the same class. (R. at 161.) They married in 2016. (R. at 125.) Marriage problems soon arose for the couple, causing Ms. HC and the children to leave Appellant for a month in 2018. (R. at 129.)

By the fall of 2019, the relationship was, as Ms. HC put it, "a little rocky," though it was getting better. (Id.) In October 2019, Ms. HC began taking Trazodone, a sleeping medication. Being a mother of three young children, Ms. HC stated, "I couldn't sleep at all. I had problems going to sleep, and then once I went to sleep, I would have problems staying asleep, more so going to sleep, and then I was having nightmares just about general things." (R. at 130.)

After the initial dosage did not work, Ms. HC and her therapist agreed to increase the dosage from 50 milligrams to 100. (R. at 121.) Ms. HC described the effects as follows:

> It would take effect about 30 minutes after I had taken the medication. I would go and tell [Appellant] good night and everything after I had taken it, and then I would go and lay in bed after my children were asleep, and I would play on my phone until I got so drowsy that I couldn't keep my eyes open. My hands started to get numb. My eyes started crossing. I was unable to focus to even respond to any texts.

(R. at 132.)

Ms. HC explained she would normally take the medicine around 9 or 10 pm after she had put the children to bed, straightened the house, and other evening chores. (Id.) Ms. HC stated she rarely drank alcohol, had been told not to drink when she was on her medication, and knew she did not drink on the night in question because it was a school night. (R. at 133.)

Ms. HC stated that Appellant knew when she took her medication and knew that "I would go to sleep within 30 minutes of taking that medication." (Id.) She added, "And we have learned that it was so strong that it would put me to sleep, so I would make sure that [Appellant]

was aware that I had taken it and I was going to bed and that he would be the one to wake up with our children." (Id.)

Ms. HC then detailed the night in question, which occurred in the fall of 2019 at their on-base house at Hill AFB. Earlier that day, around 3 or 4 pm, Ms. HC stated that Appellant had asked for sex but that she had said no. (R. at 134.) Ms. HC told Appellant that "the kids were awake and they weren't occupied at the time." (Id.)

That evening, Ms. HC did her normal routine of putting the kids down and then going to the gaming room to kiss Appellant good night. (Id.) She testified that she told Appellant that she had taken her medication and that "[w]e both knew that I'm going to go to bed." (R. at 135.)

About ten minutes after she took her medication, Appellant came to the bedroom. Ms. HC said this was atypical of Appellant because "I would always go to bed before him, and whenever he was done gaming, he would come to bed." (Id.) But that night was different. She explained:

> He came back -- he came up to the front of the house, to the bedroom, and he climbed on top of me, straddled me while I was lying on my stomach, and started to rub my back for a back massage. I thought it was an innocent thing, that he was just being nice, until his hands moved to my pants, and he tried to pull off my shorts. And I swatted his hands and I said, "No, not tonight." And he got frustrated and he huffed and puffed and he left the room.

(R. at 135-36.) Ms. HC reiterated she had to physically push Appellant's hands off of her and that she verbally told him, "No, not tonight." (R. at 136.)

Ms. HC thinks she went to sleep five to ten minutes later still lying on her stomach. (Id.) Ms. HC then stated, "My next memory is waking up in the middle of the night and [Appellant] is on top of me. I'm still on my stomach. My shorts are no longer on. My hands are pinned above my head. His penis is inside of my vagina. And his body is squishing me." (Id.) When asked

how long she was awake, Ms. HC replied, "Maybe, like, 30 seconds, a minute max. It was in and out. I woke up and I didn't really understand what was happening because I was still drowsy, and I fell right back asleep." (Id.) Ms. HC did recall thinking, "What's happening," adding, "I trusted him. He was my husband. And I didn't think that he would do anything like this to me." (Id.)

When asked if she felt like she was truly awake to comprehend what was happening to her at the time, Ms. HC explained as follows:

> I felt as though I was buzzed, like a drunk level. Not like blackout level. That's the easiest way to explain it is just I was there, but I was still so groggy as if, like, whenever I had woken up with my kids once before, bouncing down the wall, not really understanding what I'm doing or trying to do, just knowing that -- like, being there but just -- I woke up and I realized what was happening and I went back to sleep. I wasn't really able to fully comprehend anything at the time.

(R. at 137.)

Despite being groggy, Ms. HC testified that she was certain that Appellant's "penis was inside of my vagina" and that she knew it was Appellant because "I've had sex with my husband and I know how it feels." (R. at 152.) She added, "He was on top of me. I know that my hands were pinned above my head, because I did try to move them whenever I was woken up during the middle. I know that my shorts weren't on. And all of the things that I've said up here, I'm 100 percent certain about." (Id.)

Ms. HC's next memory was "waking up, and at this time I'm on my back and [Appellant] has a towel and he's wiping my leg and my vagina. And he goes to put my shorts back on, and I had grabbed them and I pulled them back up. And he leaves the room and I roll over and I got the blanket and start crying." (R. at 137.) Ms. HC said "the wiping" is what woke her up. Ms.

HC could not determine how long had passed between when she was first woken by Appellant and when she woke up the second time.

Ms. HC testified that the normal practice for the couple would be that whichever person was on top during intercourse would be the one to go get a towel and clean up afterwards. (R. at 137-38.) Ms. HC said that would happen "only if [Appellant] ejaculated." (R. at 138.)

After crying herself to sleep, Ms. HC stated she saw Appellant in the kitchen the next morning but ignored him asking her what was wrong. (Id.) Ms. HC would not talk to Appellant until later that afternoon after Appellant got home from work. Ms. HC testified:

> It was in the afternoon, and we were, like, in the doorway of the bedroom, and he was again trying to talk to me. And finally, I was like, "What happened last night?" And to me, I know that it felt like it had been a rape, which I specifically had asked him. And he said no, that he had stopped whenever he realized that I wasn't pretending to sleep, that I was actually asleep. And so then at that time I kind of was confused, if he hadn't ejaculated inside of me, what was the purpose of cleaning me up? So I asked him, and he got frustrated and he walked away.

(R. at 138-39.) Ms. HC also confronted Appellant about her previously saying no that evening. Ms. HC said Appellant had no response to her, adding, "He didn't say anything, because I had said 'no' twice prior to waking up in the middle of the night, once whenever he had asked verbally and once whenever he had attempted by pulling down my shorts while we were -- while he was giving me a backrub." (R. at 139.)

Ms. HC said at this time she was "mentally unstable" and "very emotional," adding, "And I was angry, because I -- again, I had trusted him, I loved him, he was my husband, and that was supposed to be a safe place for me." (Id.) Ms. HC stated Appellant's actions "completely destroyed me," adding, "I sat there and I tried to make the marriage work. But once

that is broken, there's no rebuilding that. I did try. But once that safety -- that sense of safety and that trust and that sense is gone, then there's no rebuilding that." (Id.)

Ms. HC would be hospitalized a few months later in January. Ms. HC explained, "I self-admitted myself into Lakeview due to mental health issues. I was suicidal, so I brought it upon myself to admit myself. I felt like that was the safest option to know that I was safe there." (R. at 140.) Additionally, in the timeframe after the assault until she checked into the hospital, Ms. HC stopped taking her sleeping medication because she was "terrified" of it after the incident. (R. at 142.)

When asked why she did not report the assault or leave Appellant, Ms. HC stated, "I was a stay-at-home mom. We had three small children. And I had no source of income. I have no family here. And I really, honestly felt that we can make it work and that it was something that we could get past." (R. at 140.) Ms. HC also told a few of her friends and her therapist about what happened. All recommended she tell authorities. However, Ms. HC was hesitant because "victims usually don't get believed." (R. at 141.)

After the assault, the couple, as Ms. HC testified, "tried to make it work" by going to marriage counseling. (Id.) However, by late 2020, Ms. HC decided the marriage needed to end. (R. at 142.) The couple went on a trip to the Virgin Islands in December 2020, but upon returning, Ms. HC realized the marriage had "no hope." (Id.) However, Ms. HC did not immediately move out because she did not have any income and was waiting to split the couple's income tax return. When they got their tax return, Ms. HC said she used her half "for me and the children to move out and me to provide them with their beds and everything." (R. at 143.)

Ms. HC stated she filed for divorce in March 2021 and moved out in April 2021. (Id.) In May 2021, Appellant brought some furniture from their on-base house to Ms. HC's new

apartment. Prior to this day, Ms. HC had not told Appellant where she was staying, explaining, "I guess I was more or less scared for him to know where I lived, because he wasn't okay with the fact that we were getting a divorce." (R. at 144.) Ms. HC explained that even though she wanted a divorce, Appellant still wanted to be with her because of "the way he would talk to me, just saying that he loved me and that he missed me and that he knew that he had . . . fucked up." (R. at 145.)

As Appellant was helping Ms. HC carry a chair up the stairs, Appellant asked Ms. HC what kind of underwear she was wearing. (R. at 144.) Ms. HC told him it was none of his business. When Appellant put down the chair in the upstairs bedroom, Ms. HC explained what happened next:

> He came and he hugged me. And I asked him to stop. And I tried to squirm out. He had my arms here so that I was, like, pinned. My arms were pinned against my body, so I tried to squirm out from underneath his arms. He then squeezed tighter. And I told him to stop, "Jay, stop. Jay, let go, like, please stop." He then squeezed me tighter and he picked me up off of the ground. He held me there for a minute and then he turned around and he threw me onto the bed. And I was able -- the way he had thrown me, I landed on my back and I was able to roll off of the side and run down the stairs.

(R. at 145.)[3]

After returning back downstairs, Ms. HC took the kids outside and told them to tell their dad goodbye. (R. at 146-47.) When Appellant came outside, Ms. HC said Appellant "took both his hands and slapped me on the butt and said, 'Oh, the things I'd do to you.'" (R. at 147.) When asked how this made her feel, Ms. HC responded, "It made me feel even more uncomfortable, because our marriage was over, I had moved out, which obviously should have

[3] Appellant was acquitted of the assault charge related to this testimony.

been a realization to him that I didn't want to be with him, and I didn't want any kind of sexual advances or really anything from him." (Id.)

Ms. HC went inside, cried, and posted a picture of herself on Instagram with the caption, "It's a shame that it has to be said, but no means no. End of story." (Id.) Within ten minutes of posting the picture, Ms. HC said Appellant texted her. That text exchange is at Prosecution Exhibit 1 and reads as follows:

> Appellant: I'm sorry.
>
> Appellant: I shouldn't have hugged you.
>
> Ms. HC: It was everything. You completely betrayed me and my requests. I was saying "No. Please don't. Jay stop. No" and you wouldn't let me go, and that's just a trigger for me from when I was being held down crying. Or the night I told you no and you took it as me "playing" and had your way with me when I fell asleep because of my medication. It's the fact you slapped my ass and said "oh the things I'd do to you." It's everything. It was disrespectful.
>
> Appellant: I apologize for all of it. It shouldn't have happened and it won't happen again. I pinky promise. I'm very sorry and I know how much that hurts you. I'm sorry
>
> Appellant: I mean it with all of my heart hands I'm sorry

(Pros . Ex. 1.) Later that afternoon at a child's birthday party, Ms. HC said she was crying and told one of her friends, Ms. TH, about the incident. (R. at 149-50.) She also told another one of her friends, Ms. AC, on the phone. (R. at 149.)

At the time, Ms. HC still did not plan on reporting Appellant because "victims aren't usually believed." (Id.) She did tell her therapist about the incident, who recommended that Ms. HC contact law enforcement. Still, all Ms. HC wanted was, as she put it, for Appellant to "just . . . leave me alone." (R. at 150.) So she asked her therapist to contact Appellant's First Sergeant "to tell the first shirt to tell [Appellant] to leave me alone, that I didn't want anything to do with

him and that I wanted him to leave me alone." (Id.) However, since the First Sergeant was a mandatory reporter, the First Sergeant then contacted the Air Force Office of Special Investigations (AFOSI).

Ms. HC testified that she never intended this to become a law enforcement report, stating, "[Appellant] had a wonderful career. I didn't want to affect that career in any way. I wanted him to leave me alone." (Id.) When asked if she ever would have reported it, Ms. HC replied, "I don't know. I can't say. Again, victims are rarely believed, so I don't know if I would have reported it." (R. at 151.)

Ms. HC testified that Appellant has stalled the divorce from moving along because he will not agree to a child support amount. (R. at 126.) Ms. HC stated that she only wanted child support from Appellant and had never filed for or was interested in receiving alimony from Appellant. (R. at 127.) Ms. HC stated there was no dispute between her and Appellant as to child custody, only the child support amount.

Ms. HC replied, "No," when asked if she had tried to use Appellant's court-martial or the allegations against him to influence the divorce and as leverage for custody. (R. at 128.) In fact, Ms. HC stated that she would gain nothing from Appellant's court-martial, adding, "I actually have stuff to lose. I lose the one support person that I have here. I lose out on $1,000 in child support that I gained through the military right now, even though our divorce isn't final. And I would love to be the type of mom that doesn't need a break every so often, but I do, and that means that I would lose out on that. So I don't have anything to gain from this." (Id.) At trial, Ms. HC said she currently had custody of the three children, works 12-hour days at two different jobs, and was a full-time college student. (R. at 152.)

On cross-examination, Ms. HC stated that she was taking a depression medication at the same time she was taking Trazodone. (R. at 164.)

Appellant's trial defense counsel then asked about a time when Ms. HC was able to take care of one of her kids while under the effects of Trazodone. (R. at 165.) Ms. HC replied, "There was one night, yes, that I stumbled down the hall. The bottle was already made in my daughter's room. I stumbled down the hall. Our hall was very narrow, probably about this wide, back and forth bouncing off the walls. I was unable to open my eyes. I gave her the bottle and then I bounced back in. I went straight back to bed and had no problems falling back asleep. I was extremely drowsy." (R. at 166.) Ms. HC said she handed the bottle to her daughter and that "she was old enough to hold it herself." (Id.)

Regarding when Appellant came into the bedroom that night and attempted to give Ms. HC a backrub, Ms. HC stated, "I didn't have on a bra, but my shirt was still on." (Id.) When asked by Appellant's counsel about her telling AFOSI that she took off her shirt, Ms. HC responded, "I did think that I had taken off my shirt. It was something that had been brought up. I couldn't remember where my shirt was during the incident, but it did not come off." (Id.)

When Appellant's counsel stated that Ms. HC had told AFOSI that she had fallen asleep during the backrub, Ms. HC responded that she did not fall asleep during the backrub and that Appellant left the room prior to her falling asleep. (R. at 167.)

When asked about who put her shorts back on her once Appellant finished having sex with her, Ms. HC stated that Appellant "was pulling them up onto me and I grabbed them whenever they were about halfway and pulled them up the rest of the way." (Id.)

Ms. AC became friends with Ms. HC around January 2017. (R. at 182.) Ms. AC testified that in the fall of 2019, Ms. HC "had confided in me that she thought her husband had

raped her." (R. at 184.) Ms. AC testified that she received a text one night from Ms. HC asking if she could talk to her. The next day, Ms. HC came to Ms. AC's house appearing as if she had been recently crying a lot. (R. at 187.) Ms. HC then told Ms. AC, "I think [Appellant raped me last night." (R. at 189.) Ms. AC testified that Ms. AC told her the following:

> That she woke up to him using a towel to clean off her private -- her lower private parts, and she was a little hazy and looked over and noticed the bedroom door was shut. And then she looked back at him and he was cleaning his lower private parts with the same towel. And that is when she asked him, "Did we just have sex?" And he said, "Yes." And then that was when she had told me, she said that she had expressed to him that she wasn't aware that they had just had sex.

(R. at 199.)

Later, Appellant and the kids came over to Ms. AC's house. Ms. AC saw Appellant and Ms. HC having a conversation in the kitchen and heard Appellant say, "I'm so sorry. I'm so sorry. I'll never do that again." (R. at 192.)

On cross-examination, Ms. AC said she and Ms. HC talked about the assault five to ten times over the course of the year. (R at 197.) She said that Ms. HC told her she woke up one time during the incident and that was when Appellant was cleaning up. (Id.) When asked if Ms. HC ever told her she woke up while Appellant was having sex with her, Ms. AC replied, "No." (Id.)

Ms. TH, another of Ms. HC's friends, testified that in May 2021 she was at a children's birthday party on base when Ms. HC showed up late and looking upset. (R. at 202-03.) Ms. HC then told Ms. TH that Appellant had come over before the party and had touched her butt. (R. at 204.) Ms. TH said Ms. HC was close to tears as she told her about the incident. (R. at 204-05.)

The Government also called Maj AC who was recognized as an expert in the field of pharmacology. (R. at 215.) Maj AC stated that Trazodone was prescribed as an antidepressant

and a sleep aid. (R. at 216.) Maj AC said the effects of Trazodone typically begin within 30 minutes and 100 to 120 minutes. He said Trazodone causes drowsiness, whereas a drug like Ambien causes a hypnotic state. (R. at 219.) Maj AC discussed case reports for Ambien where "individuals were having intercourse and, to their partner, they looked lucid, they looked awake, but come the following morning they have zero recollection of doing that. (Id.) However, Maj AC said there were no such case reports for Trazodone.

Maj AC testified that patients may have a stronger or weaker effect by taking Trazodone, just as is the case for any medication. (Id.) Maj AC agreed that a person's maximum level of tiredness when taking Trazodone would be soon after taking the medication versus a few hours later. (R. at 220.) Maj AC also confirmed that hands going numb and eye crossing were reported side effects of Trazodone. (R. at 244.)

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

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY SUFFICIENT.

Standard of Review

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

Law

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

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).

Specification 1 of Charge I as charged under Article 120, UCMJ, states that Appellant "did, at or near Hill Air Force Base, Utah, between on or about 1 August 2019 and on or about 31 December 2019 commit a sexual act upon [Ms. HC], by penetrating her vulva with is penis, when he knew or reasonably should have known she was asleep." (Charge Sheet, ROT, Volume I.)

At trial, the military judge instructed the members as to the elements of the offense as follows:

> (1) That at or near Hill Air Force Base, Utah, between on or about 1 August 2019 and on or about December 31 2019, [Appellant] committed a sexual act upon [Ms. HC] by penetrating her vulva with is penis;

(2) That the accused did so when [Ms. HC] was asleep; and

(3) That the accused knew or reasonably should have known that [Ms. HC] was asleep.

(R. at 257-58.)

The military judge instructed that a "sexual act" meant "the penetration, however slight, of the penis into the vulva or anus or mouth." (R. at 258.)

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. This Honorable Court should equally be convinced and affirm Appellant's conviction.

Notably, Appellant seems to only contest the third element of this offense as it begins his analysis of this issue by stating, "This assignment of error turns on whether SSgt Cornwell knew, or reasonably should have known, that she was asleep." (App. Br. at 8.) However, each of these elements will be addressed in turn.

- ***Appellant placed his penis inside Ms. HC's vulva.***

The evidence is clear Appellant placed his penis inside Ms. HC's vulva. Ms. HC testified that she clearly remembered waking up on the night of the incident with Appellant's penis inside of her. (R. at 136, 152.) As Ms. HC stated, Appellant's "penis was inside of my vagina" and she knew it was him because "I've had sex with my husband and I know how it feels." (R. at 152.) Appellant notably does not contest the fact that he placed his penis into Ms. HC's vulva.

- ***Appellant did so while Ms. HC was asleep.***

The evidence is equally clear that Appellant committed these acts while Ms. HC slept. Ms. HC testified that she was on sleeping medication at the time that both she and Appellant knew would cause her to be so drowsy that she could not keep her eyes open, her eyes would start to cross, and that her hands would go numb. (R. at 132.) Ms. HC testified that these effects would occur about 30 minutes after taking the medication. (Id.)

On the night in question, Ms. HC stated she did her normal routine of straightening up the house and putting the children to bed before she took the medicine. She then took her medicine, told Appellant goodnight while he played games in the gaming room, and went to the bedroom. After Appellant came to the bedroom and she rebuffed Appellant's attempt to give her a backrub, Ms. HC testified she went to sleep and was awoken with Appellant's penis inside of her. (R. at 136-37.) She also testified that she drifted back off to sleep and was awoken again when Appellant was wiping her leg and vagina with a towel. (R. at 137.)

As with the first element, Appellant likewise does not contest in his brief whether Ms. HC was sleep.

- ***Appellant knew or should have known Ms. HC was asleep.***

Finally, the evidence shows Appellant knew or should have known Ms. HC was asleep when he sexually assaulted her. To start, as noted above, Appellant knew Ms. HC had specifically told Appellant on two occasions during that day that she did not want to have sex. The first occurred earlier in the afternoon when Ms. HC told Appellant that the kids were awake and not occupied. (R. at 134.) The second occurred right before Ms. HC went to sleep that night when Appellant attempted to give her a backrub and then pull off her shorts. Ms. HC plainly told him "No, not tonight," to which Appellant grew angry. (R. at 135-36.) This evidence shows

Ms. HC was in no mood for sex even before she went to sleep, had specifically told Appellant as much, and that Appellant was mad about it.

Furthermore, Appellant knew Ms. HC had taken her sleeping medications and knew the side effects it had on her. As Ms. HC testified, both she and Appellant "had learned that it was so strong that it would put me to sleep, so I would make sure that [Appellant] was aware that I had taken it and I was going to bed and that he would be the one to wake up with our children." (R. at 133.)

Here, Appellant knew Ms. HC did not want to have sex, knew that she had taken her medication, and knew the medicine put her into such a sleeping state that Appellant would have to take care of the children should they wake. Considering these circumstances, Appellant either knew or well should have known Ms. HC was sleeping when he entered their bedroom and placed his penis into her vagina.

In sum, the evidence overwhelmingly shows Appellant inserted his penis into Ms. HC's vulva while she slept and that Appellant either knew or reasonably should have known Ms. HC was asleep.

Before this Court, however, Appellant makes the same arguments that proved unpersuasive at trial before the panel members. These arguments should meet an equal fate before this Honorable Court.

First, as he did at trial, Appellant claims he did not actually know the side effects of Trazodone because Ms. HC had just recently increased the dosage of the medication. (App. Br. at 8.) Yet, whether the medication was recently increased or not, Ms. HC still plainly testified that she and Appellant had discussed the current effects of the medication and the effects it had on Ms. HC. Here, Appellant "knew that I would take it and that I would go to sleep within 30

minutes of taking that medication" and that the couple, again, had "learned that it was so strong that it would put me to sleep, so I would make sure that he was aware that I had taken it and I was going to bed and that he would be the one to wake up with our children." (R. at 133.)

Next, Appellant claims the side effects Ms. HC testified she had from the Trazodone did not "square with Maj AC's uncontradicted expert testimony about the drug." (App. Br. at 9.) Here, as he does throughout his brief, Appellant attempts to downplay the side effects of Trazodone, calling it "far weaker" than other sleeping drugs such as Ambien because they did not have the same "hypnotic" effects. (App. Br. at 2.) However, Appellant fails to highlight the nuance of Maj AC's testimony when he stated that Trazodone was "weaker than Ambien." (R. at 217.) In his testimony, Maj AC was simply stating that while Trazodone only caused drowsiness, Ambien caused people to go into a hypnotic state where patients would actually do things that they did not remember. (R. at 217-18.) Maj AC stated that patients on Ambien would be lucid and look awake, but would later have no recollection of anything. (R. at 219.) For Trazodone, however, Maj AC said the side effect was just drowsiness. (R. at 217-18.)

Here, Appellant's discussion on the differences between Ambien and Trazodone hurts Appellant's claim rather than helps it, as it highlights that Trazodone simply puts people to sleep, which is exactly what happened to Ms. HC. Appellant's claim that he thought Ms. HC was awake might actually be stronger if Ms. HC had been taking Ambien, considering the reports cited by Maj AC of patients being totally lucid and awake during the prime effects of Ambien. Here though, Ms. HC was on Trazodone which, as Maj AC testified, simply puts people to sleep.

Appellant also notably fails to discuss Maj AC's testimony that reported side effects from Trazodone included hand numbness and crossing eyes, which corroborated Ms. HC's testimony as to what would happen to her hands and eyes after taking the medication. (R. at 244.)

Notably, all of Maj AC's testimony was theoretical as he had never seen or discussed firsthand what effects Ms. HC actually experienced from Trazodone. Thus, the generalized scale of their effects and differences between Ambien and Trazodone were inconsequential in the face of direct testimony from Ms. HC about the side effects she actually faced (which Maj AC confirmed were known side effects) and direct testimony that Appellant knew exactly what types of actual side effects Trazodone had on Ms. HC on the night in question. While Appellant claims he "would not have reason to believe that [Ms. HC] would be essentially incapacitated by a routine sleep aid,"[4] the evidence shows Appellant actually knew Trazodone knocked his wife out within 30 minutes of her taking it and he actually knew she had taken it that night. Considering these circumstances, Appellant therefore knew or should have known Ms. HC was asleep when he placed his penis into her vulva.

Still, Appellant attempts to argue he did not know the effects of Trazodone because, on the following day, he continually asked Ms. HC "what was wrong" and claimed to Ms. HC that he thought she "was pretending to be asleep." (App. Br. at 10.) Appellant's statements the morning after his sexual assault should carry little weight with this Court. First, Appellant was asking his wife "what was wrong" because he had a guilty conscious about what he had done to his wife the night before. He knew that she did not want to have sex that night. He knew that he had been mad about it. He knew that he had waited for her to fall asleep so she would not and could not protest. And he knew that she was actually asleep when he began having sex with her. Knowing all of this, and knowing that she would likely have some memory issues because of the Trazodone side effects of which he was well aware, Appellant was asking Ms. HC "what was wrong" as a way of prodding from his wife what she did or did not remember from the incident.

[4] *See* App. Br. At 10.

Then, once he realized she remembered that sex occurred, he makes the unbelievable claim that he thought she was pretending to be asleep and that he stopped once he realized she was indeed asleep.

Yet, even this part of Appellant's story fails for multiple reasons. First, the evidence shows zero indication that the couple had ever engaged in any sort of sexual activity where the other partner pretended to be sleeping. Further, Appellant had already been denied sex twice that day, including that very night in that that very bed when Ms. HC specifically said, "No, not tonight," as Appellant attempted to take off her shorts. Finally, Appellant claiming he "stopped" once he realized Ms. HC was asleep does not square with his later actions of getting a towel and wiping Ms. HC's leg, vagina, and himself. These actions are indicative of someone who has ejaculated and is confirmed by Ms. HC's testimony that the two would normally only clean up (i.e., get a towel) when Appellant had ejaculated. If Appellant had indeed stopped at the point he supposedly realized she was asleep, there would have been no ejaculation and no need for a towel. Yet, Appellant did get a towel and used it to clean himself and Ms. HC.

Here, Appellant's story fails to explain how Ms. HC twice rebuffing his sexual advances somehow morphed into consensual sex where Ms. HC was pretending to be asleep. Instead, the evidence shows Appellant did not stop having sex with Ms. HC until he ejaculated, which destroys his claim that he stopped having sex with her because he realized she was asleep and causes irreparable doubt on his ultimate claim that he thought she was pretending to be asleep from the beginning.[5]

[5] Notably, when Ms. HC confronted Appellant about why he would be cleaning her up if he stopped and why he would think she would want sex after telling him no twice, Ms. HC said Appellant "didn't say anything" and "got frustrated and he walked away." (R. at 138-39.) Likewise, when Ms. HC would months later send a text that mentioned this night, the fact that she told him "no" and that Appellant still "had your way with me when I fell asleep because of

Next, Appellant turns to attacking Ms. HC's credibility by discussing whether or not Ms. HC had her shirt on or not during the incident or whether Appellant or Ms. HC put her shorts back on after Appellant finished sexually assaulting her. (App. Br. at 10-11.)[6]

Appellant also takes issue with Ms. HC "never telling" Ms. AC that she woke up during the intercourse. (App. Br. at 11.) Yet, Appellant fails to mention what Ms. HC did tell Ms. AC the day after the sexual assault. Ms. HC told Ms. AC she thought Appellant raped her, that Appellant admitted to her that they had sex, and that she woke up to Appellant cleaning her lower private parts. (R. at 199.) All of these details are consistent with Ms. HC's testimony and Appellant has provided no reasoning as to why Ms. HC would fabricate this near-immediate report to Ms. AC.

Here, Appellant's notations about slight inconsistencies in Ms. HC's testimony about whether her shirt was on or whether her hands were over her head or at her side only further highlight the drowsy state Ms. HC was in that night. Considering the effects of Trazodone on here, such slight inconsistencies should be expected.

Furthermore, each of these supposed inconsistencies mentioned by Appellant are inconsequential to what Appellant calls the "crux of this specification" and what this "assignment of error turns on" – namely whether Appellant knew or should have known she was asleep. (App. Br. at 8, 11.) Whether Ms. HC remembered her shirt being on or off or her hands being above her head does not impact whether Appellant knew or should have known she was

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my medication," Appellant never denied that she was asleep or argued he thought she was not. Instead, Appellant said, "I apologize for all of it." (Pros. Ex. 1.)

[6] In doing so, Appellant cites to a Prehearing Officer Exhibit that was not admitted at trial. As noted above, this Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; Beatty, 64 M.J. at 458.

asleep. As detailed above, the evidence shows Appellant was on notice of the side effects that Trazodone had on Ms. HC, was on clear notice that Ms. HC did not want to have sex that night, and was on notice that Ms. HC had taken her medication that night.

Finally, Appellant attacks Ms. HC credibility by stating that the sexual assault did not really "destroy" her because the two continued to have sex for over a year and it "was only much later, during divorce proceedings, that she reported her allegation." (App. Br. at 11.) However, as shown above and through the context of her testimony, Ms. HC explained exactly why she tried to make her marriage with Appellant work even after the sexual assault and also why she was not in any position to leave him after his attack. As she put it, "I was a stay-at-home mom. We had three small children. And I had no source of income. I have no family here. And I really, honestly felt that we can make it work and that it was something that we could get past." (R. at 140.)

Further, while Appellant now claims that Ms. HC "reported her allegation" during divorce proceedings, the record shows Ms. HC never reported Appellant's actions to law enforcement and never intended them to reach that level. While Ms. HC did ask her therapist to contact Appellant's First Sergeant, Ms. HC only wanted her therapist to tell the First Sergeant "to tell [Appellant] to leave me alone." (R. at 150.) She did not intend for law enforcement to become involve, as she stated, "[Appellant] had a wonderful career. I didn't want to affect that career in any way. I wanted him to leave me alone." (Id.)

Moreover, Appellant has failed to show Ms. HC had any motive for fabricating her claims against Appellant. In fact, the opposite is true. As Ms. HC testified, "I actually have stuff to lose. I lose the one support person that I have here. I lose out on $1,000 in child support that I gained through the military right now, even though our divorce isn't final. And I would love to

be the type of mom that doesn't need a break every so often, but I do, and that means that I would lose out on that. So I don't have anything to gain from this." (R. at 128.)

Here, Appellant's claims that he did not know the effects of Trazodone, that he thought Ms. HC was awake, and his attacks on Ms. HC's credibility are the same arguments and attacks he used against Ms. HC at trial and were well before the panel who had the opportunity to personally observe Ms. HC's testimony. Despite these arguments and attacks, the panel found beyond a reasonable doubt that Appellant sexually assault Ms. HC in her sleep. This Court should not disturb that verdict.

In sum, the evidence adduced at trial shows Appellant penetrated Ms. HC's vulva with his penis, that he did it while she was sleeping, and that he either knew or should have known that she was asleep. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of the sexual assault specification against Appellant was met. This Honorable Court should likewise, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, equally be convinced of Appellant's guilt beyond a reasonable doubt.

II.

APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT IS FACTUALLY SUFFICIENT.

Standard of Review & Law

The standard of review and law pertinent to this issue are the same as in Issue I.

Additionally, Specification 2 of Charge I as charged under Article 120, UCMJ, states that Appellant "did, within the state of Utah, on or about 1 May 2021, commit sexual contact upon

[Ms. HC] by touching her buttocks, with his hand with an intent to satisfy his sexual desire, without her consent." (Charge Sheet, ROT, Volume I.)

At trial, the military judge instructed the members as to the elements of the offense as follows:

> (1) That, within the state of Utah, on or about 1 May 2021, [Appellant] committed a sexual contact upon [Ms. HC] by touching her buttocks with his hand; and
>
> (2) That the accused did so without [Ms. HC's] consent.

(R. at 258.)

The military judge instructed that "sexual contact" meant "touching, either directly or through the clothing, the buttocks of any person, with an intent to gratify the sexual desire of any person, and that the touching "may be accomplished by any part of the body or an object." (Id.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of abusive sexual contact 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.

- ***Appellant touched Ms. HC's buttocks with his hand.***

The evidence is clear Appellant touched Ms. HC's buttocks with his hand on or about 1 May 2021 outside of her new apartment. As Ms. HC testified, Appellant "took both of his hands and slapped me on the butt" while also saying, "Oh, the things I'd do to you." (R. at 147.)

- ***Appellant did so without Ms. HC's consent***

Here, there is no evidence of consent on Ms. HC's part. As the evidence shows, Ms. HC was actively pursuing a divorce from Appellant, had moved out of their on-base residence, and was doing all she could to distance herself from Appellant, going so far as to hide where her new apartment was located until it was absolutely necessary. While Ms. HC did eventually tell Appellant where she lived, she did so only because she needed his assistance with moving more of her belongs *from* their on-base house to her new apartment. Everything in the record shows Ms. HC was trying to get away from Appellant. Ms. HC neither invited nor wanted Appellant to touch her buttocks that day as she was trying to get him to leave her apartment. There was no consent.

Still, Appellant argues he mistakenly believed Ms. HC consented to having her buttocks touched that day. (App. Br. at 13-14.) Based on a previous time when Ms. HC had moved back to Louisiana but later came back, Appellant claims he "would have every reason to believe they could rekindle their relationship." Appellant's supposed mistake of fact defense is farfetched and Appellant offered no evidence at trial that he believed Ms. HC wanted him to touch her buttocks.. As stated above, the only reason Appellant was even at Ms. HC's apartment was to help move her out of the couple's former on-base residence. While there is evidence in the record that Appellant wanted Ms. HC back,[7] the opposite is not true considering Ms. HC's testimony on this point that she just wanted him to "leave her alone." (R. at 150.) Further, as Ms. HC testified, "I had moved out, which obviously should have been a realization to him that I didn't want to be with him, and I didn't want any kind of sexual advances or really anything from him." (R. at 147.)

[7] *See* R. at 145.

Moreover, immediately after Appellant left, Ms. HC posted a picture of herself on Instagram and captioned, "no means no." (R. at 145.) Appellant, within minutes, sent an unsolicited text saying, "I'm sorry" and "I shouldn't have hugged you," before "apologiz[ing] for all of it" and saying it "shouldn't have happened and it won't happen again." (Pros. Ex. 1.)

Here, there was no mistake of fact on Appellant's part. Just like on the night when he sexually assaulted his sleeping wife after not taking no for an answer, Appellant on this day thought "about the things he'd do" to Ms. HC and took it upon himself to act.

Next, Appellant renews his credibility attacks against Ms. HC while also calling what occurred an "innocent butt touch between husband and wife." (App. Br. at 14.) Here again, Appellant fails to understand that his wife by this point had left him, having moved both herself and their children out of the couple's on-base house. They were, by this point, "husband and wife" by legality only, and Ms. HC had made it clear she wanted nothing to do with Appellant. Any sexual touching of Ms. HC under those circumstances was not "innocent," as Appellant now argues.

Still, Appellant finds fault, claiming that Ms. HC "exaggerated" Appellant's conduct when she testified that Appellant "slapped" her buttocks. Appellant bases this argument on Ms. AC's testimony that Ms. HC told her Appellant had only "touched" her buttocks. (App. Br. at 14.) Yet, whether a touch or slap, the fact remains that Appellant, as charged, "touched [Ms. HC's] buttocks with his hand," it was done without her consent and, within hours of Appellant committing this act against her, Ms. HC told Ms. AC that Appellant had touched her buttocks.

In sum, the evidence adduced at trial shows Appellant touched Ms. HC's buttocks without her consent. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of the abusive sexual contact specification against Appellant was met.

This Honorable Court should likewise, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, equally be convinced of Appellant's guilt beyond a reasonable doubt.

III.[8]

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 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

Relying on Ramos v. Louisiana, 140 S. Ct. 1390 (2020), Appellant argues the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by his court-martial panel. (App. Br. Appendix at 1). In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

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.

[8] This issue is raised in the appendix pursuant to Grostefon, 12 M.J. at 436–37.

Just last month, 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 Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. ___, 2023 CAAF LEIS 439 (C.A.A.F. 2023). Further, as Appellant readily admits, "the CAAF's recent decision . . . binds this Court." (App. Br. Appendix at 2.) Accordingly, Appellant's claim must fail.

IV.[9]

APPELLANT'S CONVICTIONS FOR SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT ARE LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. Washington, 57 M.J. at 399.

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

Analysis

Here, Appellant simply incorporates the same arguments he made in Issues I and II above and concludes that "[n]o reasonable factfinder could conclude that the Government met it burden

[9] This issue is raised in the appendix pursuant to Grostefon, 12 M.J. at 436–37.

to prove [sic] beyond a reasonable doubt." (App. Br. Appendix at 3.) Yet, just as he was with Issues I and II above, Appellant is mistaken here. The evidence analyzed above in Issues I and II shows Appellant sexually assaulted his wife while she slept and committed abusive sexual contact by touching her buttocks. When drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution and considering the evidence in the light most favorable to the prosecution, this Court should be convinced that a reasonable factfinder could have found all the essential elements of both offenses beyond a reasonable doubt. Thus, Appellant's claim must fail.

CONCLUSION

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

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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 2 August 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **JULIAN L. L. CORNWELL,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S REPLY BRIEF** Before Panel No. 2 No. ACM 40335 22 August 2023

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

Appellant, Staff Sergeant (SSgt) Julian L. L. Cornwell, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 2 August 2023 (Ans.). SSgt Cornwell stands on the arguments in his initial brief, filed on 3 July 2023 (App. Br.), and submits additional arguments for the issues listed below.

I.

WHETHER SSGT CORNWELL'S SEXUAL ASSAULT CONVICTION IS FACTUALLY INSUFFICIENT.

While the Answer raises numerous issues with this assignment of error (AOE), this reply will focus on two topics: (1) what SSgt Cornwell knew or should have known about whether HC was asleep; and, relatedly, (2) why HC's inconsistencies and credibility problems matter despite evidence that she was in fact asleep.

1. Under the circumstances, SSgt Cornwell neither knew, nor should he reasonably have known, that HC was asleep.

The Government unhesitatingly accepts HC's speculation that SSgt Cornwell understood Trazadone would have the powerful effect it seems to have had. (Ans. at

16.) Yet it misapprehends what SSgt Cornwell would have known through his experience with HC. Even if he knew it would put her to sleep—the intended effect of the drug—the question is why he would expect a routine sleep would essentially incapacitate her to the point she slept through sexual activity. And a key point, which the Government minimizes, is that HC changed dosage from 50mg to 100mg the very same week as the incident. (R. at 165.) The Government treats this as unimportant because HC and SSgt Cornwell discussed the medication's effects. (Ans. at 16–17.) But HC had taken Trazodone for two to three weeks with "no effect" (R. at 131, 165); thus, it would be especially unexpected that doubling the dose would render her functionally incapacitated. SSgt Cornwell "always" went to bed after HC, so he would have no opportunity during that single week to observe the impact. (R. at 135.) And even during that limited window there was an instance where HC was able to wake up and take care of a child before returning to bed. (R. at 165–66.) Simply because SSgt Cornwell knew a sleep medication would put her to sleep does not mean he knew or reasonably would know it would affect her to the degree it apparently did.

The empirical data further supports that HC's reaction to Trazodone was unexpected. HC's description of Trazodone's effect is incompatible with Maj AC's testimony and, indeed, the vast body of reports that Maj AC drew upon for his testimony. The Government complains that SSgt Cornwell "attempts to downplay the side effects of Trazodone, calling it 'far weaker' than other sleeping drugs such as Ambien," and claims SSgt Cornwell fails to appreciate "nuance" in the testimony. (Ans. at 17.) But the Government does not identify clearly what the nuance is and

concludes by stating that "Maj AC said the side effect was just drowsiness." (*Id.*) Trazodone's relative weakness, which matters to what SSgt Cornwell reasonably should have known, is not a product of SSgt Cornwell's argument; instead, it is clearly stated in Maj AC's testimony.

Maj AC began by explaining that "Ambien is on one end of the spectrum and [T]razodone is on the opposite end of the spectrum as far as being more weak than Ambien." (R. at 217.) He explained that in numerous case reports, patients on Ambien were knocked out in the middle of an activity. (R. at 218.) Such a description fits with what HC described—that she woke up and then fell back asleep while in the midst of sexual activity. By contrast, Maj AC stated that for 20-million-plus prescriptions of Trazodone, there was not a single case of someone being knocked out in the middle of doing some other act. (*Id.*)

It is worth pausing on this point. If events happened as HC described, she experienced something never before reported in more than 20 million prescriptions of Trazodone. This is crucial for what SSgt Cornwell reasonably should have known. If he entered the room and began a backrub upon HC,[1] and it then proceeded to sexual activity, he would have no reason to believe that she would fall asleep during sexual activity.

[1] As explained in the opening brief, this Court should find HC's testimony that she told SSgt Cornwell "not tonight" and stopped the backrub highly suspect; far closer in time to the incident, she told the Air Force Office of Special Investigations (OSI) she fell asleep during the backrub. (App. Br. at 10–11; R. at 167.)

Perhaps because of the force of Maj AC's testimony, the Government shifts gears and asks this Court to ignore his testimony because it is "theoretical." (Ans. at 18.) But expert testimony—*from a Government witness*—is not so easily ignored. Instead, it deeply undermines the notion that SSgt Cornwell should have known the drug would have such an effect.

Of note, the Government declines to engage with HC's use of other depression medications. This issue prompted a question from one of the members on the effects of mixing Trazodone with other antidepressants. (Appellate Exhibit (AE) XI.) Maj AC then explained that the combination could have an additive effect. (R. at 221–22.) As the opening brief argued, this could explain the unprecedented effect of the Trazodone on HC. (App. Br. at 9–10.) And since there is no evidence that SSgt Cornwell was aware of her mixing antidepressants, he would have no reason to know Trazodone, in combination with other unknown antidepressants, would have the effect it did.

The Government raises another argument that has no bearing on the legal theory under which SSgt Cornwell was charged and convicted. It repeatedly highlights that HC supposedly told SSgt Cornwell she did not want to have sex earlier in the day, once during the afternoon and later during the backrub. (Ans. at 15–16, 19.) But the relevance is questionable when the charge was sexual assault while HC was asleep. The Government could have, but did not, charge sexual assault both while she was asleep and without her consent. *See United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (explaining that the Government has complete discretion

over how to charge an appellant and accepts the risk that the appellant may not be liable based on the evidence presented).

Even if they were relevant to the charge, this evidence still lacks probative value. This Court should take little from the first point—declining to have sex earlier in the day while the children were unoccupied is unsurprising and bears little on what happened later that night. And it is also unsurprising that he would try again at a time when HC said they had a "very healthy sex life." (R. at 129.) The second instance is also suspect. Recall that HC originally told OSI that she fell asleep during the backrub. (R. at 167.) A year later at trial, she reversed course and said that she did not fall asleep, but instead stated, "no, not tonight," a very convenient addition upon which the Government seizes. (R. at 135; Ans. at 15, 19.) What is more likely, consistent with her earlier statement to OSI, is that she fell asleep during the backrub, the sexual activity began, and only when SSgt Cornwell turned her over did he realize she was asleep.

Finally, the Government urges this Court to discount SSgt Cornwell's after-the-fact actions in trying to find out why HC was upset as guilty conscience and not the act of a concerned husband. (Ans. at 18.) This Court should disregard the Government's evidence-free speculation about what was going through SSgt Cornwell's head. (*Id.*)

The Government cannot overcome the evidence—presented by its own trial counsel—that shows HC's reaction to Trazodone was utterly unexpected. This fact fits cleanly with what we know from SSgt Cornwell's perspective. He entered to give

her a back rub, he began having sex with her while she was on her stomach, he turned her over at some point, and then he stopped having sex with her when he realized she was asleep.

2. HC's credibility problems provide an unstable foundation for establishing what SSgt Cornwell should have known.

The Government dismisses HC's inconsistencies as "inconsequential" to whether SSgt Cornwell knew or should have known HC was asleep. (Ans. at 20.) But her credibility remains central to the case. Why? Because she is the source of most of the information about what SSgt Cornwell should have known.

The building blocks of the Government's case all stem from HC. For example, she claimed that he knew Trazodone put her to sleep. (R. at 133.) She claimed that she slapped his hand away during the backrub and told him "not tonight." (R. at 135.) She claimed that he cleaned her with a towel[2] afterwards. (R. at 137.) She claimed that he told her he thought she was asleep (R. at 139.) All of this formed the predicate of the Government's assertion that SSgt Cornwell knew or should have known HC was asleep, and thus her credibility and inconsistencies must matter where they undermine the facts upon which the Government relied for conviction.

HC's trial testimony lacks credibility because it was far more damaging than what she originally said to OSI, and differed from what she told her friends in important ways. (App. Br. at 10–11.) Additionally, the purportedly "devastating"

[2] The Government makes much of SSgt Cornwell using a towel to clean off HC, including HC's testimony that they only used a towel upon ejaculation. (Ans. at 19.) But query whether SSgt Cornwell, realizing his wife was actually asleep, would not help clean her even if there was no ejaculate.

impact upon HC only manifested itself much later during divorce proceedings, and despite this impact she continued having consensual sex with SSgt Cornwell for another year. (R. at 150, 171.)

Even if the evidence shows that HC was asleep at some point during sex, her credibility remains crucial because her testimony largely established what SSgt Cornwell knew or reasonably should have known. And where the Government must prove its case beyond a reasonable doubt, her credibility provides an insufficient basis to do so.

WHEREFORE, SSgt Cornwell respectfully requests this Honorable Court set aside Specification 1 of Charge I and the sentence.

II.

WHETHER SSGT CORNWELL'S ABUSIVE SEXUAL CONTACT CONVICTION IS FACTUALLY INSUFFICIENT.

Once again, mistake of fact is the key issue. The Government complains that "Appellant offered no evidence at trial that he believed Ms. HC wanted him to touch her buttocks." (Ans. at 24.) But SSgt Cornwell did not bear the burden on this issue. R.C.M. 916(b)(1), (j)(1).

Adopting HC's testimony wholesale, the Government argues that "[e]verything in the record shows [HC] was trying to get away from [SSgt Cornwell]." (Ans. at 24, 25.) In so doing, it misses the arc of their sometimes-troubled relationship. The Government only mentions in passing that HC left SSgt Cornwell once before, took the children to Louisiana, and then later returned. (Ans. at 24.) HC claimed that moving out "obviously should have been a realization to him that I didn't want to be

with him." (R. at 147.) But, once again, SSgt Cornwell had seen this before when HC left for Louisiana and "d[id]n't plan on coming back." (R. at 129.) They had discussed divorce before and reconnected. (R. at 173.) At the time of the incident there were *discussions*, but HC conceded no actual divorce filings. (*Id.*) In such a context, SSgt Cornwell would reasonably believe he could reunite with his wife. As HC admitted, even when things were "rocky," they still had a "very healthy sex life." (R. at 121.) Thus, when he slapped her buttocks, he acted in a way consistent with the relationship he wanted to rekindle. Even if HC did not consent, SSgt Cornwell's belief that she would was well founded and reasonable.

A final note. The Government declines to engage with several key points: (1) HC, knowing her friend TH would speak with SSgt Cornwell's counsel, called TH to add new details but later denied making that call (R. at 175, 206–07); (2) HC told TH a different version where she claimed SSgt Cornwell continued touching her buttocks after being told to stop (a story which she did not repeat at trial) (R. at 147, 204); and, (3) this new version to TH also reversed events and placed the buttocks slap before the alleged hug upstairs, again making it seem more offensive. (R. 145, 147, 204, 206.) These now-unrefuted contradictions, combined with the credibility problems explained in AOE I, should lead this Court to question whether the allegation occurred as HC described. Again, her deficient credibility prevents the Government from meeting its burden of proof beyond a reasonable doubt, including disproving his mistake of fact as to consent.

WHEREFORE, SSgt Cornwell respectfully requests this Honorable Court set aside Specification 2 of Charge I and the sentence.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
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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 Appellate Government Division on 22 August 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **JULIAN L.L. CORNWELL,** United States Air Force, *Appellant.*	)	No. ACM 40335 22 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Major Matthew Blyth has resumed representation of Appellant. A thorough turnover of the record between counsel has been completed. The undersigned counsel will be departing from the Air Force Appellate Defense Division and beginning a new assignment on 5 September 2023.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 August 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force