IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force, *Appellant*	**NOTICE OF APPEARANCE OF COUNSEL** Case No. ACM 40268 Before Panel No. 1

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

COMES NOW, Mr. Peter Kageleiry, Jr., pursuant to rule 12.1 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court that:

(1) his business mailing address is:

(2) his phone number is:

(3) his business email is: ; and

(4) He is admitted to practice before this Court's bar.

Respectfully submitted,

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 20 May 2022.

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S**
Appellee	)	**MOTION TO EXAMINE**
	)	**SEALED MATERIALS**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 40268
ANDRÉ T. FALLS DOWN	)	
United States Air Force	)	9 June 2022
Appellant	)	

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, Senior Airman André T. Falls Down, Appellant, hereby moves this Court to permit his counsel's examination of the sealed exhibits and sealed portions of the transcript in this case.

Facts

On 10 December 2021 at a general court-martial comprised of officer and enlisted members and convened at Creech Air Force Base, Nevada, SrA Falls Down was convicted, contrary to his pleas, of one charge, one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920[1]. Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 March 2022. He was acquitted, consistent with his pleas, of one specification of sexual assault under the same charge. The military judge sentenced SrA Falls Down to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and

[1] All references to the punitive articles of the UCMJ are to the versions in effect as of 1 January 2019, published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

allowances, and reduction to the grade of E-1. The convening authority denied SrA Falls Down's request for deferment of the automatic and adjudged forfeitures and the reduction in grade until entry of judgment, and took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action.[2]

The military judge ordered the following exhibits sealed:

(a) Appellate Exhibit (A.E.) XIV, Defense Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 1 July 2021 (54 pages)

(b) A.E. XV, Curriculum Vitae of Ms. LS, undated (4 pages)

(c) A.E. XVI, Government Response to Defense Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 12 July 2021 (22 pages)

(d) A.E. XVII, Special Victims' Counsel Response to Defense Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 9 July 2021 (7 pages)

(e) A.E. XVIII, Military Judge's Ruling on Defense Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 5 November 2021 (12 pages)

(f) A.E. XXV, Defense Second Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 16 November 2021 (8 pages)

(g) A.E. XXVI, Government Response to Defense Second Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 23 November 2021 (6 pages)

(h) A.E. XXVII, Special Victims' Counsel Response to Defense Second Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 23 November 2021 (7 pages)

(i) A.E. XXVIII, Defense Motion to Compel Discovery of Medical Records of SrA CC, 23 November 2021 (7 pages)

(j) A.E. XXIX, Government Response to Defense Motion to Compel Discovery of Medical Records of SrA CC, 1 December 2021 (28 pages)

[2] The convening authority's action memorandum is undated, but the entry of judgment indicates action was accomplished on 11 March 2022. ROT Vol. 1, Entry of Judgment, 23 March 2022.

(k) A.E. XXX, Military Judge's Ruling on Defense Motion to Compel Discovery of Medical Records of SrA CC, 2 December 2021 (5 pages)

(l) A.E. XXXI, Defense Third Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 6 December 2021 (32 pages)

(m) A.E. XXXII, Government Response to Defense Third Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 6 December 2021 (6 pages)

(n) A.E. XXXIII, Special Victims' Counsel's Response to Defense Third Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 6 December 2021 (6 pages)

(o) A.E. XXXIV, Military Judge's Ruling on Defense Third Motion *in Limine* to Admit Evidence Pursuant to Mil. R. Evid. 412, 6 December 2021 (9 pages)

See A.E. XXXV, Order to Seal. The military judge also ordered the following portions of the transcript sealed: pages 27-124, 213-254, 665-674, and 840-852. *Id*; R. at 27, 213, 665, and 840.

Each of the sealed exhibits identified in paragraphs (a) and (c) through (o) in the Facts section above is a motion filed by a party, a response filed by a party (or a party with limited standing), or a ruling issued by the military judge. The sealed exhibit identified in paragraph (b) in the Facts section above (A.E. XV) is a *curriculum vitae* of a sexual assault nurse examiner. R. at 21. It was offered by defense counsel as additional evidence for the military judge's consideration of the defense's motion to admit evidence pursuant to Mil. R. Evid. 412 (A.E. XIV). *Id*. Defense counsel provided a copy of A.E. XV to the military judge and to the government. *Id*.

Law

Appellate counsel may examine materials presented or reviewed at trial and

sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the *MCM*, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation. *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[3] perform "reasonable diligence,"[4] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence…[and to] endeavor to persuade the client to abandon a wholly

[3] Air Force Rules of Professional Conduct (AFI 51-110, Attachment 2), Rule 1.1.
[4] *Id.*, Rule 1.3.

frivolous appeal or to eliminate contentions lacking in substance."[5] These requirements are consistent with those imposed by the state bars to which counsel belong.[6]

Analysis

Given the nature of the sealed exhibits (motions, responses to motions, evidence submitted in support of motions, and rulings on motions), it is evident the parties "presented" and "reviewed" them at trial. It is reasonably necessary for counsel to review the entire record of trial, to include these sealed exhibits and the sealed portions of the transcript, in order for counsel to competently conduct a professional evaluation of SrA Falls Down's case and to uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and because the materials were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of sealed materials, and has shown good cause to grant this motion.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit his counsel's examination of the aforementioned sealed exhibits and transcript pages contained within the original record of trial.

[5] Air Force Standards for Criminal Justice (AFI 51-110, Attachment 7), Standard 4-8.3(b).
[6] Counsel of record are licensed to practice law in Maryland and Wisconsin.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 June 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRE T. FALLS DOWN, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40268 Panel No. 1

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 Materials. The United States does not object to Appellant's counsel reviewing transcript pages and exhibits that were released to both 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 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 9 June 2022.

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 40268**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Andre T. FALLS DOWN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 9 June 2022, Appellant's counsel moved to examine sealed materials, specifically, Appellate Exhibits XIV–XVIII and XXV–XXXIV; and transcript pages 27–124, 213–54, 665–74, and 840–52. The exhibits and transcript pages were sealed by the military judge who presided over Appellant's court-martial. Appellate defense counsel argues it is necessary to review the entire record, including these sealed materials, to ensure counsel provides "competent appellate representation" under Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870 (*Manual for Courts-Martial*, *United States* (2019 ed.)) (2019 *MCM*).

The Government does not object to Appellant's motion, 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."

Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon "a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct." Rule for Courts-Martial 1113(b)(3)(B)(i) (2019 *MCM*).

The sealed material that Appellant's counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant's counsel owes to Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 10th day of June, 2022,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED.**

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XIV–XVIII and XXV–XXXIV; and transcript pages 27–124, 213–54, 665–74, and 840–52**, subject to the following conditions: To view these sealed materials, counsel will coordinate with the court. No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available their contents to any other individual without the court's prior written authorization.

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 (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 10 June 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a first enlargement of time to file an Assignment of Errors brief. SrA Falls Down requests an enlargement for a period of 60 days, which will end on **17 August 2022**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, SrA Falls Down respectfully requests this Honorable Court grant this requested first enlargement of time for the submission of an Assignment of Errors brief.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 June 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

14 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 14 June 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. Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR LEAVE TO FILE MOTION TO COPY, RETAIN, AND TRANSMIT SEALED EXHIBITS** Before Panel No. 1 No. ACM 40268 16 June 2022

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

Pursuant to Rule 23(d) of Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file a motion to copy, retain, and transmit to civilian counsel, sealed material contained in the original record of trial. Pursuant to the same rule, the motion for leave to file the pleading and the pleading have been combined herein.

On 9 June 2022, Appellant moved this Court to permit undersigned counsel's examination of the following sealed exhibits and trial transcript portions in the original record of trial of this case: Appellate Exhibits XIV-XVIII and XXV-XXXIV, and transcript pages 27-124, 213-54, 665-74, and 840-52. On 10 June 2022, this Court granted Appellant's motion.

Appellant is represented by undersigned counsel and by Mr. Peter Kageleiry, Jr., 4445 Corporation Lane, Suite 173, Virginia Beach, Virginia 23462. Given the volume of sealed material in this case (fifteen appellate exhibits totaling 213 pages, and 161 pages of transcript) and their likely relevance and materiality to Appellant's

appeal, and given the physical distance of Mr. Kageleiry's place of business from Joint Base Andrews, Maryland, Appellant requests this Court's permission for his counsel to create and securely retain and transmit digital copies of this material to facilitate counsel's preparation of an Assignments of Error brief.

If this Court grants Appellant's request, undersigned counsel proposes the following procedure for effecting the Court's order, subject to any directive by this Court. Undersigned counsel will scan and create an electronic file containing the sealed material. Undersigned counsel will then electronically transmit that file to undersigned counsel's official, encrypted email account. Undersigned counsel will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Appellate Defense Division's secure electronic drive. Undersigned counsel will securely transmit a copy of the electronic file to Mr. Kageleiry via DoD SAFE, and Mr. Kageleiry will securely store the file in accordance with his law practice's protocols for the retention of sealed material.

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

Respectfully submitted,

aj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 June 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

21 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO COPY, RETAIN, AND TRANSMIT SEALED MATERIAL ACM 40268 Panel No. 1

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 Copy, Retain, and Transmit Sealed Materials. The United States does not object to Appellant's military counsel's request to copy, retain, and transmit Appellate Exhibits XIV-XVIII and XXV-XXXIV, and transcript pages 27-124, 213-54, 665-74, and 840-52 (the "sealed materials"), for the purpose of providing those sealed materials to Appellant's civilian counsel, Mr. Peter Kageleiry.

The United States respectfully requests, however, that this Court order that the sealed materials be transmitted by secure means and that appellate defense counsel (military and civilian) are solely responsible for (1) disposing of the sealed material after appellate review is complete; and (2) confirming that disposal with this Court.

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 21 June 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 40268**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Andre T. FALLS DOWN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 9 June 2022, Appellant's counsel moved this court to view the following sealed exhibits and trial transcript portions in the original record of trial of this case: Appellate Exhibits XIV–XVIII and XXV–XXXIV, and transcript pages 27–124, 213–54, 665–74, and 840–52. We granted the motion on 10 June 2022, finding a colorable showing had been made that examination of the materials was reasonably necessary to fulfill the professional responsibilities Appellant's counsel owes to Appellant. That order permits counsel for both parties to examine the materials, including civilian appellate defense counsel, Mr. Peter Kageleiry.

On 16 June 2022, Appellant's counsel moved this court for leave to file a motion to copy, retain, and transmit sealed material contained in the original record of trial to Appellant's civilian appellate counsel.

Appellee does not object to Appellant's military counsel copying, retaining, and transmitting the requested exhibits, so long as proper protections are put in place. Appellee specifically requests this court order that the requested sealed materials "be transmitted by secure means and that appellate defense counsel (military and civilian) are solely responsible for (1) disposing of the sealed material after appellate review is complete; and (2) confirming that disposal with this [c]ourt."

Accordingly it is by the court on this 22nd day June, 2022,

ORDERED:

Appellant's Motion for Leave to File Motion to Copy, Retain, and Transmit to Sealed Exhibits to Civilian Counsel is **GRANTED**, subject to the following conditions:

(1) As necessary to comply with this order, Appellant's military appellate counsel is permitted to scan a hardcopy of the sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided

by undersigned military appellate defense counsel; and transmit files containing sealed materials encrypted or password-protected to Mr. Peter Kageleiry via DoD SAFE. Appellant's military appellate counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "FOUO – sealed materials under R.C.M. 1113" and place it in a sealed envelope containing the same identifying information. Appellant's military defense counsel is also permitted to send sealed materials to Mr. Peter Kageleiry via U.S. mail, Federal Express, or by similar secure means of shipment.

(2) Except as outlined in this order, no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

Capt, USAF
Acting 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 (SECOND)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 10 August 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a second enlargement of time to file an Assignment of Errors brief. SrA Falls Down requests an enlargement for a period of 30 days, which will end on **16 September 2022**. The record of trial was docketed with this Court on 19 April 2022.[1] From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[2] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial

[1] Counsel previously filed a Motion for Enlargement of Time (Second) on 10 August 2022, in which counsel erroneously represented the date of docketing as 20 April 2022. Counsel corrects this error with this pleading.
[2] *Manual for Courts-Martial, United States* (2019 ed.)

convened at Creech Air Force Base, Nevada and comprised of officer and enlisted members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id*. A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[3] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the ROT and prepare an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested second enlargement of time for the submission of an Assignment of Errors

[3] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 August 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

10 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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, to Civilian Defense Counel, and to the Air Force Appellate Defense Division on 10 August 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 (THIRD) OUT OF TIME**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 13 September 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a third enlargement of time, out of time, to file an Assignment of Errors brief. SrA Falls Down requests an enlargement for a period of 30 days, which will end on **16 October 2022**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On Friday, 9 September 2022, undersigned counsel intended to electronically file via e-mail a motion for a third enlargement of time with the Court. However, while counsel "carbon-copied" the Government Trial and Appellate Operations Division (AF/JAJG) and the Appellate Records section of the Military Justice Law and Policy (AF/JAJM) on the e-mail, counsel mistakenly addressed and sent the e-mail to the Appellate Defense Division's (AF/JAJA) workflow inbox and not this Court's. Personnel at AF/JAJM helpfully informed undersigned counsel of this inadvertent error via e-mail on Monday, 12 September 2022, but because counsel was on leave status on that

day, he did not realize the error until the date of the filing of this motion. Counsel apologizes to the Court for this error—committed by no fault of SrA Falls Down—and respectfully requests this Court grant this motion despite its submission out of time.[1]

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[2] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id*. A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[3] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South

---

[1] The deadline for the submission of this motion for an enlargement of time was Friday, 9 September 2022. Thus, had the Court received the motion on the day counsel sent the misaddressed e-mail, it would have been timely.

[2] *Manual for Courts-Martial, United States* (2019 ed.)

[3] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents seventeen clients, with eight Assignments of Error briefs pending before this Court. This case is undersigned counsel's fifth priority case before this Court, behind 1. *United States v. Romero-Alegria* (ACM 40199; 200 pages), 2. *United States v. Valentin-Andino* (ACM 40185; 636 pages), 3. *United States v. Alton* (ACM 40215; 1,726 pages), and 4. *United States v. Brissa* (ACM 40206; 344 pages).[4] Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the ROT and prepare an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested third enlargement of time for the submission of an Assignment of Errors brief, out of time, for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

[4] Since SrA Falls Down's last request for an enlargement of time, counsel re-prioritized *Alton* ahead of *Brissa*.

Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 September 2022.

Respectfully submitted,

USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 7 October 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a fourth enlargement of time to file an Assignment of Errors brief. SrA Falls Down requests an enlargement for a period of 30 days, which will end on **15 November 2022**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted

[1] *Manual for Courts-Martial, United States* (2019 ed.)

members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id.* A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[2] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents sixteen clients, with six Assignments of Error briefs pending before this Court. This case is undersigned counsel's fourth priority case before this Court, behind 1. *United States v. Valentin-Andino* (No. ACM 40185; 636 pages), 2. *United States v. Alton* (No. ACM 40215; 1,726 pages), and 3. *United States v. Brissa* (No. ACM 40206; 344 pages). Since SrA Falls Down's last request for an enlargement of time, undersigned counsel submitted a Reply brief in *United States v. Berry*, (No. ACM 40170), has continued to prepare an Assignments of Error brief in *Valentin-Andino*, and is preparing Reply briefs in *United States v. Cooper* (No. ACM 40092) and *United States v. McCameron* (No. ACM 40089).

[2] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

Additionally, undersigned counsel intends to take pre-approved leave from 8 to 15 October 2022.

Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the ROT and prepare an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fourth enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 October 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

11 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 11 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 7 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a fifth enlargement of time to file an Assignment of Errors brief. SrA Falls Down requests an enlargement for a period of 30 days, which will end on **15 December 2022**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted

[1] *Manual for Courts-Martial, United States* (2019 ed.)

members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id.* A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[2] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents fourteen clients, with six Assignments of Error briefs pending before this Court. This case is undersigned counsel's third priority case before this Court, behind 1. *United States v. Alton* (No. ACM 40215; 1,726 pages) and 2. *United States v. Brissa* (No. ACM 40206; 344 pages). Since SrA Falls Down's last request for an enlargement of time, undersigned counsel submitted an Assignments of Error brief in *United States v. Valentin-Andino* (No. ACM 40185) and Reply briefs in *United States v. Cooper* (No. ACM 40092) and *United States v. McCameron* (No. ACM 40089). Undersigned counsel completed review of the record of trial in *Brissa* and is reviewing the record of trial in *Alton*. Counsel is also preparing

[2] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

for oral argument on 8 November 2022 in a case before the Court of Appeals for the Armed Forces (CAAF) (*United States v. McAlhaney*, USCA Dkt. No. 22-170/AF, No. ACM 39979). Undersigned counsel took pre-approved leave from 11 to 15 October 2022.

Mr. Kageleiry has completed his review of the record of trial, but undersigned counsel has not yet begun his review. Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the ROT and complete an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fifth enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 November 2022.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

8 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 8 November 2022.

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 40268**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Andre T. FALLS DOWN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 7 November 2022, 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 8th day of November, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 December 2022**.

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 his 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
Acting 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. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 8 December 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a sixth enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **14 January 2023**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted

[1] *Manual for Courts-Martial, United States* (2019 ed.)

members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id.* A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[2] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents fifteen clients, with eight Assignments of Error briefs pending before this Court. This case is undersigned counsel's third priority case before this Court, behind 1. *United States v. Alton* (No. ACM 40215; 1,726 pages) and 2. *United States v. Brissa* (No. ACM 40206; 344 pages). Since Appellant's last request for an enlargement of time, undersigned counsel submitted a Reply brief in *United States v. Valentin-Andino* (No. ACM 40185), delivered oral argument in a case before the Court of Appeals for the Armed Forces (CAAF) (*United States v. McAlhaney*, USCA Dkt. No. 22-170/AF, No. ACM 39979), reviewed the record of trial and drafted an Assignments of Error brief in *Brissa*, and

[2] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

reviewed the record of trial and has begun drafting an Assignments of Error brief in *Alton*.

Mr. Kageleiry has completed his review of the record of trial and has begun to draft an Assignments of Error brief; undersigned counsel has not yet begun his review. Undersigned counsel intends to file an Assignments of Error brief in *Brissa* no later than 10 December 2022 and, barring unforeseen circumstances, intends to do the same in *Alton* no later than 26 December 2022. Undersigned counsel intends to begin reviewing the record of trial in this case no later than 29 December 2022, the date of his return from approved leave over the Christmas holiday (21-28 December 2022).

Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the ROT and complete an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review and of this request for an enlargement of time; Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested sixth enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 December 2022.

Respectfully submitted,

SAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

12 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 12 December 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 6 January 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for a seventh enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **13 February 2023**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted

[1] *Manual for Courts-Martial, United States* (2019 ed.)

members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id.* A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[2] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents fourteen clients, with six Assignments of Error briefs pending before this Court. This case is undersigned counsel's first priority before this Court. Since Appellant's last request for an enlargement of time, undersigned counsel submitted Assignments of Error briefs in *United States v. Brissa* (No. ACM 40206) and *United States v. Alton* (No. ACM 40215). Undersigned counsel took leave from 21-30 December 2022.

Mr. Kageleiry has completed his review of the record of trial and is drafting an Assignments of Error brief; undersigned counsel has reviewed three-quarters of the record of trial and anticipates completing his review during the week following the date

[2] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

of this motion.

Through no fault of Appellant, and due to their duties representing other clients before this Court and others, counsel have been unable to complete review of the record of trial and complete an Assignments of Error brief, and will be unable to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review and of this request for an enlargement of time, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested seventh enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

F
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 January 2023.

Respectfully submitted,

F
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

9 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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 military 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 9 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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	)	No. ACM 40268 3 February 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman André T. Falls Down, the Appellant, hereby moves for an eighth enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **15 March 2023**. The record of trial was docketed with this Court on 19 April 2022. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

Appellant was charged with one charge and two specifications of sexual assault upon a person he knew or reasonably should have known was asleep, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet, 19 February 2021. He pled not guilty to the charge and both specifications. ROT Vol. 1, Entry of Judgment, 23 March 2022. On 10 December 2021, at a general court-martial convened at Creech Air Force Base, Nevada and comprised of officer and enlisted

[1] *Manual for Courts-Martial, United States* (2019 ed.)

members, Appellant was found guilty of Specification 1 of the Charge, not guilty of Specification 2 of the Charge, and guilty of the Charge. *Id.* A military judge sentenced Appellant to a dishonorable discharge, three years of confinement (with four days of pretrial confinement credit), forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. On 11 March 2022, the convening authority took no action on the findings and sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum, undated.[2] Appellant is currently confined at the Naval Consolidated Brig, Joint Base Charleston, South Carolina.

The trial transcript is 1,188 pages, and the ROT is comprised of twelve volumes consisting of eleven prosecution exhibits, twenty-five defense exhibits, and forty-six appellate exhibits. Undersigned counsel currently represents sixteen clients, with eight Assignments of Error briefs pending before this Court. This case is counsel's first priority before this Court.

Both Mr. Kageleiry and undersigned counsel have completed their review of the record of trial. Mr. Kageleiry is close to completing a draft of the Assignments of Error brief. Counsel anticipated submitting this brief no later than the Court's current 13 February 2023 deadline. Unfortunately, Mr. Kageleiry is experiencing an ongoing emergency involving the health of a close family member. He is currently away from his law office tending to this situation and has been unable to devote the necessary

[2] While the Convening Authority Decision on Action Memorandum is undated, the entry of judgment indicates the convening authority denied Appellant's deferment requests on 11 March 2022.

time to complete a draft of the Assignments of Error brief. While counsel still aim to submit a brief to this Court soonest, counsel make this request on Appellant's behalf out of an abundance of caution.

Through no fault of Appellant, counsel have been unable to complete an Assignments of Error brief, and may not be able to do so by this Court's current filing deadline. Counsel have advised Appellant of his right to speedy appellate review and of this request for an enlargement of time, and Appellant concurs with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested eighth enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 February 2023.

Respectfully submitted,

F
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

3 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANDRÉ T. FALLS DOWN, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40268 Panel No. 1

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 non-opposition to Appellant's Motion for Enlargement of Time based on Appellant's counsel's assertion of a family medical emergency. However, should the family emergency necessitate additional delay, the United States will likely request a status conference to discuss options to ensure timely appellate processing.

WHEREFORE, the United States respectfully requests that this Court grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 3 February 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 40268**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Andre T. FALLS DOWN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 February 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government does not oppose the motion.

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 6th day of February, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 March 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests 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,

v.

ANDRÉ T. FALLS DOWN
Senior Airman (E-4),
United States Air Force,
Appellant.

No. ACM 40268

BRIEF ON BEHALF OF APPELLANT

PETER KAGELEIRY, Jr.
Attorney at Law
4445 Corporation Lane, Suite 173
Virginia Beach, VA 23462

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

Counsel for Appellant

TABLE of CONTENTS

TABLE of CASES

Page

U.S. Supreme Court

Court of Appeals for the Armed Forces / Court of Military Appeals

Air Force Court of Criminal Appeals / Air Force Court of Military Review

Statutes

Uniform Code of Military Justice

Military Rules of Evidence

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40268 15 March 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS WHEN SHE FOUND A GOOD FAITH BASIS FOR TRIAL COUNSEL TO ASK A WITNESS, "ARE YOU AWARE THAT THE ACCUSED HAD AN ALLEGATION OF SEXUAL ASSAULT MADE AGAINST HIM?" DESPITE EVIDENCE SHOWING NO SUCH PRIOR ALLEGATION HAD BEEN MADE AGAINST APPELLANT.

III.

WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

STATEMENT OF THE CASE

On 10 December 2021, a panel of officers and enlisted members sitting as a general court-martial convicted Senior Airman André T. Falls Down, Appellant, contrary to his plea, of one

specification of sexual assault of CC in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Charge Sheet; App. Ex. XLIII; R. at 1148. The panel acquitted Appellant, consistent with his plea, of one specification of sexual assault of CC in violation of Article 120, UCMJ. *Id*. The military judge sentenced Appellant to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for three years; and to be dishonorably discharged from the service. R. at 1188. The convening authority took no action on the findings and the sentence, and denied Appellant's requests for deferment until entry of judgment of the reduction in grade and automatic and adjudged forfeitures. ROT Vol. 1, Convening Authority's Decision on Action Memorandum. The military judge entered judgment on 23 March 2023. ROT Vol. 1, Entry of Judgment.

STATEMENT OF FACTS

Appellant and CC Begin a Passionate Sexual Relationship

In early 2020, CC, an active duty female airman, met Appellant at Creech Air Force Base, Nevada, where they were both stationed. R. at 541. CC testified, "I noticed [Appellant] walk past my office desk, and I thought he was attractive." R. at 541, 607. At the time, Appellant was twenty-years old. PE 9. CC approached Appellant's roommate, SrA AI, to ask about Appellant, and SrA AI gave CC Appellant's contact information. R. at 869. CC started talking with Appellant at work and followed him on social media platforms. R. at 607-08. CC contacted Appellant on Snapchat. R. at 608. She wanted Appellant to get to know her and she hoped he would be attracted to her. R. at 608. CC and Appellant developed feelings for each other. R. at 609. By the middle

[1] All references to the UCMJ, the Rules for Courts-Martial (RCM), and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

of March 2020, the two were dating. R at 541, 607-609. CC described Appellant as a quiet, kindhearted guy. R. at 653, 678.

At the beginning of her relationship with Appellant, CC lived in the dorms at Nellis Air Force Base, NV, and Appellant lived in an apartment in nearby Centennial, NV. R. at 542-43. When she was not at work, CC spent most of her time at Appellant's apartment. R. at 543. Because of the pandemic, they had a lot of time to spend together; CC spent four to five days of the workweek with Appellant, and often spent weekends with him, too. R. at 609-610. On April 15, 2020, CC moved out of the base dorms and into a house in Centennial, five minutes from Appellant's apartment. R. at 542-43, 562. CC's friend, SrA GC, also moved into the house with CC. R. at 543. Appellant helped CC move into her house. R. at 615.

According to CC, she and Appellant "loved" having sex with each other and had sex a lot, sometimes in the morning, and sometimes multiple times a day. R. at 611. She testified that she and Appellant had great "body chemistry." R. at 611. CC testified she and Appellant would sometimes have sex in the "spooning position." R. at 612.

CC "Ends" Her Relationship with Appellant Begins Another with A1C NW

CC testified that in April 2020, she began to develop feelings for another airman, A1C NW. R. at 615-16. She and A1C NW had carried on a sexual relationship in January and February of 2020, before CC dated Appellant. R. at 623, 780. CC claimed they resumed that sexual relationship "sometime in May," but A1C NW testified they resumed their sexual relationship around his birthday on 21 April 2020. R. at 621, 786. CC claimed that around the time she began to develop feelings for A1C NW, she and Appellant had a "mutual breakup"; she explained, "Senior Airman Falls Down and I kept in contact. We would ask each other how we were doing and we would stay updated in each other's lives." R. at 544, 616. CC initially testified that she

and Appellant broke up in late April 2020, but after being confronted with her prior statements during cross-examination, CC testified that she and Appellant ended their relationship in the middle of May 2020. R. at 541, 615.

CC had strong feelings for A1C NW; she was "crazy" about him. R. at 621. A1C NW testified that in May 2020, his relationship with CC, "wasn't necessarily exclusive, but we were together." R. at 780. A1C NW was aware that CC and Appellant continued to have sex after they broke up. R. at 787. On the other hand, CC did not tell Appellant about her sexual relationship with A1C NW. R. at 621.

CC and Appellant Continue Their Sexual Relationship

CC testified that after their breakup, she and Appellant had consensual sex two times. R. at 545, 617. On one occasion after the breakup, CC got in an argument with her roommate, SrA GC. R. at 618. CC called Appellant and asked if she could have a ride to his apartment. R. 618. After arriving at Appellant's apartment, CC and Appellant had sex, and spent the night at Appellant's apartment and in his bed. R. at 618. According to CC, both times she and Appellant had sex after breaking up was at Appellant's apartment. R. at 545, 617. However, A1C NW testified that on one occasion after CC and Appellant had broken up, he was at CC's house and walked in on CC and Appellant having sex. R. at 787.

SrA GC and CC were best friends who shared a lot with one another, including their "past trauma." R. at 726-27. SrA GC considered herself the "mom" of her friend group, which included CC but not Appellant. R. at 727. According to SrA GC, Appellant and CC broke up in May 2020. R. at 722. CC told SrA GC that she only wanted to be friends with Appellant. R. at 723. SrA GC warned CC that she should stop "leading [Appellant] on." R. at 620. Despite her

closeness with CC, SrA GC was not aware that CC and Appellant continued having sex after breaking up. R. at 723.

CC Hosts a House Party on 30 May 2020

On 30 May 2020, CC and SrA GC hosted a "cup pong tournament" at their house that was themed "Anything But Clothes" for which attendees dressed in costumes. R. at 548-49, 624. About twenty people attended the party, and most arrived between 2030 and 2130 hours. R. at 549-550. CC did not consume alcohol at the party. R. at 555.

A1C NW attended the party. R. at 557. CC invited Appellant to the party via text. R. at 550. She explained,

> I had texted him and told him that he could come. He okayed it. After speaking with my roommate, G , just to let her know that he was coming, I texted him again and said, "Maybe this isn't a good idea." He said he understood and that he wouldn't be coming.

Id. However, CC explained, "And then I backtracked on what I said, and I said, 'You should -- just come. It will be fine.'" *Id*. At 2007 hours, Appellant asked CC via text if he should arrive at "830?" PE 1; R. at 553-54. CC replied, "Around then yea!" *Id*. At 2011 hours, Appellant replied, "Koo", meaning "cool." PE 1; R. at 554. At 2028 hours, Appellant texted CC that he was, "headed over." *Id*. Appellant then arrived at the party and CC welcomed him inside. R. at 554-55. They interacted at various points throughout the evening while the party was going on. R. at 555. Appellant left the party around 0140 hours. R. at 556.

At some point during the party, CC and A1C NW got into an argument; CC believed A1C NW had lied to her, telling her that he was not having sex with other people when he in fact was. R. at 558. The argument ended when CC told A1C NW she "did not want to speak to him again and that he needed to leave." *Id*.

CC Suffers an Injury and Reaches Out to Appellant

After her argument with A1C NW, CC walked outside her house and down the street to her car, where she sat to "cool off." R. at 559-60. Next, CC remembered getting a call from her roommate, SrA GC, who told CC that one of their neighbors had fired a gun towards their house after getting into an argument with one of the partygoers. R. at 560, 692. CC went back to her house. R. at 560. While running up the stairs to the second floor, CC rolled her ankle, which "hurt[] a lot." R. at 561. SrA GC recommended CC go to the hospital to treat her ankle. R. at 562. CC called Appellant, who lived roughly five minutes away, and asked him to pick her up, which he did. R. at 565. SrA GC waited at the house for the police to arrive while Appellant and CC drove to Appellant's apartment. R. at 565-66.

At his apartment, Appellant suggested CC soak her ankle in cold water. R. at 566. CC, "stayed fully clothed and laid in a cold bathtub." R. at 566. At some point, SrA GC arrived at Appellant's apartment. R. at 566. Appellant and SrA GC helped CC out of the bathtub. R. at 567. CC took off her wet clothes in front of Appellant and SrA GC. R. at 632. Appellant gave CC a sweatshirt and shorts to wear. R. at 569-70; PE 2. Appellant then drove CC to the hospital. R. at 570. SrA GC eventually went to the hospital too to support CC. R. at 570.

Because of COVID restrictions at the hospital, Appellant could not accompany CC while she received treatment. R. at 571. CC was administered a standard dose of hydrocodone, a Schedule II narcotic, by emergency room staff. R. at 572, 990-993. The court called Capt AB, a pharmacist with the 99th Medical Group, Nellis Air Force Base, to address a member's question: "What are the side effects of the narcotic, hydrocodone, that [CC] was given at the hospital[.]" R. at 986, 988; App. Ex. XL. Capt AB testified, "The general side effects when ingesting an opioid are dizziness, drowsiness, we could have clouded behavior and decision making ability." R. at

990. He also testified that the side effects may include "impaired mental and physical tasks," euphoria, and a lowering of inhibitions. R. at 993.

CC was released from the hospital "anywhere from 4:30 to 5:30, maybe even 6:00 in the morning." R. at 572. When CC left the hospital, SrA GC, SrA GC's male friend SrA JB, and Appellant, were waiting for her. R. at 573. SrA GC returned to Nellis AFB and stayed with SrA JB. R. at 573-74. CC chose to go back to Appellant's apartment with Appellant. R. at 573.

CC and Appellant Return to His Apartment

After ordering food from McDonald's, Appellant and CC returned to Appellant's apartment. R. at 574. CC was on crutches and had a brace on her foot, so Appellant helped her up the stairs to his apartment. R. at 581. CC was wearing the same sweatshirt and shorts Appellant had given her earlier. R. at 583. Appellant's roommate, SrA AI (the same who had helped introduce CC to Appellant) testified that he came home from his mid-shift "around 6:30 am" on 31 May 2020 and saw Appellant and CC in the parking lot outside the apartment. R. at 870. He walked up the stairs to the apartment with them. R. at 870. SrA AI was not surprised to see CC and Appellant together because he had helped introduce them and had seen them together in the apartment many times before, including one to two weeks prior to 31 May 2020. R. at 869-70. SrA AI had seen CC with Appellant at his apartment "just about every day" while they were dating. R. at 869. The three of them walked into the kitchen of the apartment. R. at 871. CC and Appellant sat "right next to each other" on the barstools. R. at 871, 873. CC was sitting up on the bar stool, which had no backing on it, and had no difficulty doing so. R. at 871. SrA AI had a conversation with CC. R. at 871. He asked her "how she injured her foot and if she was okay." R. at 871. He testified that CC was "coherent" during this conversation, seemed aware of her surroundings, was alert, and was in control of her body. R. at 871, 873. SrA AI surmised CC "seemed to be happy,"

and that there was no tension between CC and Appellant. R. at 871-72. He explained, "[i]t seemed like just every other time. . ." he had seen them together. R. at 872. SrA AI then left the apartment while CC and Appellant were still talking to one another in the kitchen. R. at 872-73.

CC had no memory of SrA AI being at the apartment on the morning of 31 May 2020, or having a conversation with him. R. at 641. She claimed she could not remember sitting next to Appellant on the barstools in his kitchen. *Id*. CC instead testified that after entering Appellant's apartment, they both went directly to Appellant's bedroom and ate their food there. R. at 574-75, 582, 641. She testified that after eating her food in Appellant's bedroom, she laid down on the right side of Appellant's bed, turned on her left side and fell asleep. R. at 583-84; PE 3, p. 5. During cross-examination, CC explained, "I was also still under the original pain meds that they had given me, so there's a point in time from being in the hospital that I don't – I don't remember much." R. at 639.

Appellant and CC Held Hands, "Spooned," and "Had Sex."

According to CC, she and Appellant sometimes did not engage in foreplay prior to sex and sometimes they did. R. at 612. She explained that she sometimes experienced dryness during sex: "It just depends. Just depended on – just depended on the day, I guess." R. at 613. They relied either on natural lubrication or saliva. R. at 613-14. They never used any sort of store-bought lubricant. R. at 613. It was also not uncommon for the couple to have sex in the spooning position. R. at 612. Most of their sexual encounters occurred in Appellant's bed at his apartment. R. at 613.

On cross-examination, CC said she remembers telling investigators that Appellant held her hand while lying in his bed on 31 May 2020: "I said he might have held my hand." R. at 644-45. After falling asleep, she next remembered waking up in the same position and noticed "some pain in my vagina.[.]" R. at 585. CC woke up Appellant. R. at 585, 651. Appellant asked her, "What's

wrong?" R. at 585. CC asked Appellant "What happened?" R. at 585. Appellant responded, "We had sex." R. at 585. CC testified, "I asked him if we had sex or if he – or if he fucked me." R. at 585.

Appellant responded by stating that they "had sex." R. at 585-86. CC explained that Appellant,

> kept persisting in saying that him and I had sex. . . . He said he started holding me, like in the spooning position to comfort me. And he said he grabbed my boob and got horny. And he said he started fingering me. And then he said that he put his penis into my vagina.

R. at 585-86. According to CC, Appellant told her that she was moving while they "had sex." R. at 585, 653. He told CC that he thought she was awake during the sex. R. at 653. CC asked Appellant to take her home. R. at 586; PE 7, p. 5. She claimed that as they were leaving, she asked Appellant "how he got it inside of me," and that Appellant explained she had been "wet." R. at 586-87. CC accused Appellant of lying. R. at 587. She claimed Appellant told her "he used his saliva" to lubricate her. R. at 587.

CC Outcries to SrA GC and SrA GC Confronts Appellant

After Appellant dropped CC at her house, CC called SrA GC and told her Appellant had raped her. R. at 711. SrA GC, who was staying at SrA JB's place, asked SrA JB to drive her to CC's house, which he did. R. at 754-55. In the car ride to CC's place, while SrA JB drove, SrA GC called Appellant. R. at 712. She called him because she was "upset over what I had been told and I wanted to confront him[.]" *Id*. SrA GC called Appellant using the video chat feature on Instagram. R. at 730. She used SrA JB's phone to make two video recordings of different portions of her conversation with Appellant. She made these recordings because she wanted CC to have "options" and knew that for CC to bring her case to court, she needed evidence. R. at 731-32. She

did not tell Appellant she was recording him, and lied to him and told him she was not recording him when Appellant asked whether she was. R. at 713, 731; PE 5.

The first video recording is forty-three seconds in length. R. at 712; PE 5. In it, Appellant asks if he and SrA GC could speak in person. PE 5. SrA GC responds, "I'm not fucking playing with you. No, you do not want to have this conversation with me in person babe...." PE 5; R. at 715. The second video recording is approximately two minutes and two seconds in length. R. at 712; PE 5. At the beginning of the second video recording, Appellant states,

> It's on. Cuz I thought she was moving.[2] She was movin' around. And [inaudible] then I realized that somethin' wasn't right. I stopped right away.

R. at 712; PE 5. SrA GC then had this exchange with Appellant:

> SrA GC: I don't give a fuck what you feel like man. I don't give a fuck what you feel like. . . . Whatever you fuckin' feel like, toss that shit to the fucking wind. I don't give a fuck what you feel like.
>
> Appellant: I understand.
>
> SrA GC: Whatever you fuckin' feel like, toss that shit to the fucking wind. I don't give a fuck what you feel like.
>
> Appellant: I understand.
>
> SrA GC: She was laying down and unconscious. Yes or no?
>
> Appellant: Yes.
>
> SrA GC: And you put yourself inside of her. Yes or no?
>
> Appellant: Yes.

[2] A panel member asked whether there was a transcript for the recordings. R. at 818, 822; App. Ex. XXXIV. The court subsequently admitted Court Exhibit A. R. at 822. Court Exhibit A is a transcript of the second video recording only. R. at 822; PE 5. Court Exhibit A varies slightly from the recording. The transcript in Court Exhibit A states "It looked like she was movin'" *Compare* PE 5 *with* CE A.

PE 5; Ct. Ex. A. SrA GC testified that Appellant "admitted to raping" CC. R. at 712.

When SrA GC and SrA JB arrived at CC's house, SrA GC told CC she could file a restricted or unrestricted report of sexual assault, and that if CC chose to make an unrestricted report, SrA GC had a recording of Appellant making admissions. R. at 591-92. CC told SrA JB that she wanted to see A1C NW; accordingly, SrA JB called A1C NW, who arrived shortly thereafter at CC's house and "comforted" her. R. at 590, 784. CC decided to make a report of sexual assault to the Las Vegas Metropolitan Police Department (LVMPD). R. at 592. When the police arrived at CC's house, they took statements and escorted CC to the station. R. at 593. CC later underwent a sexual assault forensic examination (SAFE) (discussed in greater detail *infra*). A1C NW spent that night with CC at her house. R. at 789. That week, CC and A1C NW had consensual sex several times, and began exclusively dating a week or two later. R. at 622-23, 787. That relationship ended in October 2021. R. at 623, 787.

Appellant Cooperates with Law Enforcement

Appellant voluntarily appeared at the LVMPD station. R. at 808. He waived his right against self-incrimination and interviewed with a LVMPD detective, who described Appellant as "cooperative." *Id*. Prosecution Exhibit 6 depicts Appellant in an interrogation room handcuffed to a table having the following exchange with the detective:

> Appellant: We recently broke up earlier this month. . . .
>
> Detective: . . . . Did you think you guys were gonna get back together again?
>
> Appellant: I did yes.
>
> Detective: . . . . she had other plans, you think?
>
> Appellant: We tried working things out. I don't know exactly.

> Detective: . . . . during the time where you guys were dating for those months, uh, were you guys intimate? Did you guys have sex . . . .
>
> Appellant: Yes, sir.
>
> Detective: . . . so that wasn't . . . an uncommon thing?
>
> Appellant: No, sir.
>
> Detective: All right. Uh, so, what was so different between then and last night, or this morning?
>
> Appellant: . . . . I noticed there wasn't a lot of response back. That's when I felt uncomfortable and stopped.
> . . . .
>
> Detective: I want you to paint a picture for me, cause I'm trying to understand.
>
> Appellant: I was being intimate and I just thought she was being quiet.

PE 7 at 4-5; Pros. Ex 6, 3:27-3:51.

Forensic Evidence Was Collected from CC

The court-martial recognized Ms. LS as an expert in SAFEs and emergency nursing. R. at 963. Ms. LS testified in the defense's case-in-chief that she would expect to see signs of injury if a purported sexual assault victim reported pain or discomfort in their vagina: "usually that is coming from a source of injury or irritation, and I will be looking for injuries and probably expect to see something." R. at 966. She explained, "in this case . . . I would expect to see something vaginally or even externally in the external genitalia area." R. at 966. Ms. LS testified that she reviewed medical documentation of the SAFE conducted on CC on 31 May 2020 and concluded, "there was [sic] no injuries identified in any portion of the exam." R. at 965-66.

The LVMPD laboratory compared DNA samples collected during CC's SAFE to a DNA sample taken from Appellant. R. at 948-49. The court-martial recognized Ms. JS as an expert in

forensic biology. R. at 940. She testified that if Appellant had ejaculated inside CC within a couple of days prior to sample collection, she would expect to find a viable DNA sample from Appellant, because his sperm would likely still be present. R. at 949. Appellant was excluded as a contributor to all DNA samples discovered on the vaginal and cervical swabs taken from CC. R. at 949.

A panel member asked Ms. JS, "If saliva were used for lubricant, would DNA be present in the vagina or cervix?" App. Ex. XLI; R. at 952. Ms. JS explained, "It is possible, but in an orifice like that, like an internal orifice, the female DNA would overwhelm that amount." R. at 952. Saliva is "usually" detected on an "external swab, like an external genital or some kind of skin swab[.]" R. at 952.

The Military Judge Instructs the Members on Consent and Mistake of Fact

The military judge instructed the members on the definition of consent and on the affirmative defense of mistake of fact. R. at 1031-33. The defense argued that CC consented to sex with Appellant on 31 May 2020, and, in the alternative, that Appellant had a reasonable belief that CC was awake and consenting. R. at 1079-84, 1097, 1102, 1106-10.

ARGUMENT

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

This court reviews factual and legal sufficiency issues de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

"Review of the factual sufficiency of the evidence is a special power and duty that Article 66(d)(1), UCMJ, confers only on the Courts of Criminal Appeals." *United States v. Thompson*, 83 M.J. 1 (C.A.A.F. 2022) (*citing United States v. Nerad*, 69 M.J. 138, 141 n.1 (C.A.A.F. 2010). 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, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In weighing factual sufficiency, the Court takes "a fresh, impartial look at the evidence" applying "neither a presumption of innocence nor a presumption of guilt." W*ashington*, 57 M.J. at 399.

The Court's duty under Article 66, UCMJ, to affirm only findings that are "correct in law and fact" requires review of both the legal and factual sufficiency of the evidence. *Thompson*, 83 M.J. at 6 (*citing Nerad*, 69 M.J. at 141 n.1). The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The specification of which Appellant was convicted required the government to prove: (1) that on or about 31 May 2020, at or near Las Vegas, Nevada, Appellant committed a sexual act upon CC by penetrating her vulva with his penis; (2) that Appellant did so when CC was asleep; and (3) Appellant knew or reasonably should have known that CC was asleep. R. at 1028-29; App. Ex. XXXVI; Art. 120(b)(2)(B), UCMJ, 10 U.S.C. § 920(b)(2)(B). "Sexual act" means "the penetration, however slight, of the penis into the vulva[.]" *MCM*, pt. IV, ¶ 60.a.(g)(1)(A). Consent

means "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). Mistake of fact is an affirmative defense to the offense of which Appellant was convicted:

> [I]t is a defense to an offense that the accused held, as a result of ignorance or 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. . . . If the ignorance or mistake goes to . . . 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.

R.C.M. 916(j)(1).

Analysis

A. CC's prior sexual relationship with Appellant is probative of both actual consent and mistake of fact as to consent.

CC's prior sexual relationship with Appellant makes it very likely that she consented on 31 May 2020. Beginning in March 2020, CC pursued a relationship with Appellant: she noticed Appellant at work and found him attractive, obtained Appellant's contact information from SrA AI, and then contacted Appellant on Snapchat. *See* R. at 541, 607-608, 869. She hoped Appellant would be attracted to her. R. at 608. Eventually, CC and Appellant developed feelings for each other. *See* R. at 609, 611. According to CC, she and Appellant had sex a lot, sometimes multiple times a day, sometimes in the morning, and sometimes in the same spooning position they used on 31 May 2020. R. at 611. She testified that she and Appellant had great body chemistry, suggesting they did not always communicate verbally during sex but instead communicated with their body language. R. at 611. A reasonable example of such communication is moving when touched in an erogenous area. Given their sexual history together, it is very likely that CC consented to sex with Appellant on the morning of 31 May 2020, even if she does not remember.

The couple's prior sexual history together also caused Appellant to reasonably believe that CC was awake and consenting at the time that he penetrated her vulva with his penis on 31 May 2020. From Appellant's perspective, that morning followed the same pattern as on previous occasions when he had consensual sex with CC. For example, a few weeks earlier when CC argued with her roommate, she called Appellant for a ride and a place to stay overnight. R. at 618. According to CC, on that occasion she had consensual sex with Appellant in Appellant's bed even though they had previously broken up. R. at 545, 617-18. Similarly, on 31 May 2020, CC called Appellant for a ride and a place to stay. R. at 565, 573. CC subsequently had sex with Appellant under the same circumstances she had on numerous previous occasions both before and after they broke up: they had sex in his bed, in the morning, with minimal foreplay, and in the spooning position. *See* R. at 545, 611-613, 617, 787.

All or most of Appellant's sexual experience was with CC. *See* R. at 858-59. Special Agent (SA) JM, the lead AFOSI investigator on this case, and other AFOSI agents attempted but failed to find any previous dating or sexual partners of Appellant. *See* R. at 858-59. Thus, Appellant would have viewed the turbulent on-again, off-again, on-again nature of his sexual relationship with CC through the lens of this limited experience. When CC called him to come pick her up on 31 May 2020, he would have reasonably anticipated that she would want to have sex as she had on previous such occasions.

Assuming CC was feeling side effects from her hydrocodone dose, Appellant did not know she was. Moments prior to climbing into bed with CC, Appellant observed CC as she, 1) held a "coherent" conversation with SrA AI; 2) was alert and in control of her body as she sat on a bar stool eating McDonald's; and 3) had a normal conversation with Appellant. *See* R. at 871-873. There is no evidence that CC told Appellant that she was experiencing any side effects such as

drowsiness or memory loss. From Appellant's reasonable perspective, CC was as capable of consenting on 31 May 2020 as she had been on previous early mornings.

Lying in bed holding CC's hand, then holding her in his arms, and engaging in foreplay by touching her breasts and body, Appellant reasonably believed that this sexual encounter was like other times they had sex in the early morning hours in the "spooning position." *See* R. at 545, 611-613, 617, 787. Appellant reacted to the body chemistry described by CC. *See* R. at 611. She was moving in reaction to his touch. *See* R. at 585-86, 653. "[U]nder all the circumstances," a reasonable person would have come to the same conclusion as Appellant: CC was awake and consenting when he penetrated her vulva. *See* R.C.M. 916(j)(1).

If Appellant reasonably believed that CC was awake and consenting at the time of penetration but subsequently discovered his "ignorance or mistake," then he is not guilty of sexual assault. *See* R.C.M. 916(j)(1). Similarly, if CC fell asleep after Appellant penetrated her vulva and Appellant withdrew upon discovery of this changed circumstance, then he is not guilty of sexual assault. *See Id*. Appellant explained to the LVMPD detective that he stopped when he "noticed there wasn't a lot of response back." PE 7, pp. 4-5; Pros. Ex 6, 3:27—3:51. If it was reasonable for him to initiate sexual intercourse and he stopped upon discovery of the true circumstances, then Appellant is not guilty of sexual assault.

B. Through her ambivalence and deceit, CC confused Appellant and misled the members.

CC testified that she broke up with Appellant in April 2020, but later admitted she continued to have sex with him well into May 2020. If CC was ambivalent and inconsistent about when she ended her relationship with Appellant, the confusion Appellant experienced must have been even greater. This confusion was exacerbated when CC sent Appellant mixed signals on the night of the party. Despite having broken up with Appellant, CC invited him to her party. R. at

550. But after speaking with SrA GC, CC texted Appellant, "Maybe this isn't a good idea," appearing to tacitly withdraw the invitation while leaving the question of Appellant's attendance to him. R. at 550. After Appellant responded by saying he understood CC's position and that he would not attend the party, CC, by her own admission, "backtracked on what [she] said" and said "You should—just come. It will be fine." *Id*. CC's ambivalence and mixed signals foreshadowed the unspoken "body chemistry" she exhibited in Appellant's bed, while Appellant's confusion over CC's ambivalence and mixed signals in this moment foreshadowed the confusion he would experience upon being accused by CC of sexual assault the very next day.

Appellant made no attempt to rekindle a romantic or sexual relationship with CC at the party, as evidenced by the fact that he left the party without even saying goodbye to CC. R. at 556. Moreover, Appellant sought to *end* his relationship with CC that night by texting her, "I don't think we should talk anymore…I don't know your take…But that's my thought." PE 1. Hurt and betrayed by A1C NW due to his sexual infidelity, CC told A1C NW she "did not want to speak to him again and that he needed to leave." PE 1; R. at 558. When CC walked to her car to "cool off" from the arguments, she no doubt ruminated over the fact that she had pushed away not one but both of the men she was romantically and sexually involved with.

Soon thereafter, in the midst of a stressful situation, CC decided to reach out to Appellant for help when by her own admission she need not have. She admitted she could have taken a ride-share to the emergency room (where SrA GC had suggested she go) or waited for the police, who were already on their way to her house to respond to the shooting, to arrive and administer aid to her. R. at 562, 628. But just as she had done on a previous occasion after getting into a fight with SrA GC, she called Appellant, who she knew was drifting out of her orbit, and who despite having tried to finally cut things off with her an hour before dutifully returned to her house. R. at 565.

From there, CC asked Appellant to take her not to the emergency room to get treatment for her badly injured ankle, but back to his house. R. at 566. Once there, she accepted Appellant's attention and care, and later had no qualms about taking off her clothes in front of Appellant. R. at 632. CC then welcomed Appellant's assistance in getting to the hospital as well. R. at 566.

Following her treatment at the hospital, CC again placed herself in Appellant's care, not in the care of anyone else who had arrived at the hospital to check on her. R. at 640. She asked Appellant to take her not back to her house, but back to his familiar apartment, where instead of sleeping on Appellant's couch or floor or asking Appellant to do the same (R. at 643), she got into his familiar bed where she had slept "tons of times" (R. at 644), where she then held his familiar hand, and got into the familiar spooning position. R. at 612, 646. Each of these decisions had the effect of rekindling a trust, familiarity, and intimacy with Appellant—an intimacy they had previously shared as lovers. All of these acts contributed to her eventual consent to sexual activity or Appellant's reasonable mistake of fact as to the same.

Aware of how her actions to re-ingratiate herself with Appellant would look to investigators and a court-martial panel trying to evaluate Appellant's actions through the lens of consent or reasonable mistake of fact, CC deceitfully downplayed them. In her interview with both LVMPD and AFOSI, she notably omitted any mention of her trip to Appellant's apartment before going to the hospital; the first time she ever acknowledged going to Appellant's apartment that night was a week before trial. R. at 633-35. She told the panel she went to Appellant's apartment before going to the hospital because she wanted to wait for SrA GC before entering the emergency room; but when she later got to the emergency room with Appellant, she did not wait for SrA GC to arrive before checking in. R. at 570 ("I don't remember if [SrA GC] came with us or not, but we went to the emergency room. And when I say we, I know for certain that it was

[Appellant] and myself"). CC engaged in these deceits—all of which impeach her credibility—because she understood that a reasonable interpretation of her actions with Appellant leading up to their sexual encounter was that she desired his presence, his attention, his care, and his intimacy. That desire culminated in sex to which she either consented or for which she could not remember signaling her consent.

But after sleeping off the stress of the evening's events, and after the placating effect of the opioid wore off, CC awoke to another capricious change of heart. She found herself back in the bed of the lover with whom she had ended things (before rekindling them, then ending them again, then rekindling them). Now, in the light of day, she no longer wished to be in that bed. In this moment, she either remembered, perhaps even vaguely, having sex with Appellant before falling asleep, or she sensed they had had sex but, because of her fatigue or the mentally impairing effects of the hydrocodone, or both, could not remember it. Either way, her reaction to realizing she had had sex with Appellant was influenced by her regret—for choosing to call Appellant in the first place, to go home with him, to be intimate with him, for using Appellant to get back at A1C NW for his sexual indiscretion, and for pushing A1C NW away. This feeling of regret was not new to her; when CC first had sex with Appellant despite "breaking up" with him a month before, she realized she had "messed up for sleeping with" him. R. at 619.

Her regret is vividly demonstrated by the fact that one of the first people she wished to see upon returning to her house from Appellant's house on 31 May 2020 was A1C NW, who stayed by her side all day and night. R. at 659. Shortly thereafter, A1C NW and CC began "officially" dating, and stayed together until October 2021. R. at 660. Just a few hours from making her rash decision to cut out A1C NW from her life, CC re-ingratiated herself with him, garnering his sympathy and attention after rashly accusing Appellant of sexual assault, when in reality, she

simply had no memory of consenting to sex with Appellant or reasonably signaling her consent.[3] The same reasons that led CC to deceive investigators about going to Appellant's house before the hospital—because it impugned her motivations—led CC to give false testimony about the fact that she had had sex with A1C NW on the day of the party (according to SA JM's testimony, he verified through CC's counsel that she had had sex with "another sexual partner" within twenty-four hours of the alleged assault). R. at 862. This motivation also explains CC's equivocation under oath about when she and Appellant broke up. CC's dissembling demonstrates her willingness to mislead the panel to preserve her credibility and to prevail at trial.

C. Appellant's supposed admissions—induced by SrA GC's strong-arming—do not satisfy the government's burden of proof.

Shortly after persistently pleading with CC to believe him when he explained that they had had consensual sex, Appellant received the call from SrA GC. *See* R. at 712; PE 5. Motivated by the fact that she felt she never got justice for being sexually assaulted herself, SrA GC angrily confronted Appellant with the goal of getting him to make recorded admissions. R. at 727, 731-32. But SrA GC lacked key information. She was unaware of the potential side effects the hydrocodone might have had on CC's memory. To SrA GC's knowledge, CC did not have sex or seek any intimacy at all with Appellant following the point at which she believed CC and Appellant had broken up. R. at 723. She did not know that CC in fact had sex with Appellant following their "break up," and that one of those occasions was on the day SrA GC and CC got into a fight—CC did not inform her "best friend" of this fact. R. at 722-23, 726-27. Thus, SrA GC was unaware that the sex between CC and Appellant on 31 May 2020 fit into a pattern of behavior that would have made it likely that CC was consenting and that Appellant would have reasonably believed

[3] CC conceded there were several points in time from 30 to 31 May 2020 that she could not remember. R. at 678.

she was consenting. This lack of information exacerbated SrA GC's anger when she confronted Appellant, which in turn impelled her to bully Appellant into submitting to her, and CC's, version of events.

SrA GC started the call menacingly: "I'm not fucking playing with you. No you do not want to have this conversation with me in person[.]" PE 5; R. at 715. Appellant continued to insist that when he and CC had sex, CC was moving. At the very beginning of the recording, Appellant can be heard saying, "It's on. Cuz I thought she was moving. She was movin' around." PE 5; Ct. Ex. A. Because the beginning of the conversation is cut off, the record does not include what Appellant said prior to, "It's on." PE 5. Because of their prior sexual encounters under similar circumstances and because CC held his hand and responded to his touch, Appellant reasonably concluded that, "It's on," meaning CC was awake and agreeable to having sex.

SrA GC responded to what amounted to Appellant's articulation of a reasonable mistake of fact as to consent by screaming, "I don't give a fuck what you feel like…Whatever you fucking feel like, toss that shit to the fucking wind. I don't give a fuck what you feel like." PE 5; Ct. Ex. A. SrA GC's anger matched CC's only a short while before. R. at 585-86 ("I sit up and I…hit [Appellant] in his chest or on his face to wake him up, and I'm yelling his name…I was so mad."). In the face of this ire from both CC and her best friend, Appellant was quickly reduced to docility—realizing he would not be able to explain his point of view, he gave short answers and agreed with the premise of SrA GC's questions. *See* PE 5; Ct. Ex. A. When Appellant answered in the affirmative the leading questions, "She was laying down and unconscious[, y]es or no?" and "And you put yourself inside of her[, y]es or no?", he was agreeing from what he had *then come to know* based on CC's reaction, which is that she was in fact "unconscious" or otherwise not recording memories when he thought she had been moving and reciprocating sex. When Appellant said he

was "inside" of CC for "no longer than a minute," and then said "The whole situation was [probably] five, six minutes," he was differentiating between the amount of time his penis was inside CC's vagina (less than a minute) and the amount of time the entire sexual encounter lasted, which included time leading up to the penetration when he was touching CC's body.

This Court should look to the circumstances under which the recording was obtained in determining what weight to give it.[4] SrA GC's clandestinely recorded video recording was certainly emotionally compelling evidence. However, such emotion in the courtroom is precisely why this Court is empowered to come to a more rationale, non-emotional conclusion. *See* Article 66(d)(1), UCMJ. This video only further demonstrates Appellant's confusion after what he reasonably believed was a consensual sexual encounter.

D. Appellant's reputation and past behavior, coupled with his reaction to CC's allegation, strongly weigh against the notion that he would sexually assault CC while she was asleep.

CC agreed that what she had accused Appellant of doing was "out of character" for him. R. at 654. This concession is consistent with SrA AI's opinion of Appellant, offered in the defense's case-in-chief, that Appellant had a character trait of being respectful towards women. R. at 868; *See* Issue II *infra*. CC conceded Appellant had never articulated any interest in a "rape fetish." R. at 661. Appellant had shown her nothing but care and compassion as she recovered from a shooting at her house and from the injury to her ankle. CC claimed at trial that Appellant apologized to her repeatedly in his car and asked her who she planned to tell. R. at 654. Any apology offered to CC by Appellant is not evidence of his guilt but is rather a reasonable and compassionate response to CC's point of view. With respect to Appellant asking CC who she

[4] "The physical and psychological environment that yielded the confession can…be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). Even voluntary confessions, "are not conclusive of guilt." *Id*.

planned to tell, CC never conveyed this alleged probative admission to either LVMPD or AFOSI, and only first mentioned it a week before trial. R. at 654-55. This impugns CC's credibility and affords little weight to this claim.

According to CC, Appellant did not deny that they had sex when she pointedly confronted him in his bed. If Appellant had taken advantage of her by deliberately having sex with her while she was asleep, it is more likely that he would have simply denied that they ever had sex. As demonstrated by the forensic evidence in this case, Appellant did not ejaculate inside CC. He was thus even better positioned to plausibly deny having sex with CC without her consent, because he left no physical trace of it. But that is not what Appellant did. Nor did he react angrily to being accused; he did not kick CC out of his apartment or act disrespectfully towards her in an act of dissembling. R. at 653-54. Instead, he clearly cared that she was upset, and agreed to drive her home. R. at 653-54.

E. The forensic evidence does not corroborate CC's claims but does corroborate Appellant's version of events.

CC claimed she woke up "with some pain" in her vagina. R. at 585. But the forensic evidence collected in this case impeaches this claim. At the very least, the forensic evidence suggests that while CC may have felt a sensation in her vagina suggestive of recent penetration, she did not suffer injury to her vagina or vulva that would be consistent with feeling the pain she reported. Ms. LS testified she would expect to see signs of injury if a purported sexual assault victim reported pain or discomfort in their vagina: "usually that is coming from a source of injury or irritation, and I will be looking for injuries and probably expect to see something." R. at 966. But the SAFE revealed no sign of injury or irritation to CC's vagina. R. at 965-66.

The forensic evidence does suggest that Appellant, consistent with his account of the sexual encounter, did not ejaculate inside CC, because he was excluded as a contributor to all DNA

samples discovered on the vaginal and cervical swabs taken from CC. R. at 949. Considering the powerful human impulse to seek sexual gratification, it makes little sense that Appellant would give into this impulse and penetrate CC's vulva knowing she was asleep, only to forgo orgasm and ejaculation. And no evidence was produced by the government to prove Appellant withdrew his penis from CC and ejaculated elsewhere.

F. Neither this Court, nor any rational factfinder, can be firmly convinced of Appellant's guilt.

The government failed to prove beyond a reasonable doubt that Appellant did not reasonably believe that CC was awake and consenting while he penetrated her vulva with his penis. Appellant and CC had sex many times before under the same or similar circumstances: in his bed, in the morning, in the spooning position. On 31 May 2020, they held hands, he held her in his arms, he touched her body, and initiated sex as they had done on prior occasions. They did so after CC's repeated mixed signals to Appellant, while she was under the mentally impairing and lowered inhibitions effects of hydrocodone (R. at 990), and while she was motivated to rekindle a sexual relationship with Appellant out of spite towards A1C NW, only to regret her decision later. As corroborated by the forensic evidence, Appellant ceased sexual activity with CC once he realized she was not reciprocating, and up to that point, his mistake of fact was reasonable. This case illustrates why Congress saw fit to give this court authority to, "conduct a *de novo* review of the entire record of a trial. . . ." and take, "a fresh, impartial look at the evidence. . . ." *See* W*ashington*, 57 M.J. at 399.

WHEREFORE, Appellant respectfully requests this Honorable Court disapprove the finding of guilt and the sentence.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS WHEN SHE FOUND A GOOD FAITH BASIS FOR TRIAL COUNSEL TO ASK A WITNESS, "ARE YOU AWARE THAT THE ACCUSED HAD AN ALLEGATION OF SEXUAL ASSAULT MADE AGAINST HIM?" DESPITE EVIDENCE SHOWING NO SUCH PRIOR ALLEGATION HAD BEEN MADE AGAINST APPELLANT.

Standard of Review

A military judge's ruling to admit evidence is reviewed for an abuse of discretion. *United States v. Ayala*, 81 M.J. 25, 27 (C.A.A.F. 2021); *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Ayala*, 81 M.J. at 27-28.

Law

The balancing test in Mil. R. Evid. 403 applies to "have you heard" and "do you know" questions intended to test the basis of a witness's opinion. *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988) (citations omitted). "In the application of this balancing test, the trial judge is universally recognized as exercising 'wide discretion[.]'" *Id*. at 125 (quoting *Michelson v. United States*, 335 U.S. 469, 480); *see also United States v. Westcott*, 2022 CCA LEXIS 156, at *45 (A.F. Ct. Crim. App. Mar. 17, 2022) (unpub.). A military judge's "rulings in this area are to be reversed only when he has abused that discretion." *Id*. This discretion, "is nevertheless 'accompanied by heavy responsibility . . . to protect the practice from any misuse.'" *Id*.

Long ago, the Supreme Court explained, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson*, 335 at 479. If an accused opens that door, then "his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion." *Id.*

"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Mil. R. Evid. 404(a)(1). However, "[t]he accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it." Mil. R. Evid. 404(a)(2)(A). Military Rule of Evidence 405(a), Methods of proving character, states:

> *By Reputation or Opinion*. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.

Mil. R. Evid. 405(a). The "relevant specific instances of the person's conduct" must actually have occurred: "It has long been recognized that references to such instances must be predicated upon a good faith basis for believing that they actually occurred." *United States v. Kitching*, 23 M.J. 601, 603 (A.F.C.M.R. 1986) (citing *Michelson* 335 U.S. at 469); *United States v. Donnelly,* 13 M.J. 79 (C.M.A. 1982).

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is admissible . . . . Irrelevant evidence is not admissible." Mil. R. Evid. 402. "The military judge may exclude relevant evidence if its probative value is

substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403.

Additional Facts

Before trial, the prosecution notified defense counsel pursuant to Mil. R. Evid. 413 "that it may introduce at trial, testimonial and documentary evidence of the accused's past sexual misconduct," specifically: "Statements by the accused to the victim regarding his having a SARC case opened against him during Tech School at Randolph AFB." AE XII at 10. The prosecution also provided defense counsel a transcript of CC's interview with LVMPD and a video recording of her interview with the Air Force Office of Special Investigations (AFOSI). AE XII at 2-3, 12-33 and Attachment 4. According to the transcript, CC told LVMPD investigators Appellant, "had already had a sexual assault case on his records…some girl he was having sex with got jealous…So then she tried to say that he raped her." AE XXII at 2, 30. During her recorded interview with AFOSI, CC states, "He says he got charged with a SARC case in tech school…He said that some girl claimed that he raped her…He said that he won the case[.]" AE XXII at 2. Later in the interview with AFOSI, CC states,

> As far as his ex, her name is J …As far as the SARC case goes…He said it right in front of me and Gabby…I believe [Appellant] said he had to speak to an OSI investigator, so I believe it went to that point. That means the girl's name should be on file and she can be contacted.

Id. The government produced no additional documentary or testimonial evidence to corroborate CC's statements.

The defense filed a motion to exclude this evidence. AE XII. The government subsequently withdrew its Mil. R. Evid. 413 notice. AE XIII. The military judge acknowledged

the defense motion to exclude and the government response during a hearing in accordance with Article 39(a), UCMJ. R. at 19-20.

After the government rested its case-in-chief, the defense called SA JM, the lead AFOSI investigator on the case and the leader sexual assault investigator at Nellis AFB at the time. R. at 834. He explained that in a sexual assault case, AFOSI routinely attempts to locate and interview the alleged assailant's prior sexual partners "to make sure there's not that predatorial behavior that is out there, and that there are any other potential victims." R. at 857. SA JM assumed CC's allegation was true when he investigated it. R. at 859. After interviewing Appellant's co-workers, supervisor, and friends, SA JM was unable to identify and locate any of his previous sexual partners. R. at 858-59. Defense counsel continued the questioning:

> Q. [D]id you do law enforcement background checks on Airman Falls Down?
>
> A. We did.
>
> Q. And why did you do those?
>
> A. Those are done for a number of reasons. Number one, once again…you're looking for information of whether [Appellant] had been previously under investigation for a crime, or previously convicted of a crime…for officer safety purposes…[and] so that the commanders can make informed command decisions.

R. at 859.

The defense next called SrA AI. R. at 864. SrA AI offered his opinion that Appellant is "respectful" toward women. R. at 868. Prior to cross-examination, trial counsel requested an Article 39(a), UCMJ hearing. R. at 874. In that hearing, trial counsel explained he intended to ask SrA AI, "Did you know that the accused had a prior allegation of sexual assault while he was in tech school?" R. at 876. Defense counsel objected:

> [T]he government has to have a good faith basis to ask that question. This was something that was previously noticed and withdrawn because they did not have anything to support that this happened. Law enforcement checks were conducted by OSI. And we can call Agent [JM] back if we want to -- if we want to voir dire the witness, but nothing was found in this entire world to support that this happened. So, not only is it not supported, there is not a good faith basis and furthermore, it is highly prejudicial to throw this question out before the members[.]

R. at 876-77. Trial counsel responded, "the defense is correct that there is no law enforcement investigation or anything of that nature." R. at 878. Trial counsel continued, "However, the good faith basis for it is the fact that there is a statement in the record concerning this particular issue." R. at 878.

The military judge reviewed the prosecution's Mil. R. Evid. 413 notice (AE XII). R. at 878. The military judge then issued her ruling:

> This is only to test the witness's veracity. It is not evidence, and it cannot be used as evidence of any such finding. To be honest, the court is not quite sure what the words, "SARC case" means. It's not a vernacular, although the words mean something, I don't know what they mean together, and I have no idea what the accused meant at that point in time that he might have made that statement. However, that is beside the point, there is a good faith basis before the government to challenge this witness' knowledge about an issue the defense put in, and that is respect towards women. If anything, the court does understand what a SARC issue is, and that seems to go directly in the face of respect.
>
> The court has considered M.R.E. 403, and yes, the court does agree, it is prejudicial, but it is not unduly so. The objection is overruled. The probative value is not outweighed by the danger of unfair prejudice, or confusion of the issues.

R. at 884-85. After a recess and before the members returned, the military judge stated,

> All right, I just wanted to clarify one point in my ruling. So, the basis of the government's knowledge that the court has before it, is statements by the accused to the victim regarding his having a SARC case opened against him during tech school at Randolph Air Force Base. The court understands SARC to be a Sexual Assault

> Response Coordinator, and that SARC is involved in sexual assault allegations or anything under the offense of Article 120. Whether or not a SARC case opens means that there would in-fact be documentation, the court is unaware of that knowledge and therefore that is the consideration saying that that is a good faith basis and why the objection was overruled.

R. at 888-89.

The members were recalled and, over defense objection, the military judge allowed trial counsel to have this exchange with SrA AI:

> Q. And so, Airman [AI], are you aware that the accused had an allegation of sexual assault made against him and [sic] tech school?
>
> A. No sir, I did not know that.

R. at 892. The military judge then instructed the members, "The witness was just asked whether he was aware or had heard of some matter. That is a permissible question to test the witness's credibility, but if there is no evidence of that matter you may not consider the question for any other purpose." R. at 893. The military judge repeated this instruction prior to findings. R. at 1039.

The defense subsequently recalled SA JM before the members. R. at 894. He repeated his previous testimony but offered greater detail:

> Q. Did you find any evidence at all to support that a sexual assault allegation was ever made against Airman Falls Down during tech school that he attended?
>
> A. We did not. We checked all of our military databases to include the Defense Central Index of Investigations and our own web I2MS which is OSI's database. And there were no records of a sexual assault investigation into Mr. Falls Down in either of those databases. In addition to that, we also checked NCIC which is where local law enforcement would indicate any type of an investigation. Plus, it is also mandated by OSI policy and regulation that if Mr. Falls Down, because he is a military member, were the subject of a sexual assault investigation, that there was a civilian victim perhaps, then it would still be within our web I2MS database. We are required

> by OSI policy, even if we do not open up a substantive investigation because someone else is running such due to statuses or what have you, we still have to document that through informational files.

R. at 894-95.

Analysis

A. The military judge abused her discretion by permitting trial counsel to ask this "did you know" question of SrA AI because her findings of fact and logical relevance analysis were clearly erroneous and unreasonable.

The military judge first failed to account for the fact that the sole source of the purported basis for asking this question to SrA AI was CC herself, an inherently biased witness. The military judge failed to note how CC's hearsay claim regarding Appellant's prior "SARC case" came in the context of her interviews with law enforcement agencies she hoped would investigate and help prosecute Appellant for a sexual offense. CC never repeated this claim under oath, something the military judge could have *sua sponte* ordered during the Article 39(a), UCMJ session held to settle this issue but did not.

The military judge next failed to make clear findings of fact supported by the evidence. Her ruling is littered with ambivalence and uncertainty; she said she was "not quite sure what the words, 'SARC Case' means [sic]." Nevertheless, she axiomatically surmised, "the words mean something." Still, she conceded, "*I don't know* what they mean together, and *I have no idea* what the accused meant at that point in time that he *might have* made that statement." But in the very next sentence she found, "However, that is beside the point, there is a good faith basis." Thus, without making a finding of fact that Appellant indeed made these comments to CC, and without a finding of what "SARC case" meant in a relevant context, the military judge unreasonably found a good faith basis. Even trial counsel conceded, "the defense is correct that there is no law enforcement investigation or anything of that nature." R. at 878.

Perhaps realizing her initial ruling seemed rash, the military judge returned to the issue after a recess to "clarify" that she understood "SARC to be a Sexual Assault Response Coordinator, and that SARC is involved in sexual assault allegations or anything under the offense of Article 120[, UCMJ]." But the military judge never made a finding of fact of what she believed Appellant meant by "SARC case" when he allegedly made these comments to CC. Even after her clarification, the military judge acknowledged she was "unaware" whether a "SARC case" would produce "documentation" of the case, but that was no bar to whether a good faith basis existed. Without any more information, this ruling would be clearly unreasonable, as it rests on flimsy factual grounds. But the military judge had more information at her disposal that further tipped the scales against a good faith basis finding, but which she ignored or did not properly weigh.

The military judge focused exclusively on the words "SARC case" in CC's statement in rendering her ruling on the defense's objection. *See* R. at 884-85. She ignored the rest of CC's claim, namely that Appellant allegedly told her he had been accused of "rape," was interviewed by AFOSI about that allegation, and that "the girl's name should be on file and she can be contacted." Taking CC's claim at face value, the "SARC case" against Appellant was no trivial matter but rather involved an allegation of a serious offense. Yet the military judge, despite her own experience as a military justice practitioner, as well as common knowledge and sense, unreasonably claimed to be "unaware" of whether a "SARC case"—let alone one involving an allegation of *rape*—would be documented. It is difficult to imagine how an experienced military judge could be "unaware" of standard Air Force processes when it comes to sexual assault investigations.

But the military judge need not have even relied on her own experience to determine this issue, because she had SA JM's testimony, which directly contradicted CC's claim that Appellant

had told her he had been interviewed by AFOSI in connection with a rape allegation against him. *See* R. at 837, 857, 859. The lead investigator testified under oath that despite conducting extensive background checks on Appellant in several databases, and despite several investigative interviews with Appellant's friends and co-workers, he was unable to find *any* evidence that Appellant had *ever* been the subject of a previous sexual assault allegation, made by a woman named "J " or by anyone else, much less that he had interviewed with AFOSI. Perhaps if CC had merely claimed Appellant had been previously accused, without any other information about a "SARC case" or an AFOSI interview, it would be more understandable for even an experienced AFOSI agent to come up short in substantiating that claim. But again, taking CC's claim at face value, she told investigators Appellant had *interviewed* with AFOSI about the prior rape allegation. It is far less likely that even an inexperienced AFOSI investigator would fail to uncover that a criminal subject had been previously interviewed by AFOSI, much less on a *substantially similar* allegation. It is even less likely that an investigator who is specifically looking for evidence of Appellant's "predatorial behavior" or previous convictions "for officer safety purposes" would miss this easily searchable information. Yet the military judge ignored this glaring incongruity.

The military judge's clearly erroneous and unreasonable findings of fact and logical relevance analysis amounted to an abuse of discretion. *See Ayala*, 81 M.J. at 27-28. For a "fact" to be relevant, that "fact" must be true. *See* Mil. R. Evid. 401. If not true, then the "fact" has neither "any tendency to make a fact more or less probable…[nor is] of consequence in determining the action." *See id*.

B. The military judge's legal relevance analysis was also clearly erroneous and unreasonable, and caused Appellant unfair prejudice.

This was no mundane "did you know" question. Not only did this question tend to impugn the reliability of SrA AI's opinion of Appellant's character for respectfulness towards women,

which in and of itself prejudiced Appellant, but it also strongly implied Appellant had been previously credibly accused of *the same or substantially same crime* for which he was being tried. The military judge's abuse of discretion permitted the trial counsel to state in the presence of the members and during a closely contested court-martial, despite no sworn supporting evidence, that "the accused had an allegation of sexual assault made against him [at] tech school." R. at 892.

"Did you know" or "have you heard" questions are, by their nature, insidious. They are highly suggestive and coy. They are invariably devoid of context but bear the imprimatur of the person asking them, and of the military judge who permits them. Coming from the mouth of a prosecutor and Air Force officer representing the United States government, with the sanction of the military judge, this question took on a hue of truth when in reality it was shrouded in doubt. Before voir dire, the military judge instructed the members, "My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law." R. at 275. Given this instruction, and given the military judge's clear command of the proceedings, the members could be forgiven for believing that she would not permit trial counsel to ask such a damning question if its underlying premise had not been proven to a reasonable degree of certainty in a session outside their presence. But it had not. In fact, quite the opposite was true: SA JM's testimony tended to disprove it. The military judge's limiting instructions were tepid, and did little to "unring" the bell of "repeat sexual abuser" the question rung. Even if evidence of this "SARC case" was not entered pursuant to Mil. R. Evid. 413, the stench of propensity nevertheless polluted the courtroom.

Because "allegation of sexual assault" was devoid of any context—an allegation by whom? What kind of assault? When? What were the attendant circumstances? Was the allegation investigated? By whom? What was the result?—the probative value of the question, i.e. its

tendency to impeach the reliability of SrA AI's opinion, was minimal to zero. On the other hand, the prejudicial effect *in a sexual assault case* was *substantial*. *See* Mil. R. Evid. 403. "[T]he potential for undue prejudice can increase…[when] the impeaching offense more closely approximates the charged offense." *See Pearce*, 27 M.J. at 125. This Court cannot be certain whether the members convicted Appellant in part because they feared he was a serial sexual abuser.

Appellant had a substantial right to defend himself and the military judge's abuse of discretion interfered with that right. Military Rule of Evidence 405(a) permits an accused to "prove his good name" as one means to defend himself. *See Michelson*, 335 U.S. at 479. The use of "have you heard" and "did you know" type questions to test the basis for a character witness's opinion is a basic aspect of military justice practice, but only when the government has a good faith basis to ask the question. In this case, the government had no such basis, and the military judge failed to "protect the practice from any misuse" by permitting trial counsel to ask the question. *See Pearce*, 27 M.J. at 125 (*quoting Michelson*, 335 U.S. at 480).

WHEREFORE, Appellant respectfully requests this Honorable Court disapprove the finding of guilty and the sentence.

III.

WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

Prior to trial, the defense requested "that a unanimous finding be ordered by the military judge, consistent with the United States Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)." AE V. The government opposed the motion. AE VI.

In denying the defense's motion, the military judge found *Ramos* "by its own terms…does not address courts-martial," and "is predicated upon the right to a jury trial *in the civilian context*."

AE VII at 9-10 (emphasis in original). She cabined the *Ramos* holding to the Sixth Amendment's right to a jury trial; finding no such right extended to courts-martial, she was left "unpersuaded that unanimous verdicts are applicable" to courts-martial. *Id*. at 10. She found the defense failed to demonstrate the factors militating in favor of a unanimous verdict are "so extraordinarily weighty as to overcome the balance struck by Congress." *Id*. (citing *Weiss v. United States*, 510 U.S. 163, 177 (1994)). She cited finality of verdicts and avoidance of unlawful command influence as two specific military conditions that "require a different rule that prevailing in the civilian community. *Id*. The military judge advised Appellant he could be convicted if three-fourths of the members concurred as to guilt. R. at 263. Later, the members received the same instruction. R. at 1121.

Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The Court of Appeals for the Armed Forces (CAAF) granted review in *United States v. Anderson* to determine whether a military accused has a constitutional right to a unanimous verdict. No. 22-1093/AF, 2022 CAAF LEXIS 529, at *1 (C.A.A.F. Jul. 25 2022). The CAAF also granted trailer review of several cases wherein Appellants, like SrA Falls Down, preserved the same issue at trial. *See, e.g., United States v. Veerathanongdech*, No. 22-0205/AF, 2022 CAAF LEXIS 533 (C.A.A.F. 25 July 2022); *United States v. Martinez*, No. 22-0165/AF, 2022 CAAF LEXIS 562 (C.A.A.F. 3 August 2022); *United States v. Apgar*, No. 22-0226/AR, 2022 CAAF LEXIS 600 (C.A.A.F. 18 August 2022); *United States v. Miramontes*, No. 22-0233/AR, 2022 CAAF LEXIS 693 (C.A.A.F. 27 September 2022); *United States v. Aikanoff Jr.*, No. 22-0258/AR, 2022 CAAF

LEXIS 706 (C.A.A.F. 4 October 4). As Appellant preserved this issue at trial by motion, this Court should—and must—decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

WHEREFORE, Appellant respectfully requests this Honorable Court decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

Respectfully submitted,

4445 Corporation Lane, Suite 173
Virginia Beach, VA 23462

ESHAWN R. RAWLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 15 March 2023.

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

13 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40268
Senior Airman (E-4)	)	
ANDRE T. FALLS DOWN, USAF	)	Panel No. 1
Appellant.	)	

ANSWER TO ASSIGNMENTS OF ERROR

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

INDEX

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

13 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	ACM 40268
Senior Airman (E-4) ANDRE T. FALLS DOWN, USAF *Appellant.*	)	Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS WHEN SHE FOUND A GOOD FAITH BASIS FOR TRIAL COUNSEL TO ASK A WITNESS, "ARE YOU AWARE THAT THE ACCUSED HAD AN ALLEGATION OF SEXUAL ASSAULT MADE AGAINST HIM?" DESPITE EVIDENCE SHOWING NO SUCH PRIOR ALLEGATION HAD BEEN MADE AGAINST APPELLANT.

III.

WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

CC was stationed at Creech AFB from October 2019 until October 2021. (R. at 540.) In mid-March 2020, she began dating Appellant. (R. at 541.) That relationship, which was sexual, would last approximately six weeks, until late April 2020. CC testified the breakup began happening in mid-April 2020 when she moved into a new house and "became a lot less dependent on him and a lot more independent." (R. at 542.) Before moving into her home, CC lived in the dormitories on Nellis AFB. Appellant lived in an off-base apartment, so the two would spend most of their time at Appellant's place prior to CC getting her own house. (Id.) In her new house, CC lived with SrA GC. (R. at 543.)

After the relationship ended, CC and Appellant kept in contact with one another. (R. at 544.) CC testified that the squadron had a recent suicide, and she was trying to stay in touch with Appellant because the death impacted Appellant pretty hard. (Id.) CC estimated the two texted every couple of days. (R. at 545.) After the breakup, the two also had two sexual encounters. Both occurred at Appellant's apartment. CC testified that she initiated both instances by kissing him. (R. at 546.)

In mid-May, after the two post-breakup instances of consensual sex, CC had a disagreement with something Appellant did and told Appellant that it was "best that we cut ties as far as in a sexual manner and not continue to have sex with each other." (R. at 547.) CC testified that Appellant told her he was sorry and "that he understood and he respected what I decided." (Id.) After that conversation, CC was a lot more distant with Appellant. (R. at 548.)

Also during this timeframe, CC began seeing A1C NW. (R. at 548.) That relationship would soon turn sexual. (Id.)

On the evening of 30 May 2020, CC hosted a cup pong tournament at her house. CC estimated she and SrA GC invited 20 people to attend. (R. at 549.) CC invited Appellant and explained that, due to the recent suicide, "[Appellant] had told me that he wanted some human interaction, so I decided to reach out to him and let him know that he was more than welcome to come if he wanted to." (R. at 550.) However, after inviting him, CC began to have reservations and told Appellant, "Maybe this isn't a good idea." (Id.) Appellant told her he would not come, but then CC backtracked and said he should come and that it "will be fine." (Id.)

CC testified as soon as everyone arrived, the cup pong tournament began. (R. at 554.) Alcohol was consumed at the party, but CC did not drink. In addition to being under 21, CC wanted to remain sober in case anyone needed a designated driver. (R. at 555.) When Appellant arrived, CC welcomed him and told him to find a partner to play cup pong. Throughout the course of the night, CC stated the only time she interacted with Appellant was when he would ask her to get him another beer. (Id.)

CC did not see when Appellant left the party. According to text messages, Appellant arrived at his apartment around 0141 hours, now on 31 May 2020. (R. at 556; Pros. Ex. 1.) Appellant also sent a message saying that he made it home and that he did not think the two should talk anymore. (Id.) CC testified that she did not see those messages until hours later.

Meanwhile, back at the party, a fight broke out between one of CC's friends and one of A1C NW's friends. (R. at 557-58.) Eventually, CC and A1C NW would get into an argument. (R. at 558.) CC explained that she and A1C NW had been "testing the waters" in their relationship and that A1C NW "had told me that he wasn't going to be sleeping with anybody else." (R. at 563.) However, CC was told at the party that A1C NW had lied to

her about that. (Id.) The argument lasted a while and ended with CC telling A1C NW that she did not want to speak to him again and that he needed to leave. (R. at 558.)

When A1C NW left, CC returned to playing cup pong. (R. at 558.) At some point, CC walked out to her vehicle that was parked on the street. (R. at 560.) The next thing CC recalled was getting a phone call from SrA GC about a shooting at the house. CC went back inside the house to find everyone was gone. (R. at 561.) As she ran upstairs to find SrA GC, CC rolling her ankle badly.

When CC made it upstairs, SrA GC explained that the friend of SrA GC's who had been in the earlier fight was outside waiting for an Uber when he got into a screaming match with a neighbor. (R. at 562.) The screaming escalated to a gunshot by the neighbor.

At that point, SrA GC noticed CC was in pain because of her ankle and recommended that she call Appellant to take her to the hospital. (Id.) SrA GC did not have a license and CC could not drive herself since her right ankle was the injured one. CC said she and Appellant "were obviously friends, or at least okay with each other, and he lived five minutes away from me at the time." (Id.)

CC then called Appellant, who picked her up. CC explained that even though she also sent Appellant a text message around the time she called him (approximately 0258 hours), she still had not read Appellant's earlier text messages from 0141 hours about not wanting to talk anymore. (R. at 564.) CC testified that she was in pain at the time and just wanted to get to the hospital. (R. at 565.)

CC wanted SrA GC to accompany her to the hospital. However, SrA GC could not leave the house because the police were enroute due to the shooting. (R. at 566.) Instead of waiting at the house for SrA GC to finish with the police, Appellant ended up taking CC to

his apartment to wait for SrA GC. There, Appellant suggested CC put her ankle into a cold bathtub to help the swelling. (R. at 566.) CC testified she got into the bathtub fully clothed.

When SrA GC arrived at Appellant's apartment, she and Appellant helped CC out of the bathtub. (R. at 567.) Since her clothes were now wet, Appellant offered CC a pair of his shorts and a shirt. Those clothes are depicted in Prosecution Exhibit 2. Appellant and SrA GC then helped CC get dressed. On cross-examination, CC acknowledged this involved her taking off all of her wet clothes and being naked. (R. at 631-32.)

After changing, the three went to the emergency room. (R. at 571.) Due to COVID restrictions, only CC could remain at the hospital. Eventually, CC was given hydrocodone for her pain. (R. at 572.) After being x-rayed, she was eventually released between 0430 and 0600.

When she was released, CC said she was feeling the effects of the pain medication, noting that while she felt no pain in her ankle, she "felt nauseous, dizzy, extremely tired, and ultimately high." (R. at 573.) A group of people, included SrA GC and Appellant, were waiting for CC outside of the hospital. CC got into Appellant's car, and they went to McDonalds before ending up at Appellant's apartment. (R. at 574.) CC said both she and SrA GC were not comfortable going back to their house because of the neighbor who had gotten upset and shot at their house. Since SrA GC went with some friends back to the dorms at Nellis AFB, Appellant offered to have CC go to his place.

When they arrived, Appellant helped CC, who was on crutches and had her ankle in a brace, up the stairs to his bedroom. (R. at 581.) Appellant turned on the television and the two began eating their food. (R. at 583.) CC said she next only remembered "turning on my left side and just looking through my phone and falling asleep." (R. at 584.)

CC awoke in the same position with her cell phone still in her left hand. (R. at 584, 590.) However, testified that she noticed "that there is some pain in my vagina, and I noticed that the right side of the shorts I was wearing were a little rolled at my waist." (R. at 585.) She said she sat up and "either hit [Appellant] in his chest or on his face to wake him up, and I'm yelling his name." (Id.)

CC said Appellant sat up and said, "What's wrong?," to which she replied, "What happened?" (Id.) Appellant responded, "We had sex." When CC told Appellant that he was lying and that they had not had sex, Appellant "persist[ed] in saying that him and I had sex" and then explained how it happened. (R. at 586.) Appellant told CC that "he started holding me, like in the spooning position to comfort me. And he said he grabbed my boob and got horny. And he said he started fingering me. And then he said that he put his penis into my vagina." (Id.)

CC said she asked Appellant if she was moaning, moving, reciprocating, or making any noise. (R. at 588.) CC testified, "And he told me no, and that's when he realized something was wrong, and then he stopped." (Id.)

CC stated she became "so mad" and "demanded that he take me back to my house." (R. at 586.) As they were getting up, CC asked him how the sex happened. Appellant at first told her that she was already wet, which CC told him was not true. (R. at 587.) After calling him a liar, Appellant eventually told her he used his saliva "to get it inside of me." (Id.)

CC also detailed the events leaving Appellant's apartment and arriving at her house:

> Right before we got into his car, I told him I couldn't believe it, and I was just mad. And the second I sat down in the car, I didn't say a single word to him in the five-minute drive to my house. It became so much more than that. And I didn't -- I couldn't process anything. I couldn't think. And I just hear him keep saying, "Who are you going to tell? Who are you going to talk to? Can we please talk

> about this? I'm so sorry." When we made it to my house, I stepped out of the car and I went inside my house. And I haven't talked to him since.

(Id.)

CC testified that prior to laying down on Appellant's bed, she never spoke to Appellant about having sex that morning and that sex never came up at any point after Appellant had picked her up at her house earlier that morning. (R. at 588.)

When she got inside her house, CC called SrA GC. CC testified, "All I could say was that I think I was raped. And [SrA GC] told me she was on her way." (Id.) When SrA GC arrived, CC said she started bawling. She said she ended up in her bed for a while and "just cried." (R. at 591.) When she eventually came back downstairs, CC said, "That's when I'm explaining to [SrA GC] that I don't understand why he would have done that and I don't understand why he would have put himself in that situation and that I'm so mad. And I couldn't -- I couldn't process anything. I couldn't believe that that happened." (Id.)

SrA GC then talked to CC about whether or not she wanted to report the sexual assault. SrA GC also told CC about a phone call SrA GC had with Appellant after she had spoken with CC about the sexual assault. The call occurred while SrA GC was driving to her house from the dorms. SrA GC had recorded the conversation and played it for CC. (R. at 592.)

CC then called the Clark County Police Department and reported that she was raped. She was taken to the police station and interviewed by GL. She then went to the hospital for a SANE exam. (R. at 593.)

CC testified that on the morning of 31 May 2020 Appellant never asked to put his fingers inside of her, never asked if he could put his penis inside of her, and she was never woken up by Appellant before he did these things. (R. at 602-03.)

On cross-examination, CC agreed that the breakup between her and Appellant was not rough and that, after they had their conversation about breaking up, they "both came to the answer that breaking up was a good idea." (R. at 616.) Still, the two hung out and CC wanted to still see Appellant because she knew he was struggling with the breakup. (R. at 617.) She again acknowledged that she and Appellant had sex after the breakup and that she initiated those occasions.

CC also stated that she and A1C NW began dating exclusively in June 2020, a week or two after the incident, and dated up until a few months before Appellant's December 2021 court-martial. (R. at 623.)

CC also acknowledged that she could have gone with another one of her friends when she was discharged from the hospital on the morning of 31 May. (R. at 639-40.) However, CC again explained she went with Appellant because the other friends lived 20 minutes or further from the hospital. In contrast, Appellant's apartment was minutes from the hospital. SrA CC also explained again why she was uncomfortable going back to her house that morning because of the incident with her neighbor. (R. at 640.) She said she felt safe going back to Appellant's apartment.

With regard to Appellant's bed and bedroom, CC said she did not have a specific side of the bed she slept on. (R. at 642.) CC said she might have held Appellant's hand when they laid down, but she could not specifically recall. (R. at 645.) She specifically remembered though that she did not kiss him or touch her in any other way.

Since she was asleep, CC acknowledged that she had no memory of anything sexual in nature with Appellant. (R. at 650.) She said, "I only know what he told me when I woke him up." (Id.) CC did agree that she had throbbing and pain in her vagina. CC said when she woke up and noticed this pain and her shorts being askew, she remembered "hitting him and saying his name." (Id.) CC again explained that she asked Appellant what happened, and he responded, "We had sex." (R. at 651.) CC said Appellant told her he saw her "twitch or move and assumed that I was awake." (R. at 653.)

On re-direct examination, CC again said the subject of sex never came up between her and Appellant that morning. (R. at 680.) She said Appellant never touched her prior to her falling asleep and never asked her if she was still awake. She again stated that she had no memory of what happened while she was asleep, but that when she woke up the first thing she noticed was her vagina hurting. (R. at 681.

SrA GC, CC's roommate, also testified to the events of 30-31 May 2020. She said the party on 30 May 2020 began around 1900 or 2000 hours and was attended by around 20 people. (R. at 690.) SrA GC estimated Appellant was at the party for "maybe an hour." (R. at 691.) SrA GC said the party ended because of her friends got too drunk and a crowd gathered outside while a group put the friend into an Uber. (R. at 692.) She said her neighbor started yelling at them and eventually shot a gun toward their house. SrA GC said she went inside to call her mom and was crying. At some point, a different neighbor knocked on the door and said they had called the police. (R. at 693.)

SrA GC testified about CC hurting her ankle as she came up the stairs and Appellant coming to pick CC up to go to the hospital. (R. at 694-95.) After the police came to her

house, SrA GC got either a call or text message from Appellant telling her to bring a first aid kit to his apartment. (R. at 696.) Prosecution Exhibit 4 shows the message sent by Appellant.

When she arrived at Appellant's apartment, SrA GC found CC in the bathtub fully clothed. (R. at 699.) SrA GC testified that she helped CC changed her clothes after getting out of the bathtub. (R. at 707, 728.) SrA GC said Appellant drove she and CC to the hospital. (Id.) Because of COVID restrictions, GC could only sit in the waiting area. At some point, additional friends arrived. (R. at 707.)

When CC was discharged from the hospital, SrA GC and the group of friends decided what to do next. SrA GC decided to go with the friends back to Nellis AFB. She did not want to go back to her house because of the shooting. (R. at 709.) CC went back to Appellant's apartment.

SrA GC described CC at this time as "extremely loopy," "disoriented," and that she "just didn't seem coherent." (R. at 710.) SrA GC added, "I could tell, I lived with her so I knew what she looked like sober, and she definitely didn't look like that." (Id.)

SrA GC next heard from CC around 0900 when SrA CC called and told her that "she had just been raped" by Appellant. (R. at 711.) SrA GC immediately woke up one of her friends and said they had to get to her house. SrA GC also called Appellant because she "was upset over what I had been told and I wanted to confront him and ask him what had happened." (R. at 712.) SrA GC said Appellant "admitted to raping her." (Id.)

Prosecution Exhibit 5 contains two recordings of the phone call between SrA GC and Appellant. (R. at 712-13.) Court Exhibit A is a transcript from the second call contained in Prosecution Exhibit 5. The transcript was agreed upon by both the Government and Appellant's trial defense counsel. (R. at 818.) In that call, Appellant said, "It's on. It looked like she was

movin'. She w- she was movin' around. And then I could see you go and then I realized that somethin' wasn't right. I stopped right away and I stayed awake until she woke up. I fell asleep. I didn't realize that she was completely unconscious." (Pros. Ex. 5; Court Ex. A.)

In the call, SrA GC stated, "By her ex-boyfriend, the person that took us to the fucking ambulance -- or the fucking emergency room literally hours ago. Hours ago, I trusted her to be in your fucking care, my guy, your fucking care." Appellant responded, "I understand." (Id.)

The call continued:

> SrA GC: She was laying down and unconscious, yes or no?
>
> Appellant: Yes.
>
> SrA GC: And you put yourself inside of her, yes or no.
>
> Appellant: Yes.
>
> SrA GC: For how long?
>
> Appellant: Actually inside of her, no longer than a minute.
>
> SrA GC: No longer than what?
>
> Appellant: Don't – I swear.
>
> SrA GC: All right, Dre.
>
> Appellant: The whole situation st – was pry [sic] five, six minutes, yes.
>
> SrA GC: More than five to six minutes?
>
> Appellant: The whole situation maybe.

(Pros. Ex. 5; Court Ex. A.)

SrA JB was a friend who attended the 30 May 2020 party and who also came to the hospital the next morning. SrA JB came to the party with Amn AM and A1C NW. (R. at 746.) SrA JB testified about hearing a gunshot at the end of the party and going back to Nellis AFB

with A1C NW. (R. at 747.) An hour or two later, the group got a call from SrA GC saying that CC was at the hospital. (R. at 749.) SrA JB and Amn AM then went to the hospital.

There, they found SrA GC sitting on a bench outside waiting on CC. (R. at 750.) SrA JB also saw Appellant, who was sitting in his car. Eventually, CC came out of the hospital. SrA JB testified that "you could definitely tell she was on medication. She looked kind of drowsy kind of out of it I should say. We just helped her into the car and then pretty much – nobody thought anything of it." (R. at 751.) SrA JB added, "Me personally, I don't think she knew where she was, like fully." (R. at 752.) SrA JB said he told SrA GC to come back to Nellis with him because "I didn't want her going back to the house based off what just happened." (R. at 751.)

Once back at his dorm, SrA JB and SrA GC fell sleep. At some point, SrA GC woke him up and told him she needed to go home. (R. at 755.) During the ride, SrA GC called Appellant. SrA JB heard the conversation since it was on speaker. (R. at 756-58.)

Det LG was the lead civilian detective for Appellant's case. (R. at 796.) Det LG interviewed Appellant on 31 May 2020. Prosecution Exhibit 6 is a video of that interview. Prosecution Exhibit 7 is a transcript of the interview. In it, Appellant said that he "over pushed boundaries" and that CC "was just, um, wasn't conscious as I thought she was." When asked why he thought CC was "more conscious," Appellant said, "Uh, she was a little warm." (Pros. Ex. 6-7.) When asked what was different between the times they had sex before and the morning of 31 May 2020, Appellant said, "Um, I mean, usually – I noticed there wasn't a lot of response back." He added, "I was being intimate and I just thought she was being quiet." (Id.)

In his case-in-chief, Appellant called SrA JI, a very close friend of Appellant's and a former roommate. (R. at 866.) When asked about Appellant's "character for respectfulness towards women," SrA JI responded, "Respectful." (R. at 868.) SrA JI saw Appellant and CC when they returned from the hospital on 31 May 2020. When asked if CC seemed under the influence of drugs, SrA JI responded, "Not to my knowledge." (R. at 871.) On cross-examination, however, SrA JI responded, "Not too much" when asked if he talked to CC and Appellant that much that morning. (R. at 891.) He added he talked to them "a little bit." As to his opinion about Appellant's character for respectfulness towards women, SrA JI was asked he was aware that Appellant had an allegation of sexual assault made against him in tech school. SrA JI responded, "No sir, I did not know that." (R. at 892.)

Appellant also called Air Force Office of Special Investigations (AFOSI) Special Agent (SA) JM who testified that he found no records of a sexual assault investigation against Appellant while he was in tech school. (R. at 895.)

Capt AR also testified and her opinion of Appellant's character for truthfulness was that he was "truthful." (R. at 902.) Capt AR also testified that SrA GC had a reputation for being "untruthful." (R. at 903.) On cross-examination, Capt AR acknowledged he interaction with Appellant was limited to professional interactions. (R. at 904.) Capt AR also agreed that her interactions with SrA GC were fairly limited. (R. at 905.)

MSgt LG also opined that Appellant was a "truthful and honorable person." (R. at 909.) MSgt LG also testified that SrA GC had a "reputation for untruthfulness." (R. at 913.) On cross-examination, MSgt LG agreed that his opinion was founded entirely on his professional relationship with Appellant and that he had never witnessed Appellant interact with someone like a girlfriend or spouse. (R. at 911.)

TSgt AL provided her opinion on SrA GC's character for truthfulness by stating that SrA GC was "untruthful." (R. at 917.)

MSgt TE opined that Appellant was a "trustworthy individual." (R. at 924.) On cross-examination, MSgt LF agreed that his opinion was founded entirely on his professional relationship with Appellant. (R. at 925.) TSgt GS also testified and opined that Appellant was a "very truthful person." (R. at 932.)

Ms. JS, a forensic biologist, testified that Appellant' DNA profile was excluded in the test of the vaginal and cervical swabs obtained during CC's SANE exam. (R. at 949.) Ms. JS testified that if Appellant had ejaculated inside the person from whom the SANE kit was obtained, she would have expected his sperm to still be present after a couple of days. (Id.)

On cross-examination, Ms. JS was asked, "if there was penetration without ejaculation, so assuming there's penile penetration with no ejaculation, so penetration into the vagina without ejaculation, you actually wouldn't expect to find a DNA profile from that individual in the vaginal or cervical swabs, would you?" (R. at 950.) Ms. JS responded, "No, I wouldn't expect to."

Ms. JS was then asked, "And the reason you wouldn't expect to find DNA profile from an individual on vaginal or cervical swabs without ejaculation, is because the overwhelming amount of female DNA present on the inside of the vagina and the cervix actually just overwhelms the profile and you're not able to pick up the epithelial DNA that would result from that type of penetration, right?" (Id.) Ms. JS responded, "That's correct."

When then asked, "So, the absence of the DNA doesn't mean something didn't happen does it?" Ms. JS responded, "Yes, that's correct." (Id.) When asked, "Okay, so the absence of

DNA doesn't mean there wasn't sex or penetration," Ms. JS responded, "Correct, the absence cannot confirm anything." (R. at 951.)

Finally, Ms. JS was asked, "And in this case, if there is penetration without ejaculation in the vagina, you actually wouldn't even expect to find DNA in the first place, correct?" Ms. JS responded, "In most cases no." (Id.)

A court member asked whether DNA would be present if saliva was used for lubricant. Ms. JS responded as follows:

> It is possible, but in an orifice like that, like an internal orifice, the female DNA would overwhelm that amount. Usually on an external swab, like an external genital or some kind of skin swab, then we might be able to detect the saliva, because there wouldn't be so much of the female cells to overwhelm it.

(R. at 952.)

Ms. LS, a defense witness recognized as an expert in Sexual Assault Nurse Examinations (SANE), testified about CC's SANE exam but did not actually perform it. Ms. LS stated that the report from CC's exam showed "no injuries identified in any portions of the exam." (R. at 966.) Ms. LS stated that when a patient was reporting pain or discomfort in their vagina, she would usually expect that was "coming from a source of injury or irritation, and I will be looking for injuries and probably expect to see something." (Id.) Ms. LS said she would "expect to see something vaginally and even externally in the external genitalia area."

However, on cross-examination, Ms. LS acknowledged that vaginal irritation does not necessarily result in any sort of injury. (R. at 971.) She also agreed that a person could have vaginal pain without lacerations, micro abrasions, or tearing. Ms. LS also acknowledged that penetration could cause irritation. (Id.)

After Appellant rested his case, a court member asked about the effects of hydrocodone. Capt AB, a pharmacist, testified, "The general side effects when ingesting an opioid, so dizziness, drowsiness, we could have clouded behavior and decision making ability. So we could see some mood changes and disturbances that we wouldn't normally see, as well as some impaired mental and physical tasks." (R. at 990.)

A court member also inquired as to how many hours CC had been awake when she got to Appellant's apartment after the hospital visit. (R. at 997.) CC said she woke up on Saturday morning at around 1000 or 1030 and did not fall asleep until 0700 or 0730 on Sunday morning, meaning CC had been awake for approximately 21 hours when she fell asleep at Appellant's apartment. (R. at 997.)

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 LEGALLY AND 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 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).

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).

The specification as charged under Article 120, UCMJ, states that Appellant "did, at or near Las Vegas, Nevada, on or about 31 May 2020, commit a sexual act upon [SrA CC], by penetrating her vulva with his penis, when he knew, or reasonably should have known, that she was a sleep." (Charge Sheet, ROT, Volume I.)

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

> (1) One, that on or about 31 May 2020, at or near Las Vegas, Nevada, the accused committed a sexual act upon [CC] by penetrating her vulva with is penis;
>
> (2) Two, that the accused did so when [CC] was asleep; and

(3) Three, that the accused knew or reasonably should have known that [CC] was asleep.

(R. at 1028-29.)

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 1029. The military judge also instructed that a "sleeping, unconscious, or incompetent person cannot consent." (R. at 1031.) The military judge also explained that "[m]istake of fact is a defense" and that the "ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances." (R. at 1032.)

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 convictions.

- ***Appellant placed his penis inside CC's vulva.***

The evidence is clear Appellant placed his penis inside CC's vulva. CC testified that she immediately noticed her vagina hurting and her shorts askew when she woke up in Appellant's bed. (R. at 681.) When she immediately confronted Appellant, Appellant immediately admitted to penetrating CC's vulva with his penis when he said, "We had sex." (R. at 585.) When CC said he was lying, Appellant persisted in saying that the two had sex and specifically told CC that he "put his penis into my vagina." (R. at 586.)

Appellant would admit to having sex with CC again on his phone call with SrA GC. There, when SrA GC asked, "And you put yourself inside of her, yes or no," Appellant answered, "Yes." (Pros. Ex. 5; Court Ex. A.)

- ***Appellant did so while CC was asleep.***

The evidence is equally clear that Appellant committed this act while CC slept. CC clearly testified how she fell asleep in Appellant's bed while laying on her side and holding her phone. Further, circumstantial evidence, including the fact that CC had been awake for approximately 21 hours before laying down on Appellant's bed and had been given hydrocodone for her ankle, corroborated that CC was asleep when Appellant committed his acts.

Further, Appellant admitted she was asleep on multiple occasions. When CC asked Appellant if she was moaning, moving, or making any noise, Appellant told her no. (R. at 588.) Later, when on the phone with SrA GC, Appellant was asked, "She was laying down and unconscious, yes or no," to which Appellant responded, "Yes." (Pros. Ex. 5; Court Ex. A.)

- ***Appellant knew or should have known CC was asleep.***

Finally, the evidence shows Appellant knew or should have known CC was asleep. First, as noted above, Appellant knew CC had been awake all night. Appellant knew CC had spent the day before planning, prepping, and hosting a party at her house. Appellant knew CC severely injured her ankle and spent the morning hours awake either at his apartment or at the hospital. Appellant also knew CC was given hydrocodone and, at the very least, should have recognized (as all of CC's friends did) that she was impaired due to the drug. Considering the events of the day and night before, as well as the trauma of her ankle and the hydrocodone administered to her, Appellant knew or should have known that CC would be asleep when she laid down in his bed without having slept for the last 21 hours.

Moreover, Appellant's admissions show he knew she was asleep and provide further reasons why he should have known she was sleeping. Appellant admitted to CC that she was not moaning, moving, or reciprocating any of Appellant's actions. He answered "Yes," when SrA GC asked if CC was unconscious. (Pros. Ex. 5; Court Ex. A.) Appellant admitted to Det LG that she "wasn't conscious as I thought she was" and that there "wasn't a lot of response back." (Pros. Ex. 6-7.)

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

Appellant claims that the prior sexual relationship between CC and Appellant "is probative of both actual consent and mistake of fact as to consent." (App. Br. at 15.) Appellant is wrong on both counts. First, as the military judge instructed, a sleeping person cannot consent. Here, the evidence overwhelmingly shows CC was asleep when Appellant sexually assaulted her. Thus, there could have been no actual consent.

As to mistake of fact regarding consent, the evidence shows the last time Appellant and CC talked about their sexual relationship was weeks prior to this incident when both agreed that they would no longer have sexual relations. Importantly, this was after the two had broken up and after the two occasions in which the two had sex after they had broken up.

After this conversation weeks prior to the incident, there is no evidence that Appellant or CC ever talked about sex again. Certainly, on the night and morning in question, the subject

of sex never arose. Further, there was no physical interaction between the two that could reasonably lead Appellant to believe a sleeping CC would consent to sex. While the two may have held hands when CC laid down to fall asleep, there was no other touching, kissing, or sexual innuendo. Further, Appellant never asked CC about sex, or even if she was awake. Instead, Appellant, as he would later state to Det LF, "over pushed boundaries" while CC lay sleeping in his bed.

Furthermore, Appellant was well aware that CC was not in a clear frame of mind at the time she laid down in his bed. As detailed above, he knew she had been up all night hosting a party, injuring her ankle, being examined in a hospital, and being administered hydrocodone. SrA GC and SrA JB testified the hydrocodone had an impact on CC, describing her as "extremely loopy," "disoriented," and not really knowing where she was. Appellant undoubtedly saw these effects as well as the group helped CC into Appellant's car at the hospital and as Appellant himself helped CC up the stairs in his apartment. Moreover, Appellant repeatedly admits and acknowledges in his own brief that CC was affected by the drug when he states she was "under the mentally impairing and lowered inhibitions effects of hydrocodone." (App. Br. at 20, 25.) Appellant also admits CC was "fatigued" from the night before. (Id. at 20.) Appellant here knew or reasonably should have known CC was in no shape to consent to sex.

While Appellant may now say the past history between the two led him to think CC consented to sex on that morning, the evidence proves his claim unfounded and unreasonable. Both Appellant and CC had broken off any further sexual contact weeks earlier, and CC, who was under the effects of hydrocodone, had not slept in 21 hours, and had an ankle brace on, never discussed or displayed any indication of interest in sex that morning.

Still, Appellant claims mistake because CC was "moving in reaction to his touch." (App. Br. at 17.) Such a claim is unbelievable considering the circumstances. Here, Appellant admits in his brief that he "engag[ed] in foreplay by touching her breasts and body" prior to inserting his penis into CC's vulva. (Id.) Indeed, Appellant told CC that he "grabbed [her] boob and got horny" before eventually inserted his penis into her. (R. at 586.)

Yet, Appellant's own admissions show that CC never reacted to any of Appellant's "foreplay." When she specifically asked if he was moaning, moving, reciprocating, or making any noise, Appellant told CC, "No." (R. at 588.) Thus, Appellant knew, or certainly should have known, during this "foreplay," that CC was asleep and was uninterested in sexual activity with Appellant. Importantly, in the call with SrA GC, Appellant said the intercourse lasted "no longer than a minute," but that the "whole situation" lasted five to six minutes. This means that for four or five minutes, Appellant was messing around with CC's body, including grabbing her breasts, all with CC providing no reciprocation, noise or otherwise in response.

Yet, in the face of CC not moving or responding to four or five minutes of Appellant's foreplay, Appellant continued to escalate his activity from touching her breasts to inserting his penis into her vulva. There was no mistake of fact as to either consent or if CC was asleep. Appellant knew, or reasonably should have known, CC was asleep and knew she had not consented.

Next, Appellant blames CC for giving him "mixed signals" on the night of the party because she "invited him to her party," and that her "ambivalence and mixed signals foreshadowed the unspoken 'body chemistry' she exhibited in Appellant's bed." (App. Br. at 17-18.) Such a claim, that essentially an invitation to a party is somehow an implicit invitation

or precursor to sex, is unreasonable. Here, CC simply invited Appellant to a party that over 20 other people were attending. Further, Appellant's claim that a sleeping, drugged, crutch-bound and ankle-braced CC somehow exhibited an "unspoken body chemistry" in Appellant's bed is equally baseless.

Appellant additionally claims that CC calling Appellant for assistance after hurting her ankle somehow led him to believe he could have sex with her later. (App. Br. at 19.) Again, his claims are unsupported. Testimony shows it was SrA GC's idea, not CC's, to call Appellant for help in the first place. Further, Appellant's statement that CC "had no qualms about taking off her clothes in front of Appellant" insinuates something far more seductive than the records actually shows. While CC did get undressed in front of Appellant after soaking in the bathtub, Appellant fails to highlight that SrA GC was also there and that SrA GC was the person helping CC get undressed and dressed. Further, all evidence shows SrA GC was in significant pain and in need of medical attention. The context of that situation is far different than what Appellant's "taking off her clothes in front of Appellant" quote infers. Instead, Appellant just happened to be in the presence of a friend helping an injured friend get dressed in preparation for a trip to the hospital. Appellant's insinuation that a hurt and tired CC was somehow seducing him for sex as she was being helping into clothes by SrA GC should not persuade this Court.

Next, Appellant turns to attacking CC's statements to law enforcement before delving into a self-serving theory, unsupported by facts, that CC consented to the sex with Appellant "out of spite towards A1C NW," but, that "after sleeping off the stress of the evening's events, and after the placating effect of the opioid wore off, [CC awoke to another capricious change of heart," felt regret, and essentially made up the whole story. Appellant

believes CC made up the rape charge to deal with her regret and then went on to "deceive investigators," give "false testimony," and "mislead the panel" at Appellant's court-martial. (App. Br. at 20-21, 25.) Here, while Appellant provides no evidence to support any of these "regret" claims, Appellant does finally acknowledge that CC was affected by the hydrocodone administered to her that morning, which severely undercuts his previous mistake of fact claims.[1]

Next, Appellant attempts to downplay his admissions on the phone call between him and SrA GC by stating that SrA GC did not know about CC and Appellant having sex after they had broken up. (App. Br. at 21.) Yet, SrA GC's knowledge about those encounters are irrelevant to Appellant's admissions on the phone call. That phone call, and Appellant's admissions, speak for themselves. Whether SrA GC was clueless about past encounters between Appellant and SrA GC had no impact on Appellant's admissions during the phone call that he knew CC was unconscious when he placed his penis inside her.

Appellant next turns to his "reputation and past behavior" towards women and then attempts to argue that his admission to sex somehow bolsters his case because he could "have simply denied they ever had sex." (App. Br. at 23-24.) None of these arguments, however, proved persuasive at trial or overcome the clear evidence that CC was asleep with Appellant sexually assaulted her and that Appellant knew or should have known that she was sleeping.

Finally, Appellant claims the forensic evidence "impeaches" CC's claim that she woke up with pain in her vagina. (App. Br. at 24-25.) Appellant also states, "it makes little sense that Appellant would give into this impulse and penetrate CC's vulva knowing she was

[1] Appellant also later acknowledges in his brief that CC was "under the mentally impairing and lowered inhibitions effects of hydrocodone," which undercuts his claims that he thought CC could actually consent to or was aware of his unwanted sexual activity. (App. Br. at 25.)

asleep, only to forgo orgasm and ejaculation." (Id.) In making such claims, Appellant appears now to be arguing that sex never occurred. Of course, such a claim goes against Appellant's multiple admissions that he did, in fact, insert his penis into CC's vulva.

Moreover, none of CC's testimony was impeached by forensic evidence. Ms. LS, who was called by Appellant during his case-in-chief, acknowledged that that a person could have vaginal pain without lacerations, micro abrasions, or tearing, and that penetration alone could cause irritation. (R. at 971.) Further, Ms. JS, another witness for Appellant, confirmed that in "most cases" she would not expect to find DNA if there was penetration without ejaculation. In short, the forensic evidence did not impeach CC's testimony or cast doubt on whether Appellant placed his penis inside CC's vulva.

All told, Appellant inserted his penis into CC's vulva while she slept and Appellant either knew or should have known that CC 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 be convinced that a reasonable factfinder could have found all the essential elements of the offense beyond a reasonable doubt. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

II.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN ALLOWING THE GOVERNMENT TO ASK A WITNESS IF THEY WERE AWARE OF A PRIOR ALLEGATION OF SEXUAL ASSAULT BEING MADE AGAINST APPELLANT.

Standard of Review

This Court tests a military judge's admission or exclusion of evidence for an abuse of discretion. United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000).

Law

An abuse of discretion occurs when the military judge makes clearly erroneous findings of fact or when the military judge's legal conclusions are influenced by an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010).

Mil. R. Evid 405(a) states, "When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct." Counsel may ask such questions on cross-examination, on a good-faith basis, to test the basis for and attempt to undermine the witness's opinion. United States v. Westcott, No. ACM 39936, 2022 CCA LEXIS 156, at *45 (A.F. Ct. Crim. App. Mar. 17, 2022) (*citing* United States v. Anderson, No. ACM 39141, 2018 CCA LEXIS 122, at *5 (A.F. Ct. Crim. App. Feb. 28 2018).

When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." Manns, 54 M.J. at 166. The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *See, e.g.*, United States v. Baldwin, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (*citing* Stephen A. Saltzburg et al., Military Rules of Evidence Manual 490 (4th ed. 1999)).

Additional Facts

Prior to trial, the Government provided notice under Mil. R. Evid. 413 of its intent to introduce evidence that Appellant had previously told CC that he had a "SARC case opening against him during Tech School at Randolph AFB." (App. Ex. XII. at Attachment 1.) Specifically, during an interview with the civilian law enforcement, CC stated that Appellant told her and SrA GC "how he had already had a sexual assault case on his records." (App. Ex. XII at 30.) CC continued, "And apparently some girl he was having sex with got jealous- this is just what he told me – got jealous that he was having sex with a different girl. So then she tried to say that he raped her." (Id.)

During her interview with AFOSI, CC stated, "[Appellant] says he got charged with a SARC case in tech school . . . He said that some girl claimed that he raped her because she was jealous that he had sex with another girl. He said he won the case, but after talking with other people, they said she could have just refused to participate." (App. Ex. XII at 2.) CC further stated, "As far as his ex, her name is [J] . . . As far as the SARC case goes, when we first started dating, I had no idea about it. He said it right in front of me and [SrA GC] . . . I believe

[Appellant] said he had to speak to an OSI investigator, so I believe it went to that point. That means the girl's name should be on file and she can be contacted." (Id.)

Appellant moved to exclude this evidence. (App. Ex. XII.) The Government responded by withdrawing its previous notice regarding this evidence because it no longer intended to introduce the evidence. (App. Ex. XIII.)

During its case-in-chief, the Government never sough to introduce evidence regarding Appellant having a SARC case opened against him while at Randolph AFB.

During his own case-in-chief, Appellant called SrA JI to provide an opinion on Appellant's character for respectfulness towards women. When asked about his opinion on the matter, SrA JI responded, "Respectful." (R. at 868.) Prior to starting cross-examination, the circuit trial counsel requested an Article 39(a) to inform that military judge of an intent "to ask this witness about a subject matter that I believe was fairly raised when they asked his character for respectfulness towards women." (R. at 876.) The circuit trial counsel continued, "Specifically, that the accused had previously had someone that claimed she was – specifically what was noticed in the previous 413 motion – or notice, from the government, that the accused had a SARC case opened against him during tech school at Randolph." (Id.) The circuit trial counsel explained the question "cuts squarely against" the witness's respectfulness of women opinion of the Appellant "and goes to the depth and understanding of his opinion. (Id.) The circuit trial counsel made sure to highlight this question was "not offered for any propensity purpose, but simply the limited purpose of exploring the credibility of the witness's opinion as it gives it on that particular matter." (Id.)

Appellant's trial defense counsel objected, stating that the Government did not have a good faith basis to ask the question, that it was highly prejudicial, and that the Government had

withdrawn the 413 notice "because they did not have anything to support that this happened." (R. at 876-77.) The circuit trial counsel acknowledged that it had withdrawn the 413 notice, but noted, "That's an entirely different standard than a cross-examination question intended to voir dire the opinion or the depth of knowledge a witness has about someone that they just offered a character statement about." (R. at 877.) The circuit trial counsel continued, "413 is offered as propensity evidence to actually use as substantive evidence," while this question was being asked to "impeach[] the opinion of this witness who just said that he had a character for respectfulness towards women when there's evidence before the court in the statements provided, that the accused had told another witness in this court about that allegation." (R. at 878.)

The military judge then noted that the Government's good faith basis was based on statements made by Appellant to CC "regarding his having a SARC case opened against him during tech school at Randolph Air Force Base." (Id.) When Appellant's trial defense counsel stated that there was evidence that AFOSI SA JM could find no law enforcement record of a sexual assault investigation against Appellant while in tech school, the circuit trial counsel responded that the good faith basis is based on a recorded witness interview to law enforcement "of which all parties have had the entire time," adding, "the fact that there was no official court record, or law enforcement record, simply does not indicate that the government doesn't have a good faith basis to ask the question." (R. at 881.)

When Appellant's trial defense counsel stated that "there is nothing to exist in this world" to support the good faith basis, the military judge responded, "It's your client [making a] statement to [CC], that's what they're basing it on. So, I don't know that the word nothing is quite accurate there. That there's no record, that appears to be accurate from the testimony

before this court." (R. at 882.) Appellant's counsel also said that "it seems like they are attempted to bootstrap 413 evidence in without going through the requirements." (R. at 884.)

Regarding the good faith basis, the military judge stated:

> Again Counsel, the difference between a record found and not opened, I don't know that the court will presume that just because a record is not found in the military, the event did not occur. There seems to be at least a good faith basis to ask the question. Based on the evidence that I have before me, you're just fighting that it's not good enough.

(R. at 883.) As to Appellant's "bootstrapping" concern, the military judge stated:

> To be clear, no one will be bootstrapping anything that doesn't meet the rule. This is not being considered under M.R.E. 413 whatsoever. This is only to test the witness's veracity. It is not evidence, and it cannot be used as evidence of any such finding. To be honest, the court is not quite sure what the words, "SARC case" means. It's not a vernacular, although the words mean something, I don't know what they mean together, and I have no idea what the accused meant at that particular point in time that he might have made that statement. However, that is beside the point, there is a good faith basis before the government to challenge this witness' knowledge about an issue the defense put in, and that is respect towards women. If anything, the court does understand what a SARC issue is, and that seems to go directly in the face of respect.

(R. at 884.)

The military judge then articulated a Mil. R. Evid. 403 balancing test on the record, stating, "The court has considered M.R.E. 403, and yes, the court does agree, it is prejudicial, but it is not unduly so. The objection is overruled. The probative value is not outweighed by the danger of unfair prejudice, or confusion of the issues." (R. at 885.)

Appellant's counsel then requested an "appropriate curative instruction as soon as logically possible after the question is asked." (Id.) The military judge then stated, "You are asking me to give the instruction much earlier than I would otherwise." (Id.) While the

Government felt it unnecessary, it did not object. The military judge then agreed to give an instruction at the end of the Government's cross-examination. (R. at 886.)

After a recess, the military judge stated the following clarification to her ruling:

> All right, I just wanted to clarify one point in my ruling. So, the basis of the government's knowledge that the court has before it, is statements by the accused to the victim regarding his having a SARC case opened against him during tech school at Randolph Air Force Base. The court understands SARC to be a Sexual Assault Response Coordinator, and that SARC is involved in sexual assault allegations or anything under the offense of Article 120. Whether or not a SARC case opens means that there would in-fact be documentation, the court is unaware of that knowledge and therefore that is the consideration saying that that is a good faith basis and why the objection was overruled.

(R. at 888-89.)

On cross-examination, the extent of questioning regarding this issue was as follows:

> CTC: [SrA JI], you also testified on direct examination that you've known the accused for a while and that he has a character for respectfulness towards women, is that correct?
>
> SrA JI: Yes, sir.
>
> CTC: And so, [SrA JI], are you aware that the accused had an allegation of sexual assault made against him and tech school?
>
> SrA JI: No sir, I did not know that.

(R. at 890.)

The Circuit Trial Counsel then said there were not further questions. The military judge then gave the following instruction to the members:

> Members, I'm just going to give you one instruction. The witness was just asked whether he was aware or had heard of some matter. That is a permissible question to test the witness's credibility, but if there is no evidence of that matter you may not consider the question for any other purpose.

(R. at 893.) The military judge repeated this instruction later during findings instructions. (R. at 1039.) Neither Appellant nor his trial defense counsel objected to the instruction. Appellant's trial defense counsel also did not conduct a redirect examination of SrA JI.

Appellant then called SA JM who testified that he found no records of a sexual assault investigation against Appellant while he was in tech school. (R. at 895.)

Analysis

The military judge did not abuse her discretion in permitting the Government to test the foundation of SrA JI's opinion on Appellant's character for respectfulness towards women by asking him if he was aware of the prior assault allegation. SrA JI had testified to Appellant's character for respectfulness towards women and declared Appellant was "respectful" based upon his friendship with Appellant. This left the impression that Appellant was "respectful" towards women and had been so the entire time Appellant and SrA JI had known each other. The fact SrA JI was not aware of the allegation tended to undermine the basis for his opinion about Appellant's character as it demonstrated SrA JI had limited knowledge as to Appellant's nature toward women and therefore his opinion was entitled to less weight. *See*, e.g., United States v. Pearce, 27 M.J. 121, 125 (C.M.A. 1988) (finding no error in asking a witness if he was aware the appellant had been under investigation several years prior to his court-martial for a similar offense, in part because the witness's lack of knowledge of the investigation undercut the basis for the witness's opinion about the appellant's honesty).

Further, the miliary judge did not err in finding a good faith basis for the question. Here, CC provided two separate interviews to two different law enforcement authorities where she recounted Appellant's admissions to her that he had previously had a sexual assault allegation alleged against him while he was in tech school at Randolph AFB. Here, as he did at trial,

Appellant argues this good faith basis was overcome by SA JM's testimony that he could find no documented record of a law enforcement sexual assault investigation. However, as correctly noted by the military judge at trial, just because SA JM did not find documentation related to an investigation about the allegation did not mean that (1) the prior allegation did not occur and (2) Appellant did not tell CC that an allegation occurred.[2]

Notably, the Government never sought to introduce evidence of this prior allegation in its case-in-chief. In fact, it was Appellant's own actions in calling SrA JI and asking his opinion of Appellant's character for respectfulness towards women that opened the door to this entire issue. This attribute, respect towards women, squarely related to Appellant's essential theory of the case that Appellant's character as an honest and respectful person towards women meant he would never commit such an act against CC.[3] That SrA JI was unaware of this previous allegation demonstrated his relationship with Appellant was not as close as he portrayed it, especially considering Appellant told CC about the prior allegation, but did not tell SrA JI. This, in turn, undermined the basis of his opinion.

In Pearce our superior Court discussed the pros and cons of Appellant's character evidence strategy, stating, "Admittedly, the potential for undue prejudice can increase as the impeaching offense more closely approximates the charged offense. However, that was a risk undertaken by the defense in electing to present affirmative character evidence." Pearce, 27 M.J.

---

[2] For instance, a restricted sexual assault report allows a sexual assault victim to disclose confidentially the details of an assault to the SARC, Healthcare Personnel, or a VA without triggering an official law enforcement investigation. *See* Air Force Instruction 90-6001, *Sexual Assault Prevention and Response (SAPR) Program*, Attachment 1 (21 May 2015).

[3] Appellant began the foundation of this theory in his opening statement when Appellant's trial defense counsel stated, "And contrast the government's presentation to what you'll hear of [Appellant's] character. Because you'll hear that he has a character for truthfulness and a respectfulness towards women. And you will hear that he cared for [CC]. He really cared for her." (R. at 535.)

at 125. The Court then quoted the United States Supreme Court's observation in Michelson v. United States, 335 U.S. 469 (1948):

> [T]he law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him. Given this option, we think defendants in general and this defendant in particular have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense.

Pearce, 27 M.J. at 125. While Appellant may now generally claim that "'did you know' or 'have you heard' questions are, by their nature, insidious," and that they are "high suggestive and coy,"[4] his own actions and case strategy necessitated their use when he "voluntarily tendered" the issue of Appellant's character for respectfulness of women.

Considering Appellant's attempt to portray himself as someone incapable of sexually assaulting CC because of his "respectfulness for women," the military judge did not abuse her discretion by then allowing the Government to test the basis for that characterization.

Moreover, even when it did seek to ask SrA JI about the prior allegation, the Government made sure to specifically highlight it was being raised *only* for the limited purpose of exploring the credibility of the witness's opinion as it gives it on that particular matter, and was not being raised in any fashion as propensity evidence under Mil R. Evid. 413. Further, the military judge noted Appellant's "bootstrapping concern" and removed any doubt as to how the evidence would be considered when she stated, "To be clear, no one will be bootstrapping anything that doesn't meet the rule. This is not being considered under M.R.E. 413 whatsoever. This is only to test the witness's veracity. It is not evidence, and it cannot be used as evidence of any such finding." (R. at 884.)

[4] *See* App. Br. at 35.

Further, the military judge conducted a Mil. R. Evid. 403 balancing test on the record and found the singular question asked by the Government was not unduly prejudicial. Moreover, the question was immediately followed by an instruction to the panel members by the military judge that the question was to be used only to test the witness's credibility and could not be used for any other purpose. The military judge would provide the same instruction again later in the proceedings. Absent evidence to the contrary, this Court may "presume that members follow[ed] [the] military judge's instructions." United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted). Moreover, trial counsel did not return to the allegation during closing argument or otherwise seek to capitalize on it.

Here, the miliary judge did not abuse her discretion in allowing trial counsel to test SrA JI's opinion by asking about the prior sexual assault allegation. As noted by the military judge during her Mil. R. Evid. 403 analysis, the relevance of testing the basis for SrA Ji's opinion was not substantially outweighed by the danger of unfair prejudice. The Government should not have been required to let SrA JI's opinion basis go untested in light of Appellant's own prior admissions that he had a previous sexual assault allegation levied against him. While all parties agreed the question was prejudicial, the Government's argument as to why its was not unduly prejudicial, and the military judge's ruling as such, is supported by the record – especially considering the fact that it was the Defense that brought SrA JI's testimony in the first place. Furthermore, only a single question on the matter was asked and the question was devoid of specific details, as it only asked if SrA JI knew Appellant had a prior sexual assault allegation made against him.

Even if error is assumed in Appellant's case, his claim should still be denied because it did not prejudice Appellant's substantial rights. United States v. Lopez, 76 M.J. 151, 156 (C.A.A.F. 2017) (citations omitted). For non-constitutional errors, an appellant is only entitled to relief if the error materially prejudiced a substantial right. Article 59(a), UCMJ. A four-part test is used for evaluating prejudice under this standard, and it requires weighing: "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Lopez, 76 M.J. at 156 (*quoting* United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)). Each one of the four prongs of this analysis weigh in favor of the Government and against a finding of prejudice.

The first two factors favor the Government. As shown in Issue I above, the Government provided overwhelming evidence in this case of Appellant's guilt. Issue I also highlights the overall weakness of Appellant's defense case, which included testimony from two expert witnesses that provided information favorable to the Government's case. (*See* testimonies of Ms. LS, who agreed that penetration alone could cause vaginal irritation (R. at 971), and Ms. JS, who confirmed that in "most cases" she would not expect to find DNA if there was penetration without ejaculation (R. at 950).) The rest of Appellant's case consisted only of opinion testimony that showed similar shortcomings on cross-examination.

The remaining two factors are the "materiality" and "quality" of the evidence in question. Lopez, 76 M.J. at 156. These considerations also weigh in favor of the Government, and they refute Appellant's specific arguments for prejudice. In examining "materiality" and "quality," the Court "considers the particular factual circumstances of each case." United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020). The "particular factual circumstances" may encompass a variety of considerations, including: (1) "the extent to which instructions to the

panel may have mitigated the error"; and (2) "the extent to which the government referred to the evidence in argument." Id. (citations and quotation marks omitted).

First, the military judge correctly instructed the panel members on the law, and he specifically instructed *twice* on how the panel could consider trial counsel's cross-examination of SrA JI. (R. at 893, 1039.) There is no reason to discount the effectiveness of these instructions because, as noted previously, court members are presumed to follow instructions, and there is no evidence in the record that any member failed to do so. *See* Taylor, 53 M.J. at 198.

Second, there is no prejudice in this case because the allegedly objectionable cross-examination did not appear in trial counsel's findings argument. The absence of any reference to SrA JI's testimony in trial counsel's argument supports a finding of no prejudice because it shows the testimony did not play a significant role in Appellant's case. *See* United States v. Brooks, 26 M.J. 28, 29 (C.M.A. 1988) (finding an error harmless because the "trial counsel did not refer to the objectionable evidence in his argument").

Moreover, as he notes in his brief, Appellant called SA JM immediately after SrA JI's testimony and the members heard from SA JM that that he found no records of a sexual assault investigation against Appellant while he was in tech school. (R. at 895.) This significantly blunted any negative implication that Appellant was a bad person from trial counsel's cross-examination question.

In light of the "particular factual circumstances" of Appellant's case, the "materiality" and "quality" factors also weigh in favor of the Government. Washington, 80 M.J. at 111. The military judge provided an appropriate evidentiary instruction to the panel twice and trial counsel did not refer to the allegedly objectionable testimony in his argument. Taking these conclusions along with the strong Government case and comparatively weak Defense case, there is no reason

to believe that the cross-examination of SrA JI materially prejudiced Appellant's substantial rights. Each one of the four prongs weigh in favor of the Government, so any presumed error is proven harmless and there is no material prejudice to Appellant. Lopez, 76 M.J. at 156.

Finally, in Pearce, our superior Court noted that "the implication that appellant had merely been investigated for another crime was, if anything, mitigating. As everyone knows, and as appellant was free to argue to the members, the fact that someone has merely been investigated, coupled with the inferences to be drawn from the lack of further action, scarcely establishes that he is a 'bad man.' Many an innocent person has been investigated, merely to be exonerated." Pearce, 27 M.J. at 124. Therefore, it is highly unlikely that the members disregarded the military judge's instructions, used the cross-examination question for an improper purpose, and convicted Appellant because they thought he was a bad person, rather than based on the evidence.

In sum, the military judge did not commit a clear abuse of discretion by allowing the Government to ask a sole "did you know" question about Appellant's self-admitted prior sexual assault allegation to a witness called by Appellant (SrA JI) and regarding an issue voluntarily raised by Appellant (his character for respectfulness towards women). The military judge appropriately found a good faith basis for the question and determined the evidence survived the balancing test under Mil. R. of Evid. 403. Moreover, any presumed error is harmless and there is no material prejudice to Appellant. Therefore, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

III.

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

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 1337). Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 40-41).

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.

The Court recently addressed the applicability of Ramos to 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), review granted 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022). It rejected the same claims Appellant raises now:

> Ramos does not purport, explicitly or implicitly, to extend the scope of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in Ramos refer to courts-martial at all. Accordingly, after Ramos, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in Ramos.
> …
> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. See also, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

CONCLUSION

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

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 13 April 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **ANDRÉ T. FALLS DOWN** United States Air Force *Appellant*	**REPLY BRIEF** Before Panel No. 1 No. ACM 40268 20 April 2023

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

COMES NOW Senior Airman André T. Falls Down, Appellant, who, by and through counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, submits this Reply to the United States' Answer (Gov. Ans.), dated 20 April 2023. Appellant stands by the arguments advanced in his opening brief submitted to this Court on 15 March 2023 and further provides the following.

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY INSUFFICIENT.

In insisting the evidence against Appellant was "overwhelming" (Gov. Ans. at 20, 36), Appellee embellishes the strength of what was a contested prosecution, one which the members deliberated on for three hours and asked questions about before resolving. R. at 952, 981-82, 1128, 1147.

Appellee claims multiple times that Appellant was aware that CC had been administered hydrocodone at the hospital (Gov. Ans. at 19, 21, 24), but provides no citation. One does not exist, because the record never established Appellant was aware CC was given any medication, much

less an opiate that "impair[s] mental and physical tasks" and lowers inhibition.[1] R. at 993. Appellee nevertheless argues, "[Appellant] knew [CC] had been…administered hydrocodone," and "undoubtedly saw these effects [of the drug]…as Appellant helped [CC] up the stairs in his apartment." Gov. Ans. at 21. Testimony from both CC and SrA AI supports the inference that Appellant helped CC up the stairs to his apartment not because the hydrocodone rendered her unable to walk, but because negotiating the stairs with crutches proved difficult. R. at 578; 870. SrA AI testified that he spoke with CC at his apartment after she returned from the hospital and that he observed her as she and Appellant sat "right next to each other" on barstools. R. at 871, 873. CC was sitting up on the barstool, which had no backing on it, and had no difficulty doing so. R. at 871. SrA AI testified that CC was "coherent," seemed aware of her surroundings, was alert, and in control of her body. R. at 871, 873.

Appellee next points to the fact that Appellant "repeatedly admits and acknowledges in his own brief that [CC] was affected by the drug" as proof of Appellant's knowledge of CC's condition at the time of the charged event. Gov. Ans. at 21; *see also* Gov. Ans. at 24, 24 n.1. Indeed, at this post-trial appellate stage, and after sitting through his own trial, Appellant has knowledge of the prosecution's theory that CC was under the effect of hydrocodone at the time of the charged event. But Appellant's acknowledgment of this fact on appeal does not equate to his contemporaneous knowledge of the same fact at the time of the charged event.

Whatever evidence the prosecution produced to prove CC was experiencing the effects of hydrocodone at the time of the charged event was insufficient to prove those effects precluded her ability to consent to sex, or that Appellant was aware of these effects. The United States both at

[1] Trial counsel did not argue during closing argument that Appellant knew CC had been administered hydrocodone.

trial and now on appeal points to the testimony of SrA GC and SrA JB, who claimed CC was "loopy" and "drowsy," respectively, when she exited the hospital. R. at 708-10, 752-53. SrA GC—whose reputation for untruthfulness was established by multiple witnesses—was an unreliable, obviously biased witness whose testimony should be afforded significantly diminished weight. Given her bias and credibility issues, it is likely she embellished CC's "loopy" state after she became aware of CC's allegation against Appellant, after she confronted Appellant, and after she learned she would testify in support of CC's allegation.[2] When SrA JB was asked whether he could remember CC's state when she left the hospital, he first said, "Not really…it's kind of blurry, the whole situation." R. at 752. But SrA AI testified reliably that CC seemed coherent and not under the influence of drugs. His observation of CC was much closer in time to the charged event, after her body had ostensibly metabolized much of the hydrocodone. R. at 871.

Appellee misstates the facts relating to the timeline of CC's and Appellant's romantic and sexual relationship to minimize the on-again, off-again, on-again nature of that relationship. Appellee writes, "SrA CC testified that the breakup began happening in mid-April 2020 when she moved into a new house." Gov. Ans. at 3. Appellee ignores CC's testimony on cross-examination that she and Appellant ended their relationship in the middle of May 2020. R. at 541, 615. CC continued having sex with Appellant until at least the middle of May 2020. In his interview with the LVMPD detective, Appellant explained he and CC, "recently broke up earlier this month." Pros. Ex. 6. Appellant reasonably believed that when CC got into his bed with him, they were engaging in the same familiar intimacy they shared when their relationship was on-again.

[2] SrA GC's eagerness to help substantiate CC's allegation at all costs was revealed when she admitted on cross-examination that she wrote down the questions defense counsel asked her during a telephonic pretrial interview and provided them to prosecutors. When she was asked by defense counsel if she did this to "secretly help the government," SrA GC responded, "I wouldn't say secretly." R. at 734.

Without citing to the record, Appellee asserts,

> As to mistake of fact regarding consent, the evidence shows the last time Appellant and CC talked about their sexual relationship was weeks prior to this incident when both agreed that they would no longer have sexual relations. Importantly, this was after the two had broken up and after the two occasions in which the two had sex after they broke up.

Gov. Ans. at 20. This assertion is undermined by the record. Appellee overlooks the third time CC had sex with Appellant after they had broken up. A1C NW testified that on one occasion after CC and Appellant had broken up, he was at CC's house and walked in on CC and Appellant having sex. R. at 787. CC testified that she had sex with Appellant only twice after breaking up, and that both of those sexual encounters occurred at Appellant's apartment. R. at 545, 617-18. Appellee ignores the evidence of this third post-breakup sexual encounter because it tends to bolster Appellant's reasonable belief that CC would consent to sex on the morning 31 May 2020 and simultaneously undermines CC's credibility.

Appellee misconstrues Appellant's argument on other points. For instance, Appellant argued CC's confusing, mixed signals to Appellant on and around the night of the charged event foreshadowed the confusion and misunderstanding between the two in Appellant's bed. Opening Brief (Op. Br.) at 17-18. Appellant argued each of CC's decisions—inviting Appellant to the party, reaching out to him after she injured herself, going to his place, returning to his place after getting treatment, getting into bed with him, holding his hand, spooning with him—rekindled "a trust, familiarity, and intimacy with Appellant," and that all of these acts contributed to [CC's] eventual consent to sexual activity or Appellant's reasonable mistake of fact as to the same. Op. Br. at 19. To this nuanced point, Appellee reductively responds, "Such a claim, that essentially an invitation to a party is somehow an implicit invitation or precursor to sex, is unreasonable." Gov. Ans. at 21-22. This is not at all what Appellant argues. Rather, Appellant submits that sex between two

people—and the consent undergirding it—rarely generates in a vacuum but is instead rooted in myriad and subtle moments and interactions over time.

Appellee gives the same facile treatment to Appellant's point about CC removing her clothes in front of Appellant, claiming Appellant "insinuates something far more seductive than the record actually shows." Gov. Ans. at 23. But Appellant never claimed CC was trying to "seduce" him by removing her clothes in front of him in his apartment. Rather, he argued this moment illustrated CC's "trust, familiarity, and intimacy" with Appellant, which formed the basis of the unspoken "body chemistry" CC testified the two had. R. at 611. CC, not Appellant, asserted that they had great "body chemistry." R. at 611. This same body chemistry contributed to what Appellant reasonably believed was consensual sex on 31 May 2020.

But CC regretted the sex with Appellant that day, sex to which she consented and gave many indications of consent. Here, Appellee claims Appellant "provides no evidence to support any of these 'regret' claims." Gov. Ans. at 24. This statement ignores CC's own testimony, wherein she admitted feeling as if she had "messed up" by (i.e., regretted) having sex with Appellant just a month before the charged event. R. at 619. CC's regret over having sex with Appellant a mere month before the charged event is highly probative circumstantial evidence that she woke up on 31 May 2020 and immediately regretted it. Consistent with common experience, a person who regrets an act is liable to rationalize the act in a way that absolves themselves of blame.

Appellee next misconstrues another argument advanced by Appellant. Referring to the lack of semen in CC's vagina or on her cervix, Appellant argued, "Considering the powerful human impulse to seek sexual gratification, it makes little sense that Appellant would give in to this impulse and penetrate CC's vulva *knowing* she was asleep, only to forgo orgasm and ejaculation." Op. Br. at 24-25 (emphasis added). In response to this argument, Appellee declares, "Appellant

appears now to be arguing that sex never occurred." This is not what Appellant argues. Appellant has never denied he and CC had sex on 31 May 2020. Appellant's point was that the sex was consensual, or he had a reasonable mistake of fact as to consent, and that the lack of his DNA in CC's vagina or on her cervix corroborated his account of the sexual encounter—he did not ejaculate and ceased the sexual act because he realized CC was "being quiet." Pros. Ex. 7 at 4-5; Pros. Ex 6, 3:27-3:51.

Though Appellee may see the evidence against Appellant as "clear" and "overwhelming," it was in fact contested and ultimately insufficient to establish Appellant's guilt beyond a reasonable doubt.

WHEREFORE, Appellant respectfully requests this Honorable Court disapprove the finding of guilt and the sentence.

II.

THE MILITARY JUDGE ABUSED HER DISCRETION AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS WHEN SHE FOUND A GOOD FAITH BASIS FOR TRIAL COUNSEL TO ASK A WITNESS, "ARE YOU AWARE THAT THE ACCUSED HAD AN ALLEGATION OF SEXUAL ASSAULT MADE AGAINST HIM?" DESPITE EVIDENCE SHOWING NO SUCH PRIOR ALLEGATION HAD BEEN MADE AGAINST APPELLANT.

While an accused may certainly "open the door" by putting issues into contest, not everything may fit through that door. Appellee complains SrA AI's testimony "left the impression that Appellant was 'respectful' towards women and had been so the entire time Appellant and SrA AI had known each other." Gov. Ans. at 32. This is true. Given the admissibility of SrA AI's testimony, Appellant was entitled to create that very impression. *See United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) ("The defendant has the right to present legally and logically relevant evidence at trial.") (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Just because evidence

favorable to the accused is admitted does not mean the government may impugn it any way it pleases. If the prosecution wanted to demonstrate the paucity of SrA AI's knowledge of Appellant's reputation and character, it could have asked him permissible, probative questions, e.g., "You have only known Appellant for a few months, right?" or "You've never seen how Appellant interacts with women when he's alone with them, have you?" Trial counsel could have asked SrA AI "did you know" or "have you heard" questions anchored by a *good faith* basis. But the military judge failed to carry out her "heavy responsibility…to protect the practice [of asking "did you know" questions] from any misuse." *United States v. Westcott*, 2022 CCA LEXIS 156, at *45 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.) (citing *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988)) (quoting *Michelson v. United States*, 335 U.S. 469, 480 (1948)). She erred in permitting the prosecution to impeach SrA AI's testimony using a question that was not only highly prejudicial but that was based on a tenuous, unsworn, and rebutted claim from an extremely biased witness—a claim trial counsel afforded so little weight to that it withdrew its intention to admit it via Mil. R. Evid. 413. Trial counsel simply had no good faith basis to ask the question.

Appellee doubles down on the military judge's error in arguing, "just because SA JM did not find documentation related to an investigation about the allegation did not mean that . . . the prior allegation did not occur[.]" Gov. Ans. at 33. Appellee also notes, "a restricted sexual assault report allows a sexual assault victim to disclose confidentially the details of an assault . . . without triggering an official law enforcement investigation." *Id*. at n.2. In advancing these points, Appellee, like the military judge, overlooks a critical component of CC's claim regarding this prior "SARC case." CC asserted that Appellant was interviewed by AFOSI about the allegation. Taking CC's claim at face value, the "SARC case" against Appellant was not restricted, otherwise it would

not have triggered a law enforcement investigation and Appellant's interview. It is highly unlikely an AFOSI special agent would have found *no record* of Appellant's prior AFOSI interview, no less one pertaining to a "SARC case." If the allegation happened while Appellant was in technical training, it would have been only a few years old at the time. This is not a case in which the record of a criminal subject's interview was lost decades ago. Nor would uncovering this record require SA JM to sift through the criminal indexing records of a state or foreign jurisdiction—rather, the purported record would be figuratively if not literally right under his nose.

A government investigator's inability to find any such record despite specifically searching for that record, vitiated any good faith trial counsel had in asking the question. The scope of trial counsel's good faith basis shrank with every fact placed on the record that countered CC's claim that Appellant disclosed a prior allegation to her. Appellee argues that just because SA JM did not find documentation related to an investigation, it does not mean "Appellant did not tell CC that an allegation occurred." Gov. Ans. at 33. But that was not the crux of the question trial counsel asked SrA AI. The military judge erroneously permitted trial counsel to state the existence of a prior allegation as a fact in his formulation of the question: "Are you aware that the accused had an allegation of sexual assault made against him in tech school?" But given the facts on the record, the premise of that question was no longer based in good faith. If the military judge was inclined to permit the prosecution's impeachment of SrA AI's testimony, she should have required trial counsel to retreat to a formulation such as, "Did you know CC told investigators that the accused told her he'd been previously accused of sexual assault by a woman?" and perhaps the follow up question, "Would knowing that information change your opinion of the accused's character to respecting women?" This was the only premise for which a good faith basis existed.

Appellee absolves the military judge thusly: "Considering Appellant's attempt to portray himself as someone incapable of sexually assaulting [CC] because of his 'respectfulness for women,' the military judge did not abuse her discretion by then allowing the Government to test the basis for that characterization." Gov. Ans. at 34. First, Appellant did not attempt to portray himself as "incapable" of sexual assault, but rather as someone who was *unlikely* to commit sexual assault. Secondly, Appellee's formulation is itself error. An accused may portray himself as an unlikely perpetrator of a crime, and a military judge may still err by permitting the prosecution to impeach that evidence through impermissible means.

WHEREFORE, Appellant respectfully requests this Honorable Court disapprove the finding of guilt and the sentence.

4445 Corporation Lane, Suite 173
Virginia Beach, VA 23462

ESHAWN R. RAWLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 20 April 2023.

ESHAWN R. RAWLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40268**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Andre T. FALLS DOWN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

It is by the court on this 10th day of May, 2023,

ORDERED:

The record of trial in the above-styled case is withdrawn from Panel 1 and is referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal