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. 2
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 18 January 2023

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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for a first enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 60 days, which will end on **30 March 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 77 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

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 18 January 2023.

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

19 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 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	)	**APPELLANT'S**
Appellee	)	**MOTION FOR ENLARGEMENT**
	)	**OF TIME (SECOND)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40386
DANIEL R. CSITI	)	
United States Air Force	)	23 March 2023
Appellant	)	

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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for a second enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **29 April 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 August 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 15 August 2022. Appellant is currently confined at Naval Consolidated Brig Charleston, South Carolina.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, ten defense exhibits, thirty-three appellate exhibits, and one court exhibit. Undersigned counsel currently represents sixteen clients, with seven Assignments of Error briefs pending before this Court. This case is counsel's fourth priority case before this Court, behind 1. *United States v. Bennett* (No. ACM S32733; 120 pages); 2. *United States v. Estep* (No. ACM 40336; 174 pages); and 3. *United States v. Doroteo* (No. ACM 40363; 2,149 pages). Through no fault of Appellant, counsel has been unable to review the entire record of trial and prepare an Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised Appellant of his right to a speedy appellate review, and Appellant concurs with this request.

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

Respectfully submitted,

aj, 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 23 March 2023.

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

24 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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 24 March 2023.

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)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 21 April 2023

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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for a third enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **29 May 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 August 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 15 August 2022. Appellant is currently confined at Naval Consolidated Brig Charleston, South Carolina.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, ten defense exhibits, thirty-three appellate exhibits, and one court exhibit. Undersigned counsel currently represents sixteen clients, with seven Assignments of Error briefs pending before this Court. This case is counsel's third priority case before this Court, behind 1. *United States v. Estep* (No. ACM 40336; 174 pages) and 2. *United States v. Doroteo* (No. ACM 40363; 2,149 pages). Through no fault of Appellant, counsel has been unable to review the entire record of trial and prepare an Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised Appellant of his right to a speedy appellate review, and Appellant concurs with this request.

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

Respectfully submitted,

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 email to the Court and served on the Government Trial and Appellate Operations Division on 21 April 2023.

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 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 April 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S**
Appellee	)	**MOTION FOR ENLARGEMENT**
	)	**OF TIME (FOURTH)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40386
DANIEL R. CSITI	)	
United States Air Force	)	22 May 2023
Appellant	)	

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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for a fourth enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **28 June 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 15 Aug. 2022. Appellant is currently confined at Naval Consolidated Brig Charleston, South Carolina.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, ten defense exhibits, thirty-three appellate exhibits, and one court exhibit. Undersigned counsel currently represents sixteen clients, with seven Assignments of Error briefs pending before this Court. This case is counsel's third priority case before this Court, behind 1. *United States v. Doroteo* (No. ACM 40363; 2,149 pages, fourteen volumes) and 2. *United States v. Valentin-Andino* (No. ACM 40185 (f rev)).[2] Since Appellant's last request for an enlargement of time, undersigned counsel submitted: a Reply brief in *United States v. Romero-Alegria* (No. ACM 40199 (f rev)); Assignments of Error briefs in *United States v. Estep* (No. ACM 40336) and *United States v. McAlhaney*, (No. ACM 39979 (rem))[3]; and supplements to two petitions for grants of review before this Court's superior court. Counsel is currently preparing an Assignments of Error brief in *Valentin-Andino* and a Reply brief in *United States v. Bennett* (No. ACM S32733), while progressing in his

[2] Counsel prioritized *Valentin-Andino*, which is before this Court on further review, ahead of this case to preserve a speedy appellate review issue. Counsel anticipates filing the Assignments of Error brief in *Valentin-Andino* in the week in which this pleading is filed.

[3] While *McAlhaney* was a lower priority than this case, counsel found it opportune to submit an Assignments of Error brief in that remanded case because much of the substantive briefing had already been written during the course of litigation before our superior court.

review of the record of trial in *Doroteo*.

Through no fault of Appellant, counsel has been unable to review the entire record of trial and prepare an Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised Appellant of his right to a speedy appellate review, and Appellant concurs with this request.

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 22 May 2023.

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

22 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 May 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 21 June 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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for a fifth enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **28 July 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 15 Aug. 2022. Appellant is currently confined at Naval Consolidated Brig Charleston, South Carolina.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, ten defense exhibits, thirty-three appellate exhibits, and one court exhibit. Undersigned counsel currently represents fourteen clients, with twelve matters before this Court. This case is counsel's second priority case before this Court, behind 1. *United States v. Doroteo* (No. ACM 40363; 2,149 pages, fourteen volumes). Since Appellant's last request for an enlargement of time, undersigned counsel filed: an Assignments of Error brief in *United States v. Valentin-Andino*, No. ACM 40185 (f rev), a Reply brief in *United States v. Bennett*, No. ACM S32733, a Reply brief in *United States v. McAlhaney*, No. ACM 39979 (rem), and a Reply brief in *United States v. Estep*, No. ACM 40336. Counsel has also continued to review the record of trial in *Doroteo* in anticipation of filing an Assignments of Error brief in that case. Counsel was on a temporary duty assignment from 17 to 19 June 2023 and attended a course from 12 to 14 June 2023, during which times he could not tend to his primary duties.

Through no fault of Appellant, counsel has been unable to review the entire record of trial and prepare an Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised Appellant of his right to a speedy appellate review, and Appellant concurs with this request.

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 21 June 2023.

Respectfully submitted.

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

22 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 June 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 June 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 23d day of June, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 July 2023**.

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

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 21 July 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, Staff Sergeant Daniel R. Csiti, 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 **27 August 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 15 Aug. 2022. Appellant is currently confined.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and one Court Exhibit. Undersigned counsel currently represents 15 clients and is presently assigned eight cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. McAlhaney*, No. ACM 39979 (rem). The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 21 August 2023.
2. *United States v. Alton*, No. ACM 40215. The CAAF denied review on 17 July 2023; the appellant intends to seek reconsideration of that decision, due on 27 July 2023.
3. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes. Counsel is reviewing the record of trial.

Since Appellant's last request for an enlargement of time, the previously assigned counsel has transitioned out of the Appellate Defense Division and the undersigned counsel has transitioned into the Appellate Defense Division, taking over the previously assigned counsel's docket. The undersigned counsel's first full day in the office was and counsel has previously approved leave scheduled from

. Counsel is completing all in-processing requirements.

Through no fault of Appellant, this enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 21 July 2023.

Respectfully submitted,

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

24 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 14 August 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, Staff Sergeant Daniel R. Csiti, 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 **26 September 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 257 days have elapsed. On the date requested, 300 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum,

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

dated 15 Aug. 2022. Appellant is currently confined.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and one Court Exhibit. Undersigned counsel currently represents 21 clients and is presently assigned 11 cases pending brief before this Court. This case is counsel's fifth priority case, behind:

1. *United States v. McAlhaney*, No. ACM 39979 (rem). The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 26 August 2023.
2. *United States v. Falls Down,* No. ACM 40268. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 2 October 2023.
3. *United States v. Estep*, No. ACM 40336. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 6 October 2023.
4. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes. Counsel began her review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a petition for reconsideration before the CAAF in *United States v. Alton* (No. ACM 40215) and has been preparing a petition for grant of review before the CAAF in *United States v. McAlhaney*. Counsel also reviewed two records of trial and advised the members regarding their opportunity to appeal directly to the Air Force Court of Criminal Appeals. Additionally, counsel completed all in-processing requirements and was out of the office for one and a half duty days for previously scheduled leave.

Through no fault of Appellant, this enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and

Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 14 August 2023.

Respectfully submitted,

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

15 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) 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 16th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **26 September 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

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force, *Appellant.*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 2 No. ACM 40386 22 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to Headquarters Air Force. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant. Capt Megan R. Crouch has been detailed to represent Appellant in undersigned counsel's stead and made her notice of appearance in this case. Counsel have completed a thorough turnover of the record.

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

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

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I filed an electronic copy of the foregoing with the Court and on the Government Trial and Appellate Operations Division on 22 August 2023.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40386**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 31st day of August, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 2 and 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
RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

F V U Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Special Panel
Staff Sergeant (E-5) **DANIEL R. CSITI,** United States Air Force	)	Case No. ACM 40386
Appellant	)	8 September 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits XII-XVIII, XXI, XXVI, and XXVII and pages 44-135 and 193-206 of the verbatim transcript.

Facts

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum, dated 15 Aug. 2022.

During the proceedings, the military judge sealed the following materials:

1) Appellate Exhibit XII, Defense Motion to Admit Evidence under M.R.E. 412, dated 30 Jun 22, 21 pages (R. at 31)
2) Appellate Exhibit XIII, Supplemental to Defense Motion to Admit IAW M.R.E. 412, dated 16 Jul 22, 90 pages (R. at 31)
3) Appellate Exhibit XIV, Government Response to Defense Motion to Admit M.R.E. 412 Evidence, dated 12 Jul 22, 8 pages (R. at 31)
4) Appellate Exhibit XV, Government Response to Defense Supplemental Motion to Admit M.R.E. 412 Evidence, dated 20 Jul 22, 5 pages (R. at 31-32).
5) Appellate Exhibit XVI, Victims' Counsel Response to Defense Motion to Admit Evidence IAW M.R.E. 412, dated 8 Jul 22, 8 pages (R. at 32)
6) Appellate Exhibit XVII, Victims' Counsel Response to Defense Supplemental Motion to Admit M.R.E. 412 Evidence, dated 20 Jul 22, 10 pages (R. at 32)
7) Appellate Exhibit XVIII, Excerpt from ROI, dated 29 May 21, 1 page (R. at 33)
8) Appellate Exhibit XXI, Ruling: Motion to Admit Evidence Under M.R.E. 412, 22 Jul 22, 11 pages (R. at 189)
9) Appellate Exhibit XXVI, Defense M.R.E. 412 Notice and Motion to Admit, dated 24 Jul 22, 3 pages (R. at 190)
10) Appellate Exhibit XXVII, Victims' Counsel Response to Defense M.R.E. 412 Notice and Motion to Admit, dated 24 Jul 22, 4 pages (R. at 191)

The military judge also ordered the following portions of the transcript sealed: pages 44 through 135 and 193 through 206, wherein the court was closed to discuss the defense's Mil. R. Evid. 412 motions. R. at 43-44, 192-193.

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).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] 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 frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with those imposed by the state bar to which counsel belong.[5]

[2] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[3] *Id*. at Rule 1.3.
[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[5] Undersigned counsel is licensed to practice law in Maryland.

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 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).

The contents of a record of trial shall include a substantially verbatim recording of the court-martial proceedings except sessions closed for deliberation and voting. R.C.M. 1112(b)(1). A record of trial is substantially incomplete if it does not include a substantially verbatim recording of the court-martial proceedings. *United States v. Valentin-Andino*, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Analysis

The sealed exhibits identified in paragraphs (1) through (10) in the facts section above are motions (and additional evidence in support of the motions) filed by the trial defense counsel, responses filed by the Government and counsel for the named victim, and a ruling issued by the military judge. Additionally, all parties would have been present for the closed sessions contained within the requested transcript pages. Thus, it is evident the parties "presented" and "reviewed" the sealed materials at trial.

It is reasonably necessary for Appellant's counsel to review these sealed exhibits and transcript pages for counsel to competently conduct a professional evaluation of Appellant'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.

The Government consents to both parties viewing the sealed materials detailed above.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 was sent via email to the Court and served on the Appellate Government Division on 8 September 2023.

Respectfully submitted,

MEGAN R. CROUCH, 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 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 22 August 2023, Appellant's detailed appellate defense counsel, Major (Maj) ER, submitted a Motion for Withdrawal of Appellate Defense Counsel. The Government did not submit any opposition.

Detailed appellate defense counsel provided the court with the necessary information required under Rule 12(b) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, specifically: (1) Appellant consents to withdrawal of his detailed appellate defense counsel, Maj ER; (2) detailed appellate defense counsel's reason for withdrawal is because he has been reassigned "from the Air Force Appellate Defense Division to Headquarters Air Force;" and (3) provisions have been made for continued representation in that a new appellate defense counsel has been detailed to Appellant's case. JT. CT. CRIM. APP. R. 12(b).

However, the motion contains one erroneous proposition of law that requires comment and correction, to wit: that in light of detailed appellate defense counsel's reassignment, "undersigned counsel is *no longer detailed* under Article 70, Uniform Code of Military Justice (UCMJ)[, 10 U.S.C. § 870, UCMJ,] to represent Appellant." (Emphasis added).

Once detailed as appellate defense counsel and after forming an attorney-client relationship with Appellant, counsel remain detailed to that case unless and until the court grants that counsel leave to withdraw. While "the responsibility for appointing appellate counsel rest[s] with the Judge Advocate General [TJAG] under Article 70, UCMJ," the Courts of Criminal Appeals have the authority to relieve appointed counsel. *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008) (citing *United States v. Bell*, 29 C.M.R. 122, 125 (C.M.A.

1960)).[1] "Leave to withdraw by any counsel who has entered an appearance . . . must be requested by motion in accordance with Rule 23 [of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals]." JT. CT. CRIM. APP. R. 12(b).

Nonetheless, notwithstanding detailed appellate defense counsel's misunderstanding that reassignment *automatically* severed both his detailing under Article 70, UCMJ, and by extension, his established attorney-client relationship with Appellant for a case still undergoing direct appellate review, the remainder of the motion is in proper form and provides the necessary good cause for withdrawal of counsel.

Accordingly, it is by the court on this 6th day of September 2023,

ORDERED:

Appellant's Motion to Withdraw as appellate defense counsel in the above captioned case is **GRANTED.**[2]

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

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[1] *See also Lovett v. United States* 64 M.J. 232, 232–33 (C.A.A.F. 2006) (granting a writ of mandamus to require TJAG to appoint appellate defense counsel where appellate defense counsel wrongly *sua sponte* severed their attorney-client relationship with Appellant prior to the case becoming final under Article 76, UCMJ). In their brief order in *Lovett*, the CAAF identified a similar circumstance to that raised in this motion, *i.e.* ramifications of a defense counsel misconstruing the enduring nature of the appellate attorney-client relationship.

> The immediate question before us is not whether counsel must file any particular matter in the course of representing a servicemember, but whether counsel may discontinue such representation before the case is final as a matter of law. Nothing in the record of the present case established a basis for counsel to sever the lawyer-client relationship.

Id.

[2] The court notes that the Article 70, UCMJ, reference is ubiquitous in several recent motions to withdraw as appellate defense counsel filed by members of the Air Force Appellate Defense Division. The court urges counsel to carefully review the statute and case law cited in this order and to correct any future filings on this subject.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Special Panel
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 14 September 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, Staff Sergeant Daniel R. Csiti, 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 **26 October 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 288 days have elapsed. On the date requested, 330 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 Aug. 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. ROT Vol. 1, Convening Authority Decision on Action Memorandum,

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

dated 15 Aug. 2022. Appellant is currently confined.

The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and one Court Exhibit. Undersigned counsel currently represents 19 clients and is presently assigned 11 cases pending brief before this Court. This case is counsel's third priority case, behind:

1. *United States v. Falls Down,* No. ACM 40268. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 2 October 2023.
2. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a petition and supplement for grant of review before the CAAF in *United States v. McAlhaney (*Dkt. No. 23-0234/AF, No. ACM 39979 (rem)) and began preparing a petition and supplement for grant of review in *United States v. Falls Down* (No. ACM 40268). Additionally, she was out of the office for five duty days (attending a two-day Newcomers Training; attending the Joint Appellate Advocacy Training; and taking leave for one day) and has approved leave from

Through no fault of Appellant, this enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 14 September 2023.

Respectfully submitted,

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

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 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 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 14 September 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 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 20th day of September, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error **not later than 26 October 2023**.

Appellant's counsel is advised that the number of enlargements granted thus far, combined with the recent withdrawal of the previously detailed appellate defense counsel (Major ER), may necessitate a status conference if another enlargement of time is requested by appellate defense counsel.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before a Special Panel
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 19 October 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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for an enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **25 November 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Entry of Judgment, 23 August 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. Convening Authority Decision on Action Memorandum, 15 August 2022. Appellant is currently

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

confined.

The trial transcript is 633 pages long, and the record of trial is comprised of 7 volumes containing 9 Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and 1 Court Exhibit. Undersigned counsel currently represents 19 clients and is presently assigned 13 cases pending brief before this Court. This case is counsel's third priority case, behind:

1. *United States v. Davis,* No. ACM 40370. The record of trial is comprised of 11 volumes containing 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and 1 court exhibit; the transcript is 1258 pages. Undersigned counsel has completed her review of the transcript and record of trial and is preparing to travel for and give oral argument on 15 November 2023
2. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes. Undersigned counsel has completed her review of the transcript. Mr. Scott Hockenberry is lead counsel on this case.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a petition and supplement for grant of review before the Court of Appeals for the Armed Forces in *United States v. Falls Down* (No. ACM 40268) on 27 September 2023. She then completed a review of the transcript (to include sealed pages within the transcript) for *United States v. Doroteo* (No. ACM 40363). On 2 October 2023, undersigned counsel was detailed to represent SrA Tyrion Davis at this Court's ordered oral argument (*United States v. Davis,* No. ACM 40370). She was not the original counsel who prepared the written briefs, nor had she reviewed the record of trial or the written filings prior to being detailed to represent SrA Davis. On 5 October 2023, this Court notified the parties for *United States v. Davis* that the oral argument would take place on 15 November 2023. As a result, undersigned counsel shifted *United States v. Davis* to her number one priority case and moved *United States v. Doroteo* to her number two priority case. Counsel completed her review of

the unsealed transcript, record of trial, and written filings for *United States v. Davis* on 17 October 2023. She also prepared for, and participated in, two moot oral arguments for JAJA colleagues (*United States v. Driskill* and *United States v. Rocha*) and advised one member regarding his opportunity to appeal directly to the Air Force Court of Criminal Appeals.

On 18 October 2023, undersigned counsel began reviewing the transcript for *United States v. Csiti* (No. ACM 40386). Counsel is scheduled to attend the University of North Carolina (UNC) Appellate Advocacy Training . Counsel registered for this training on , and as part of her registration, submitted to the UNC School of Government that she would use *United States v. Csiti* as her case for training. This case provides undersigned counsel the best opportunity to learn at the UNC Training because as sole counsel in this case, she has the greatest latitude to explore and raise issues for the Appellant. Counsel will finish her review of the transcript and record of trial, to include sealed materials, prior to the start of the UNC Training.

Additionally, during counsel's requested enlargement of time, she will attend the Appellate Judges Education Institute 2023 Summit . She has two moot oral arguments scheduled for *United States v. Davis* on 1 November 2023 and 9 November 2023. There is a federal holiday (Veterans Day) on 10 November 2023 and a family day for AF/JA on 13 November 2023. Undersigned counsel will be in Chicago, IL, from 13-15 November to represent SrA Davis at oral argument before this Court. Finally, counsel is scheduled to take leave from

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this

request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 19 October 2023.

Respectfully submitted,

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

23 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Special Panel

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 360 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 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 October 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 (TENTH)**
v.	)	Before a Special Panel
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 17 November 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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for an enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **25 December 2023**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 390 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Entry of Judgment, 23 August 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. Convening Authority Decision on Action Memorandum, 15 August 2022. Appellant is currently

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

confined.

The trial transcript is 633 pages long, and the record of trial is comprised of 7 volumes containing 9 Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and 1 Court Exhibit. Undersigned counsel currently represents 22 clients and is presently assigned 15 cases pending brief before this Court. This case is counsel's third priority case, behind:

1. *In re Banker*, Misc. Dkt. No. 2022-01. The transcript of the *DuBay* hearing is 311 pages and the record is two volumes. Mr. Banker's writ-appeal is due to the Court of Appeals for the Armed Forces on 14 December 2023.
2. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes. Undersigned counsel has completed her review of the transcript. Mr. Scott Hockenberry is lead counsel on this case.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of Appellant's record of trial. She attended the University of North Carolina (UNC) Appellate Advocacy Training , where she began identifying issues for Appellant's Assignments of Error brief. Upon returning from the UNC training, counsel immediately took leave form

. Counsel then attended the Appellate Judges Education Institute 2023 Summit . From 6-15 November 2023, counsel prepared for, and participated in, an oral argument ordered by this Court for *United States v. Davis*, No. ACM 40370, in Chicago, IL.

Through no fault of Appellant, undersigned counsel has yet to complete Appellant's Assignments of Error brief. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant

agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 17 November 2023.

Respectfully submitted,

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

17 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Special Panel

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 over 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 390 days in length. Appellant's over a 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 over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 November 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 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 17 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) 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 21st day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **25 December 2023**.

Appellant's counsel is advised that should Appellant deem it necessary to request any additional enlargements of time, the court will require a status conference prior to ruling on any additional enlargements of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S**
Appellee	)	**MOTION TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before a Special Panel
Staff Sergeant (E-5)	)	
DANIEL R. CSITI,	)	No. ACM 40386
United States Air Force	)	
Appellant	)	4 December 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(ii), and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Daniel Csiti hereby moves this Court to permit his counsel to examine Appellate Exhibit (App. Ex.) XXII included in Appellant's record of trial. App. Ex. XXII is an envelope containing 56 pages of sealed records from the general court-martial *United States v.* held at Minot Air Force Base.

The named victim in SSgt Csiti's court-martial, A.H., was also the named victim in the court-martial *United States v.* which involved an allegation of sexual assault resulting in an acquittal. Trial defense counsel for SSgt Csiti requested, as part of discovery, the complete record of trial for *United States v.* Because a portion of the record was sealed (App. Ex. XXII), trial defense counsel requested the military judge conduct an *in camera* review of the sealed materials to determine if they should be released to the parties. R. at 42. The military judge completed the *in camera* review of App. Ex. XXII and concluded that the material was privileged under Mil. R. Evid. 513 and did not meet any of the enumerated exceptions requiring disclosure to any of the parties. R. at 174.

In accordance with R.C.M. 1113(b)(3)(B)(ii), this Court may permit examination of sealed materials reviewed *in camera* but not released to trial counsel or defense counsel for good cause. SSgt Csiti's appellate defense counsel has good cause to see App. Ex. XXII, evidence allegedly falling under Mil. R. Evid. 513 and pertaining to A.H., because A.H.'s credibility is paramount to the convicted offense. If App. Ex. XXII discuss a diagnosis, such as a personality disorder, wherein a common symptom may include lying or fabricating, this information would be relevant to A.H.'s credibility.[1] App. Ex. XXII do not appear to be cumulative of any other information contained within the record. Without the opportunity to examine App. Ex. XXII, undersigned counsel cannot evaluate whether the Military Judge abused his discretion when he decided not to release the records to counsel.

A review of the entire record of trial, to include App. Ex. XXII, is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), to grant relief based on a review and analysis of "the entire record." However, this Court's review of the record, should not be a substitute for appellate defense counsel's review of the record. To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, appellate defense counsel must, therefore, examine "the entire record." The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998). It is the appellate defense counsel's responsibility to review the entire record to ensure her client received a fair trial.

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[1] *See* Ford, C. V., King, B. H., & Hollender, M. H. (1988). Lies and liars: Psychiatric aspects of prevarication. *The American Journal of Psychiatry*, 145(5), 554–562. https://doi.org/10.1176/ajp.145.5.554

Moreover, Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] 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 frivolous appeal or to eliminate contentions lacking in substance."[4] Accordingly, examination of App. Ex. XXII is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, without first reviewing the complete record of trial.

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

Respectfully submitted,

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

[2] Air Force Rules of Professional Conduct (AFI 51-110, Attachment 2), Rule 1.1.
[3] *Id*., Rule 1.3.
[4] Air Force Standards for Criminal Justice (AFI 51-110, Attachment 7), Standard 4-8.3(b).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 December 2023.

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

5 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40386 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has first determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

If, after review, this Court determines that there is good cause under R.C.M. 113(b)(3)(B)(ii), the United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion 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.

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

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations Division
United States Air Force

1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

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 6 December 2023.

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40386**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel R. CSITI	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 4 December 2023, counsel for Appellant submitted a Motion to Examine Sealed Materials. Specifically, counsel seeks to examine Appellate Exhibit XXII containing 56 pages of sealed records from the general court-martial of *United States v.* which the Appellant sought discovery of in his case, but which the military judge sealed after reviewing *in camera* and determining the records were subject to Mil R. Evid. 513 and not subject to disclosure in Appellant's case.

The Government does not oppose the motion as long as: (1) this court finds good cause to permit examination of the sealed materials; and (2) its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

Appellate counsel may examine sealed materials reviewed *in camera* by a military judge but not released to trial counsel or defense counsel at trial only upon a showing of "good cause." Rule for Courts-Martial 1113(b)(3)(B)(ii), *Manual for Courts-Martial, United States* (2019 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has not provided good cause that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 7th day of December, 2023,

ORDERED:

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

FOR THE COURT

FLEMING E. KEEFE, Capt, 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 (ELEVENTH)**
v.	)	Before a Special Panel
Staff Sergeant (E-5) **DANIEL R. CSITI** United States Air Force *Appellant*	)	No. ACM 40386 11 December 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, Staff Sergeant Daniel R. Csiti, Appellant, hereby moves for an enlargement of time to file an Assignment of Errors (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **24 January 2024**. The record of trial was docketed with this Court on 30 November 2022. From the date of docketing to the present date, 376 days have elapsed. On the date requested, 420 days will have elapsed.

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base, Montana, a panel of officers convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] Entry of Judgment, 23 August 2022. A military judge sentenced Appellant to a dishonorable discharge, two years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id*. The convening authority took no action on the findings and sentence of the court-martial and denied Appellant's request for the suspension of his reduction in rank pending the execution of the punitive discharge. Convening Authority Decision on Action Memorandum, 15 August 2022. Appellant is currently

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).

confined.

The trial transcript is 633 pages long, and the record of trial is comprised of 7 volumes containing 9 Prosecution Exhibits, 10 Defense Exhibits, 33 Appellate Exhibits, and 1 Court Exhibit. Undersigned counsel currently represents 24 clients and is presently assigned 16 cases pending brief before this Court. This case is counsel's third priority case, behind:

1. *In re Banker*, Misc. Dkt. No. 2022-01. The transcript of the *DuBay* hearing is 311 pages and the record is two volumes. Mr. Banker's writ-appeal petition is due to the Court of Appeals for the Armed Forces on 14 December 2023.
2. *United States v. Doroteo*, No. ACM 40363. The transcript is 2,149 pages and the record of trial contains 14 volumes. SrA Doroteo's AOE brief is due to this Court on 27 December 2023. Mr. Scott Hockenberry is lead counsel on this case.

Since Appellant's last request for an enlargement of time, undersigned counsel prepared a draft Writ-Appeal Petition for *In re Banker*, Misc. Dkt. No. 2022-01, and assisted her co-counsel in preparing a draft AOE brief, consisting of 11 issues, for *United States v. Doroteo*, No. ACM 40363. She also prepared for, and participated in, eight moot oral arguments for her colleagues for *United States v. Cole*, USCA Dkt. No. 23-0162/AF, *In re H.V.Z.*, USCA Dkt. No. 23-0250/AF, *United States v. Palik*, USCA Dkt. No. 23-0206/AF, and *In re R.W.*, Misc. Dkt. 2023-08. Counsel researched four potential issues for Appellant's case and expects to have a phone call with Appellant this week to finalize the issues for his AOE brief.

Undersigned counsel is filing this enlargement of time request early because counsel has approved and authorized leave from . It is counsel's understanding that no enlargements of time will be approved in this case without a status conference, and counsel wanted to ensure there was plenty of time to hold a status conference prior to her starting leave . Barring any unforeseen circumstances, counsel expects Appellant's case will

be her number one priority upon her return from leave and will begin drafting Appellant's AOE brief.

Through no fault of Appellant, undersigned counsel has yet to complete Appellant's Assignments of Error brief. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, 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 11 December 2023.

Respectfully submitted,

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

12 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DANIEL R. CSITI, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40386 Special Panel

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 over 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 420 days in length. Appellant's over a 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 over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5), **DANIEL R. CSITI** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before a Special Panel No. ACM 40386 22 January 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER STAFF SERGEANT CSITI'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE A.H. WAS CAPABLE OF CONSENTING—AND DID CONSENT—TO SEXUAL ACTIVITY WITH STAFF SERGEANT CSITI?

II.

WHETHER THE MILITARY JUDGE ERRED IN DENYING STAFF SERGEANT CSITI'S MOTION TO DISMISS FOR A DEFECTIVE PREFERRAL AND A DEFECTIVE PRELIMINARY HEARING WHEN THE SOLE TRIAL COUNSEL WAS NOT LICENSED TO PRACTICE LAW?

III.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY FALSELY REPRESENTING THAT HE HAD NOT ACTED IN ANY MANNER THAT MIGHT TEND TO DISQUALIFY HIM FROM STAFF SERGEANT CSITI'S PRELIMINARY HEARING?

STATEMENT OF THE CASE

On 27 July 2022, at a general court-martial convened at Malmstrom Air Force Base (AFB), Montana, a military judge convicted Staff Sergeant (SSgt) Daniel R. Csiti, contrary to his pleas,

of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice[1] (UCMJ), 10 U.S.C. § 920.[2] The military judge sentenced SSgt Csiti to a dishonorable discharge, two years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[3] The convening authority took no action on the findings and sentence of the court-martial and denied SSgt Csiti's request for the suspension of his reduction in rank pending the execution of the punitive discharge.[4]

STATEMENT OF FACTS

A. SSgt Csiti told A.H. her body was perfect; she responded with "show me," and then she took off her pants and underwear.

On 21 May 2021, SSgt Csiti and A.H. were hanging out at A.H.'s house after she finished a "girls' night."[5] After SSgt Csiti helped A.H. go upstairs to go to bed, A.H. went back downstairs a couple minutes later, and continued talking with SSgt Csiti.[6] A.H. leaned the chair she was sitting in, causing it to tip over, hit the wall, and leave a dent in her wall.[7] SSgt Csiti and A.H. then moved to A.H.'s couch and began making jokes about A.H.'s boyfriend and discussing body-image issues.[8]

At one point, A.H. told SSgt Csiti her body wasn't that great.[9] SSgt Csiti told A.H. her

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).
[2] R. at 597; Entry of Judgment (EOJ), 23 August 2022.
[3] R. at 633; EOJ.
[4] Convening Authority Decision on Action Memorandum – United States v. SSgt Daniel R. Csiti, 15 August 2022.
[5] R. at 241; Pros. Ex. 3 (Clip 6 at 00:30-00:52), Pros. Ex. 5 at 02:24-02:35.
[6] Pros. Ex. 3 (Clip 6 at 01:19-01:47), Pros. Ex. 5 at 02:35-03:35.
[7] Pros. Ex. 3 (Clip 6 at 01:59-02:15); Pros. Ex. 5 at 04:00-04:13.
[8] Pros. Ex. 3 (Clip 6 at 02:17-03:11; Clip 10 at 03:13-03:31); Pros. Ex. 5 at 04:37-04:42.
[9] Pros. Ex. 3 (Clip 6 at 03:12-03:19; Clip 10 at 03:32-03:40), Pros. Ex. 5 at 04:42-04:52.

body was perfect.[10] A.H. said, "Show me," and then took off her pants and underwear.[11] SSgt Csiti and A.H. kissed.[12] SSgt Csiti then performed oral sex on A.H. for approximately a minute when A.H. stopped him, saying she "needed to pee."[13] SSgt Csiti helped A.H. put her pants and underwear back on.[14] A.H. said she no longer needed to go the bathroom, but she was tired.[15] She laid down on the couch and fell asleep.[16]

B. SSgt Csiti was A.H.'s best friend—her "go-to," "emotional support" guy.

SSgt Csiti and A.H.'s close friendship began in 2017 when they met at Malmstrom AFB.[17] In the beginning of their friendship, they hung out at least once a week.[18] By 2018, they hung out all the time.[19] SSgt Csiti and A.H. confided in one another.[20] A.H. did not have many friends, and SSgt Csiti was "there for [A.H.]" as a "very good emotional support person."[21] SSgt Csiti brought A.H. food and gave her rides.[22] When A.H. became pregnant, SSgt Csiti bought things for A.H., her baby, and her household.[23] A.H.'s husband had left her, and SSgt Csiti stepped in to help support A.H. throughout her pregnancy.[24]

While A.H. was still pregnant, SSgt Csiti told A.H. that he had feelings for her and wanted

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[10] Pros. Ex. 3 (Clip 6 at 03:19-03:24; Clip 10 at 03:41-03:44), Pros. Ex. 5 at 04:53-04:58.
[11] Pros. Ex. 3 (Clip 6 at 03:24-03:36; Clip 10 at 03:45-03:53), Pros. Ex. 5 at 04:58-05:07.
[12] Pros. Ex. 5 at 05:17-05:21.
[13] Pros. Ex. 3 (Clip 6 at 03:43-03:57; Clip 10 at 03:54-04:06), Pros. Ex. 5 at 05:21-05:45.
[14] Pros. Ex. 3 (Clip 6 at 03:58-4:10; Clip 10 at 04:07-04:14), Pros. Ex. 5 at 05:45-05:53.
[15] Pros. Ex. 3 (Clip 6 at 04:13-04:19; Clip 10 at 04:14-04:27), Pros. Ex. 5 at 05:54-06:12.
[16] Pros. Ex. 3 (Clip 6 at 04:19-04:23; Clip 10 at 04:14-04:27), Pros. Ex. 5 at 05:54-06:12.
[17] R. at 217.
[18] *Id.*
[19] *Id.* at 277.
[20] *Id.*
[21] *Id.* at 219.
[22] *Id.* at 277.
[23] *Id.*
[24] *Id.* at 219.

to be more than friends.[25] A.H. rejected SSgt Csiti, and they stopped talking for a couple months.[26] SSgt Csiti respected this boundary.[27]

Once A.H.'s son was born, she reached out to SSgt Csiti to repair their friendship.[28] Their friendship went back to the way it had been—best friends.[29] A.H. still confided in him about personal matters.[30] SSgt Csiti never brought up being "more than friends" ever again.[31]

A.H. considered SSgt Csiti a "*de facto* godfather" to her son.[32] SSgt Csiti babysat A.H.'s son and picked him up from childcare.[33] A.H. could count on SSgt Csiti when she needed something.[34] He was her "go to" guy.[35] When she asked him for help, he would always say "yes," even going so far to adjust his schedule to make it work to help her.[36] The only time SSgt Csiti ever said "no" to A.H. was when it was something completely outside of his control.[37]

C. A.H. had a history of alcohol abuse.

A.H. had a history of alcohol abuse dating back to at least 2018, and continuing through 2021.[38] She was a heavy drinker with a high tolerance for alcohol.[39] She would drink to the point of intoxication multiple times a week.[40] It was common for her to blackout because of her

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[25] R. at 219.
[26] *Id.* at 219-20.
[27] *Id.* at 279.
[28] *Id.* at 279-80.
[29] *Id.* at 302.
[30] *Id.*
[31] *Id.* at 280.
[32] *Id.* at 219.
[33] *Id.* at 278.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 281, 326-27.
[39] *Id.* at 281, 325, 327.
[40] *Id.* at 281, 325.

drinking.[41] She regularly experienced gaps in her memory due to her alcohol consumption.[42] When A.H. drank alcohol, her judgment would be impaired, and she would do things that were out of her normal habit and character.[43] Often, A.H.'s friends would tell A.H. she did or said something while she was drunk, and she had no memory of it.[44] Even though A.H. did not have a memory of what her friends told her occurred, she did not doubt that she had said or done the things her friends said.[45]

There were times throughout A.H.'s friendship with SSgt Csiti when A.H. was intoxicated and she would dance erotically with SSgt Csiti.[46] In 2018, A.H. danced erotically with SSgt Csiti at a nightclub, putting her hands on his hips, his shoulders, his buttocks, and at one point, wrapping her leg around his body.[47] A.H. also gave SSgt Csiti an erotic lap dance in 2018.[48] A.H. does not recall the extent of her dancing with SSgt Csiti or giving him the lap dance in 2018;[49] however, one of the people she was with testified that she did, in fact, dance erotically with SSgt Csiti and perform an erotic lap dance on him.[50] In 2019, A.H. gave SSgt Csiti a lap dance at her house.[51] A.H. was intoxicated that night, but she was aware of what she was doing and she made the decision to give him a lap dance on her own.[52]

SSgt Csiti frequently stayed the night at A.H.'s house.[53] This often occurred when A.H.

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[41] R. at 325.
[42] *Id.* at 281, 325.
[43] *Id.* at 332.
[44] *Id.* at 328.
[45] *Id.* at 328, 332.
[46] *Id.* at 304, 496-500.
[47] *Id*. at 497-500.
[48] *Id*. at 496-97.
[49] *Id*. at 296-98.
[50] *Id*. at 496-98.
[51] *Id.* at 304.
[52] *Id.*
[53] *Id*. at 278.

had been drinking.[54] By 2021, A.H. was almost always hungover in the morning.[55]

D. SSgt Csiti babysat A.H.'s son while A.H. had a "girls' night."

On 21 May 2021, while A.H. had a "girls' night" with two friends, SSgt Csiti babysat A.H.'s son.[56] During the girls' night out, A.H. drank a few glasses of wine, ate a large pizza, and ate some salad.[57] A.H. recognized she should not drive home because she had been drinking, and she asked N.A. for a ride home.[58] SSgt Csiti went outside to meet N.A. and A.H. to help A.H. carry a pizza inside.[59] A.H. remembered getting to her house, being in her kitchen, and talking with SSgt Csiti.[60] She testified that she may have remembered being in her living room, talking with SSgt Csiti, and seeing the television was on.[61] A.H. testified she did not have any other memories of this evening.[62]

The next morning, A.H. asked SSgt Csiti to stay at her house to help with her son because she was hungover.[63] SSgt Csiti stayed at A.H.'s house into the evening, until A.H. told SSgt Csiti, "I release you" and told him he could leave.[64]

E. A.H. recorded conversations with SSgt Csiti.

A week later, A.H. invited SSgt Csiti over for dinner.[65] A.H. was "pretty intoxicated."[66] A.H. and SSgt Csiti had a conversation about SSgt Csiti performing oral sex on A.H. after she had

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[54] R. at 279.
[55] *Id.* at 317, 326.
[56] *Id*. at 241; Pros. Ex. 2, p. 1.
[57] *Id.* at 247, 306-09, 356.
[58] R. at 310.
[59] Pros. Ex. 3 (Clip 10 at 06:42-06:49); R. at 376.
[60] R. at 376.
[61] *Id*. at 312-13.
[62] *Id*. at 313.
[63] *Id.* at 319.
[64] *Id.* at 320.
[65] *Id*. at 250.
[66] *Id.* at 251.

been drinking alcohol.[67] A.H. recorded this conversation.[68] The following day, on 29 May 2021, A.H. and SSgt Csiti again discussed their sexual interactions that occurred on 21 May 2021.[69] A.H. recorded this conversation with SSgt Csiti as well.[70] Both recordings were admitted as Prosecution Exhibits at SSgt Csiti's trial.[71]

ARGUMENT

I.

Staff Sergeant Csiti's conviction for sexual assault is legally and factually insufficient because A.H. was capable of consenting—and did consent—to sexual activity with Staff Sergeant Csiti.

Standard of Review

This Court reviews the legal sufficiency of convictions *de novo*.[72] "A conviction is legally sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[73]

Neither this Court, nor the Court of Appeals for the Armed Forces (CAAF), has set forth the standard of review for factual sufficiency for Article 66, UCMJ, 10 U.S.C. § 866 (2021).[74] SSgt Csiti asserts the standard of review for factual sufficiency should remain *de novo* despite the statutory changes.[75]

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[67] R. at 251-52.
[68] *Id.* at 251; *see* Pros. Ex. 3.
[69] Pros. Ex. 5.
[70] R. at 262-63; *see* Pros. Ex. 5.
[71] R. at 254-56, 263-64.
[72] *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citations omitted).
[73] *Id.* (quotations and citations omitted).
[74] *See* William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, to require that every offense occur after the date of the law's enactment, which was 1 January 2021).
[75] *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

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

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof."[76] Upon such showing, this Court may weigh controverted questions of fact with "appropriate deference" to "the fact that the trial court saw and heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge."[77] This Court may provide relief when "clearly convinced that the finding of guilty was against the weight of the evidence."[78]

SSgt Csiti has made the requisite showing of deficiency below. The changes to Article 66, UCMJ, do not hollow out factual sufficiency review. The prior version of Article 66(d), UCMJ, empowered the Courts of Criminal Appeals (CCAs) to approve findings that are "correct in law and fact and . . . on the basis of the entire record, should be approved."[79] The Court of Military Appeals interpreted this language to require that members of a CCA "are themselves convinced of the accused's guilt beyond a reasonable doubt."[80] Neither the old nor the new statute explicitly requires the CCAs believe the accused's guilt beyond a reasonable doubt—this flows from case law alone. Where the standard is yet undetermined by the CAAF, this Court should hesitate before interpreting revisions to strip an accused of a key substantive aspect of an appeal. Where this Court is not convinced beyond a reasonable doubt that evidence is sufficient, this should suffice to clearly convince this Court that the finding was against the weight of the evidence.

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[76] Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (2021).
[77] Article 66(d)(1)(B)(ii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(ii) (2021).
[78] Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii) (2021).
[79] Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019).
[80] *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

B. A.H. demonstrated she was capable of consenting, and did consent, to sexual activity with SSgt Csiti.

1. A.H. had the motor control and cognitive function to begin, and end, sexual activity with SSgt Csiti.

When A.H. responded to SSgt Csiti's comment about her body by saying, "show me," and taking off her pants and underwear, she was giving consent. She invited SSgt Csiti to engage in sexual activity with her. And then SSgt Csiti did exactly what the Air Force has trained Airmen to do: Stop when a sexual participate communicates to stop.

Consent is a "freely given agreement to the conduct at issue by a competent person."[81] A competent person is "a person who possesses the physical and mental ability to consent."[82] A "freely given agreement" occurs when a person "first possess[es] the cognitive ability to appreciate the nature of the conduct in question, then possess[es] the mental and physical ability to make and to communicate a decision regarding that conduct to the other person."[83] The UCMJ defines "incapable of consenting" as "incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue."[84]

A.H. demonstrated, through her words and actions over the course of the evening, that she was capable of consenting to sexual activity. A.H.'s testimony established that she could make decisions, she understood her surroundings, and she knew what was going on in the relevant

[81] Article 120(g)(7)(A), UCMJ, 10 U.S.C. § 920(g)(7)(A).
[82] *United States v. Pease*, 75 M.J.180, 184-85 (C.A.A.F 2016).
[83] *Id.*
[84] Article 120(g)(8), UCMJ, 10 U.S.C. § 920(g)(8); *see United States v. Pease,* 75 M.J. 180, 185 (C.A.A.F. 2016) (concluding that "incapable of consenting" means lacking the cognitive ability to appreciate the sexual conduct in question or lacking the mental or physical ability to make or communicate a decision about whether the alleged victim agrees to the conduct.)

timeframe. She remembered drinking and eating dinner with her friends at the restaurant.[85] Demonstrating executive function, she knew she should not drive due to her consumption of alcohol and asked N.A. for a ride.[86] She remembered getting to her house, being in her kitchen, and talking with SSgt Csiti.[87] She testified that she may have remembered being in her living room, talking with SSgt Csiti, and seeing the television was on.[88] There is only a short period of time in which A.H. claimed she did not remember the events of the evening—the actual sexual conduct.

Testimony from N.A., and the recordings of SSgt Csiti and A.H.'s conversations, fill in the gaps in A.H.'s testimony. This evidence further illustrates A.H. was capable of consenting, and did consent, to sexual activity with SSgt Csiti. When N.A. and A.H. were leaving the restaurant, N.A. described A.H. as "tipsy" and "coherent." A.H. was not stumbling, and she was able to walk to N.A.'s car.[89] On the drive from the restaurant to A.H.'s house, A.H. was coherent and moved her head to the beat of the music being played in the car.[90] When A.H. got out of N.A.'s car at her house, she was "tipsy," but not drunk, and A.H. was capable of walking unassisted from the car to her front door.[91]

When A.H. returned home, she hung out and talked with SSgt Csiti for approximately an hour.[92] After SSgt Csiti helped A.H. go upstairs to go to bed, she went back downstairs on her own and unassisted.[93] A.H. was coherent enough to lean in one of her chairs while she talked

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[85] R. at 306-09.
[86] *Id.* at 309-10.
[87] *Id.* at 310.
[88] *Id.* at 312-13.
[89] *Id.* at 360.
[90] *Id.* at 361.
[91] *Id.* at 376.
[92] Pros. Ex. 3 (Clip 6 at 00:30-01:26); Pros. Ex. 5 at 02:24-03:14.
[93] Pros. Ex. 3 (Clip 6 at 01:29-01:47), Pros. Ex. 5 at 03:23-03:35.

more with SSgt Csiti, eventually causing the chair to fall and dent A.H.'s wall.[94] A.H. and SSgt Csiti then moved to A.H.'s couch, and began making jokes about A.H.'s boyfriend and discussing body image issues.[95]

A.H. was mentally and physically capable of having these conversations with SSgt Csiti. She was also mentally and physically capable of making and communicating a decision to engage in sexual conduct with SSgt Csiti. When SSgt Csiti told A.H. her body was perfect, A.H. said "show me."[96] A.H. then took off the pants she was wearing and took off her underwear—on her own.[97] In this moment, A.H. was fully capable of appraising the nature of her conduct and SSgt Csiti's conduct. She and SSgt Csiti kissed for a few moments. SSgt Csiti then performed oral sex on A.H. for approximately a minute before she pushed him away, and he immediately stopped.[98] A.H. demonstrated she was aware and in control. She was physically capable of declining participation in, or communicating her unwillingness to engage in, any sexual act with SSgt Csiti. When A.H. pushed SSgt Csiti away and said she needed to use the restroom, SSgt Csiti stopped, asked if A.H. wanted to get dressed, and helped A.H. put her clothes back on.[99]

2. A.H.'s history of alcohol abuse shows she is a high-functioning alcoholic.

The possibility that A.H. may have been in a blackout does not mean she was incapable of consenting. "Intoxication, standing alone, does not indicate one is sufficiently impaired to be incapable of consenting to sexual activity."[100] A.H. admitted that she has a high tolerance for

[94] Pros. Ex. 3 (Clip 6 at 01:59-02:15); Pros. Ex. 5 at 04:00-04:13.
[95] Pros. Ex. 3 (Clip 6 at 02:17-03:24); Clip 10 at 03:13-03:44), Pros. Ex. 5 at 04:37-04:58.
[96] Pros. Ex. 3 (Clip 6 at 03:24-03:36; Clip 10 at 03:45-03:53), Pros. Ex. 5 at 04:58-05:07.
[97] *Id.*
[98] Pros. Ex. 3 (Clip 6 at 03:43-03:57; Clip 10 at 03:54-04:06), Pros. Ex. 5 at 05:17-05:45.
[99] Pros. Ex. 3 (Clip 6 at 03:58-4:10; Clip 10 at 04:07-04:14), Pros. Ex. 5 at 05:45-05:53.
[100] *United States v. Smith*, 83 M.J. 350, 360, n.4 (C.A.A.F. 2023) (citations omitted).

alcohol[101] and it was not uncommon for A.H.'s friends to tell her something had occurred—whether that be something she said, something she did, or a decision she made—while A.H. was drunk that A.H. had no memory of.[102] A.H. acknowledged that when those situations occurred, she did not doubt that she had said or done those things she could not remember.[103] A.H. also admitted that when she is drinking, her judgment is impaired and she does things that are out of her normal habit and character.[104]

3. A.H.'s request for sexual intimacy demonstrated her consent.

A.H. and SSgt Csiti were best friends.[105] SSgt Csiti was A.H.'s "go to" and "emotional support" friend.[106] Throughout the duration of their friendship, SSgt Csiti routinely cared for and supported A.H. and her son.[107] SSgt Csiti almost always said "yes" to A.H. when she asked him for help, and the only time he said "no" to her was when it was something completely outside of his control.[108] It is no surprise then, that when A.H. demanded SSgt Csiti "show [her]" that her body is perfect, and she took off her pants and underwear on her own, that SSgt Csiti gave in to A.H.'s request. When A.H. made this demand, she was fully capable of appraising the nature of the sexual conduct she was choosing, on her own volition, to engage in with SSgt Csiti.

4. Case law is distinguishable.

The CAAF recently evaluated the legal sufficiency of a similar issue in *United States v. Smith*.[109] The Court considered whether the evidence in that case "was legally insufficient because

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[101] R. at 327
[102] *Id*. at 328-29.
[103] *Id*. at 329, 332.
[104] *Id.* at 332.
[105] *Id.* at 302.
[106] *Id*. at 219, 278.
[107] *Id*. at 219, 277-78.
[108] *Id*. at 278.
[109] 83 M.J. 350, 352 (C.A.A.F. 2023).

the alleged victim was capable of consenting and where, even if she was not capable of consenting, Appellant reasonably believed that she did consent."[110] Ultimately, the Court held that the conviction was legally sufficient because "the Government introduced ample evidence for a rational trier of fact to find beyond a reasonable doubt" that the victim in that case was incapable of consenting due to impairment by intoxication, and the appellant knew or reasonably should have known of the impairment.[111] However this case is distinguishable.

The appellant and victim in *Smith* went to a concert together.[112] Although the appellant stated he did not know how many drinks the victim consumed, he estimated it was approximately the same amount he had—four or five double shots.[113] The appellant told investigators[114] that they were "kicked out of the concert" by security guards because the victim "was so intoxicated she could not stand up."[115] By the time they left, the victim "was 'literally falling over' and slurring her speech."[116] The appellant "had to help [the victim] unlock her phone to find the address for their hotel" and he had "never seen her so intoxicated."[117] Their taxi driver "had to help them into the hotel."[118] The appellant told investigators that once they were back to their hotel room, the victim "urinated on both beds and stumbled around the room mumbling."[119] The victim then "stripped down to her underwear," and the appellant "ripped [her underwear] off her."[120] The

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[110] *Id.*
[111] *Id*. at 353.
[112] *Id.*
[113] *Id.* at 354.
[114] The appellant's interviews with the Office of Special Investigations (OSI) were videotaped and played for the members at trial. *Id*.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*

appellant and the victim "made out" and the appellant "performed oral sex on [the victim]."[121]

The circumstances here are different. SSgt Csiti could not have known how many drinks A.H. consumed earlier in the night because he was not with her when she was drinking. A.H. was not kicked out of a restaurant; rather, N.A. testified that A.H. was only "tipsy" and could walk on her own.[122] A.H. was able to get into her house on her own, and there was no evidence introduced to suggest that A.H. stumbled or fell (while standing) at any point throughout the night. There is no evidence that A.H. was so intoxicated that she could not operate her phone or that she urinated on any furniture. A.H. was capable of carrying on conversations with SSgt Csiti throughout the evening, and she was capable of walking down her stairs, unassisted, to continue talking with SSgt Csiti.[123] Finally, it was A.H. who took off her pants and underwear—by herself, without any help—after demanding that SSgt Csiti "show [her]" how her body was perfect.[124]

In this case, the Government did not meet their burden of introducing sufficient evidence to prove beyond a reasonable doubt that A.H. was incapable of consenting to sexual activity. Rather, the evidence demonstrates that A.H. was capable of consenting, and did consent, to sexual conduct with SSgt Csiti on 21 May 2021.

C. Even if A.H. did not consent, SSgt Csiti had a reasonable mistake of fact that A.H. consented to sexual activity.

Based on A.H.'s conduct, as observed by SSgt Csiti, the evidence failed to establish beyond a reasonable doubt that SSgt Csiti's mistake of fact was not reasonable. As stated above, the evidence established A.H.'s participation in sexual acts with SSgt Csiti.[125] Through SSgt Csiti's

[121] 83 M.J. at 354.
[122] R. at 376.
[123] Pros. Ex. 3 (Clip 6 at 00:30-03:24; Clip 10 at 03:24-03:44), Pros. Ex. 5 at 02:24-04:58.
[124] Pros. Ex. 3 (Clip 6 at 03:24-03:36; Clip 10 at 03:45-03:53), Pros. Ex. 5 at 04:58-05:07.
[125] Pros. Ex. 3; Pros. Ex. 5.

lens, A.H. was a willing and capable participant in the sexual activity. She communicated to him what she wanted when she wanted it. From his perspective, A.H. demonstrated she was aware and in control. When A.H. communicated her unwillingness to continue engaging in the sexual activity, by telling SSgt Csiti to stop, he listened and immediately stopped.

The Government's case could not refute or explain A.H.'s conduct to overcome the reasonableness of SSgt Csiti's mistake of fact and A.H.'s actual consent. The unvarnished reality here is that there was an abject failure of proof by the government as to A.H.'s ability to consent.

D. SSgt Csiti could not reasonably have known A.H.'s level of intoxication.

SSgt Csiti was not present with A.H. throughout the entire evening. There was no evidence introduced at trial to suggest SSgt Csiti knew how much alcohol A.H. consumed that evening. The record is not even clear exactly how many drinks A.H. consumed that evening.[126]

When A.H. returned home from the restaurant, she was "tipsy," but not drunk, and capable of walking unassisted from the car to her front door.[127] SSgt Csiti was able to observe A.H.'s behavior and physical demeanor because he met A.H. at N.A.'s car when N.A. dropped A.H. off, to help carry in a pizza.[128] A.H. continued to have conversations with SSgt Csiti throughout the remainder of the evening.[129] No evidence was introduced at trial to suggest SSgt Csiti had any reason to doubt A.H.'s capacity to have these conversations or make decisions for herself throughout the evening.

After SSgt Csiti helped A.H. go upstairs to go to bed, A.H. went back downstairs on her own and unassisted.[130] It is reasonable that SSgt Csiti would interpret A.H.'s ability to walk down

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[126] R. at 247, 309, 356.
[127] *Id*. at 376.
[128] *Id.* at 362, 376. Pros. Ex. 3 (Clip 10 at 06:42-06:49).
[129] Pros. Ex. 3 (Clip 6 at 00:30-03:24; Clip 10 at 03:24-03:44), Pros. Ex. 5 at 02:24-04:58
[130] Pros. Ex. 3 (Clip 6 at 01:29-01:47), Pros. Ex. 5 at 03:23-03:35.

her stairs, by herself, as A.H. having the mental and physical capacity to choose to engage in sexual activity with SSgt Csiti shortly thereafter.

That is precisely what A.H. did shortly after she returned downstairs. When SSgt Csiti and A.H. were having a conversation regarding body image issues, SSgt Csiti told A.H. her body was perfect.[131] A.H. responded by directing SSgt Csiti to "show [her]."[132] A.H. then took off her pants, on her own.[133] Next, she took off her underwear, on her own.[134] SSgt Csiti watched her do this. No evidence was introduced at trial to suggest A.H. struggled or fell when she took off her clothes. It was reasonable that, when SSgt Csiti saw A.H. take off her own clothes, and demanded that he "show [her]," he believed she was asking him to engage in sexual activity with her. It was also reasonable for SSgt Csiti to believe A.H. was capable of making that decision—that she had the cognitive ability to make and communicate a decision about whether to engage in sexual activity with him.

SSgt Csiti later acknowledged to A.H. that he knew she was drunk.[135] But being drunk does not automatically mean a person is incapable of consenting.[136] Even though SSgt Csiti acknowledged A.H. was drunk when their sexual activity occurred, that alone is not sufficient to prove that SSgt Csiti reasonably should have known A.H.'s state of intoxication and any possibility that she may have been incapable of consenting. A.H.'s behavior and physical demeanor around

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[131] Pros. Ex. 3 (Clip 6 at 03:19-03:24; Clip 10 at 03:41-03:44), Pros. Ex. 5 at 04:53-04:58
[132] Pros. Ex. 3 (Clip 6 at 03:24-03:36; Clip 10 at 03:45-03:53), Pros. Ex. 5 at 04:58-05:07
[133] *Id.*
[134] *Id.*
[135] Pros. Ex. 5 at 04:16-04:25.
[136] *See United States v. Bodoh,* 78 M.J. 231, 237 (C.A.A.F. 2019) (noting that it is a "false premise that a person who is intoxicated is inherently incapable of consenting to sexual acts"); *United States v. Rogers*, 75 M.J. 270, 274 (C.A.A.F. 2016) (correcting the erroneous "belief that if someone was too drunk to remember that they had sex, then they were too drunk to consent to having sex").

SSgt Csiti demonstrated otherwise. Based on the evidence presented at trial, SSgt Csiti could not reasonably have known A.H.'s level of intoxication or any potential inability to consent to sexual activity on 21 May 2021.

For these reasons, the finding of guilt is against the weight of the evidence, and this Court should set aside SSgt Csiti's conviction. Furthermore, the evidence is legally insufficient to convict. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt that SSgt Csiti sexually assaulted A.H.

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

II.

The military judge erred in denying Staff Sergeant Csiti's motion to dismiss for a defective preferral and a defective preliminary hearing when the sole trial counsel was not licensed to practice law.

Additional Facts

Capt C.P. was a judge advocate who performed military-justice functions pertaining to SSgt Csiti's case and court-martial.[137] At the time Capt C.P. performed these military-justice functions, Capt C.P. was not licensed to practice law.[138] Capt C.P. was originally licensed to practice law in the state of Tennessee in 2019.[139] On 15 March 2021, Capt C.P.'s license to practice law was suspended.[140] His license remained suspended through, at least, 22 July 2022.[141]

On 29 November 2021, Lt Col C.A.P. preferred the charges and specifications against

[137] App. Ex. XXII, paras. 3-4.
[138] App. Ex. XXV, para. 5.
[139] *Id*.
[140] *Id.*
[141] *Id.*

SSgt Csiti (which led to SSgt Csiti's general court-martial).[142] Capt C.P. administered the oath to Lt Col C.A.P. for the preferral.[143] Capt C.P. also represented the Government at SSgt Csiti's Article 32, UCMJ, preliminary hearing.[144] Capt. C.P. was the sole trial counsel for the preliminary hearing.[145] During the preliminary hearing, Capt C.P. admitted evidence, delivered argument, and submitted a legal memorandum making assertions and analysis of law as to the admissibility of specific evidence.[146]

When Capt C.P. administered the oath to Lt Col C.A.P. for the preferral of charges against SSgt Csiti, and when he represented the Government as the sole trial counsel at SSgt Csiti's preliminary hearing, Capt C.P.'s law license was suspended by his state bar association.[147]

According to the Tennessee Board of Professional Responsibility (BPR),[148] an attorney with a suspended license is "not in good standing and cannot practice law in Tennessee, subject to reinstatement to active status."[149] No attorney suspended by the BPR shall resume practice until reinstated by order of the Supreme Court of Tennessee.[150]

Capt C.P. commissioned as an active-duty officer in the United States Air Force in 2020, received a direct appointment to the Air Force Judge Advocate General's (JAG) Corps on 13 January 2020, and was designated as a Judge Advocate by The Air Force Judge Advocate

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[142] *Id.* at para. 2.
[143] *Id.* at para. 3.
[144] *Id*.
[145] App. Ex. XXIII, para. 4.
[146] *Id.* at para. 4, p. 14-15.
[147] App. Ex. XXV, p. 1, para. 4.
[148] The BPR consists of twelve people appointed by the Supreme Court of Tennessee who are charged with, *inter alia*, investigating and disposing of any alleged ground for discipline of any Tennessee attorney. TENN. SUP. CT. R. 9, § 4.5.
[149] Board of Professional Responsibility of the Supreme Court of Tennessee Online Tennessee Attorney Directory, https://www.tbpr.org/for-the-public/online-attorney-directory (visited 16 Jan. 2024).
[150] TENN. SUP. CT. R. 9, § 12.2.

General (TJAG) in September 2020.[151]

Between September 2020 and 22 July 2022, Capt C.P.'s status as an active-duty officer and member of the Air Force JAG Corps was not terminated or revoked.[152] During that time frame, TJAG did not suspend or revoke Capt C.P.'s designation as a judge advocate.[153] On 5 March 2022, the Malmstrom AFB Staff Judge Advocate became aware that Capt C.P.'s license was suspended.[154] Capt C.P. was removed from all legal responsibilities at that time, and worked in a different, non-legal office through, at least, 22 July 2022.[155]

On 21 July 2022, SSgt Csiti's trial defense counsel filed a motion to dismiss charges for defective preferral and defective Article 32, UCMJ, hearing.[156] The military judge denied SSgt Csiti's motion to dismiss the charges because the defense "failed to meet their burden to show that either an improper oath was provided during the preferral of charges or that an inadequate Article 32 hearing occurred in this case."[157] According to the military judge, Capt C.P.'s status as an active-duty officer and a member of the Air Force JAG Corps "was sufficient to meet the definition of a 'judge advocate'" and Capt C.P. was not "automatically strip[ped] . . . of his status as a 'judge advocate' for purposes of the UCMJ."[158] The military judge asserted that "TJAG found Capt [C.P.] qualified and designated him as [a judge advocate] . . . prior to Capt [C.P.] taking any actions in this case."[159] The military judge did not address the argument by defense counsel that Capt C.P. was no longer qualified to serve as a judge advocate; rather, the military judge relied on

[151] App. Ex. XXV, para. 6.
[152] *Id.* at para. 7.
[153] App. Ex. XXIV, para. 2.
[154] App. Ex. XXIII, para. 5.
[155] *Id.*
[156] App. Ex. XXIII.
[157] App. Ex. XXV, para. 26.
[158] *Id.* at paras. 27-28.
[159] *Id.*

Capt C.P.'s designation not being withdrawn.[160]

Standard of Review

This Court reviews a military judge's rulings on motions to dismiss for abuse of discretion.[161] "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact."[162]

Law and Analysis

The term "judge advocate" is defined as "an officer of the Judge Advocate General's Corps of the Army, the Navy, or the Air Force."[163] "To be designated as a judge advocate, officers must . . . [b]e a graduate of a law school that was accredited or provisionally accredited by the American Bar Association at the time of graduation; and . . . [b]e in active (or equivalent) status, in good standing, and admitted to practice before the highest court of a United States (US) state, commonwealth or territory, or the District of Columbia."[164]

Once an attorney is designated as a judge advocate, he or she "*must maintain current eligibility to actively practice law before the highest court of the jurisdiction where they are licensed*."[165] "Currently eligible to engage in the active practice of law" means "having the current ability to practice law on a continuing and full-time basis under the rules of the licensing jurisdiction."[166] "Being listed as a member in 'good standing' alone will not satisfy paragraph

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[160] App. Ex. XXV, paras. 27-29.
[161] *United States v. Douglas*, 2017 CCA LEXIS 407, at *19 (A.F. Ct. Crim. App. 15 Jun 17) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).
[162] *Smith*, 83 M.J. at 355 (citation omitted).
[163] 10 U.S.C. § 801.
[164] Air Force Instruction (AFI) 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development*, paras. 6.2.2, 6.2.2.1, 6.2.2.2. (29 Nov. 2018). Although this AFI has been updated since 2018, this version is the version that was in effect when SSgt Csiti's charges were preferred and the preliminary hearing occurred.
[165] *Id.* at para. 6.3.1.
[166] *Id.* at para. 6.3.1.1.

6.3.1 unless the 'good standing' status confers full eligibility to practice law in the jurisdiction concerned."[167]

Only "commissioned officers of the Air Force who are *qualified* under regulations prescribed by the Secretary, and who are designated as judge advocates" may perform judge advocate functions- in the Air Force and Space Force.[168] "By statute, only attorneys *qualified* and designated by TJAG as judge advocates may perform judge advocate functions."[169] "These include any functions that the UCMJ or Air Force Instructions require to be performed by a judge advocate. Examples of such functions include *acting as trial counse*l . . . . *in an Article 32 hearing* . . . . '[J]udge advocates' are those officers designated as judge advocates in accordance with AFI 51-101."[170]

Capt C.P. was not qualified to perform judge advocate functions between 15 March 2021 through SSgt Csiti's general court-martial, because he failed to maintain current eligibility to practice law before the highest court of Tennessee.[171] The military judge misapplied the law to the facts. It is the job of the court to say what the law is—not TJAG.[172] Military judges should not be deferring to TJAG to determine whether an attorney remains "qualified" as a judge advocate after the attorney's law license is suspended. Simply being designated as a JAG is not sufficient to perform the functions of a judge advocate. The JAG must also be qualified.[173] AFI 51-110 confirms this interpretation through its repeat use of the term "and" as well as the inclusion of the

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[167] *Id.*
[168] 10 U.S.C. § 9063(g).
[169] AFI 51-110, *Professional Responsibility Program*, para. 11.2.2. (11 Dec. 2018) (emphasis added).
[170] *Id.*
[171] The only United States jurisdiction in which he appears to have been admitted to practice law.
[172] *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")
[173] 10 U.S.C. § 9063(g); AFI 51-110, para. 11.2.2.

designation of "attorney."[174] Failure to maintain a current, active license to practice law may not necessarily result in loss of designation, but it does preclude the member from being qualified to perform judge advocate functions by virtue of failure to maintain their department-designated qualifications. This is analogous to a pilot who is not qualified to fly, pursuant to a medical, training, or disciplinary matter, but does not necessarily lose their rated position, Air Force Specialty Code (AFSC), or their aviator badge (also known as "pilot wings"). A JAG who is no longer eligible to practice law, is no longer qualified to perform judge advocate functions.

Congress authorized charges and specifications to be preferred against a military member only when the charges and specifications are "signed by a person subject to this chapter under oath before a commissioned officer of the armed forces *authorized to administer oaths*."[175] "Those officers specifically authorized to administer these oaths are designated by Article 136 and by regulation and statute as provided for in Article 136."[176] Article 136, UCMJ, states that judge advocates on active duty or performing inactive-duty training may administer oaths for military justice.[177]

Capt C.P. was unqualified to be a judge advocate in November 2021 because he did not have an active license to practice law. Therefore, he was unable to perform judge advocate functions, to include administering an oath or serving as trial counsel at a preliminary hearing.[178] Capt C.P.'s administration of the oath to the preferring commander for SSgt Csiti's court-martial was without authority, rendering the preferral for the convicted charge and specification unsworn

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[174] AFI 51-110, para. 11.2.2.
[175] *Frage v. Moriarty*, 27 M.J. 341, 343 (C.M.A. 1988) (quoting 10 U.S.C. § 830(a)(2)) (emphasis in original).
[176] *Id.* at 343.
[177] 10 U.S.C. § 936.
[178] 10 U.S.C. § 9063(g); AFI 51-110

and defective. "No accused should be tried on unsworn charges over his objection."[179] "In view of the requirements of Article 30 and of the admitted fact that the officer was not authorized to administer oaths, it is plain that there was error, and that the procedure was not in accordance with the provisions of the Article and of the Manual."[180] Because Capt C.P. was not authorized to administer oaths, there was error in SSgt Csiti's case.

Additionally, Capt C.P.'s sole representation of the Government at the preliminary hearing was without authority, rendering the Article 32, UCMJ, preliminary hearing defective. The military judge incorrectly applied the law to the facts and erred by denying SSgt Csiti's motion to dismiss for a defective preferral and a defective preliminary hearing.

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

III.

Trial counsel committed prosecutorial misconduct by falsely representing that he had not acted in any manner in any manner that might tend to disqualify him from Staff Sergeant Csiti's preliminary hearing.

Additional Facts

On 15 March 2021, Capt C.P.'s license to practice law was suspended.[181] On 19 Jan 22, Capt C.P. represented the Government, as the sole trial counsel, at SSgt Csiti's Article 32, UCMJ, preliminary hearing.[182] During the preliminary hearing, Capt C.P. asserted he had not "acted in any way which might tend to disqualify [him] from [this] hearing."[183]

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[179] *United States v. Miller*, 31 M.J. 798, 801 (A.F.C.M.R. 1990) (citing *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988); *United States v. Goodman*, 31 C.M.R. 397 (N.B.R. 1961); *United States v. Bolton*, 3 C.M.R. 374 (A.B.R. 1951), *pet. denied*, 3 C.M.R. 150 (C.M.A. 1952)).
[180] *United States v. May*, 2 C.M.R. 80, 81 (U.S. C.M.A. 1952).
[181] App. Ex. XXV, para. 5.
[182] *Id.*; Preliminary Hearing Officer (PHO) Report, Continuation of Item 13a, p. 7.
[183] PHO Exhibit (Ex.) 8, Part 1 of 2, 01:46-02:11.

Standard of Review

This Court reviews prosecutorial misconduct *de novo*.[184] Trial counsel commits prosecutorial misconduct when he or she "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[185] Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g. a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon."[186]

When an objection is made at the trial level, appellate courts review for prejudicial error.[187] "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial."[188] The CAAF concluded that the "best approach" for determining the impact of prosecutorial misconduct "involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[189]

Law and Analysis

Capt C.P., as the sole trial counsel at SSgt Csiti's preliminary hearing, asserted he had not "*acted in any way which might tend to disqualify [him] from [this] hearing*."[190] However,

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[184] *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)).
[185] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)).
[186] *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quotations and citations omitted).
[187] Article 59, UCMJ, 10 U.S.C. § 859 (2019) ("A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.")
[188] *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)
[189] *Id.*
[190] PHO Ex. 8, Part 1 of 2, 01:46-02:11.

Capt C.P.'s license was suspended by the BPR on 15 March 2021—ten months before SSgt Csiti's preliminary hearing.[191] It is reasonable to infer that Capt C.P. was aware of the BPR's suspension of his license to practice law. Additionally, the record gave no indication that Capt C.P. corrected his false statement as of July 2022, when trial defense counsel filed their motion to dismiss, when the military judge issued his ruling, or when SSgt Csiti was convicted and sentenced at his court-martial. These circumstances create a reasonable inference that Capt C.P. either knew his license was suspended or, having learned of the suspension, knowingly failed to correct his false statement. By failing to maintain an unsuspended license to practice law as of ten months before SSgt Csiti's preliminary hearing, Capt C.P. acted in a manner that "might tend" to result in his disqualification.[192]

A judge advocate "shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."[193] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[194] Capt C.P. committed prosecutorial misconduct when he falsely represented at the preliminary hearing that he had not acted in any manner that might tend to disqualify him in that proceeding.[195]

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[191] App. Ex. XXV, para. 5.
[192] *See United States v. Brissa*, 2023 CCA LEXIS 97, at *13 (A.F. Ct. Crim. App. 27 Feb. 2023).
[193] AFI 51-110, *Professional Responsibility Program*, Atch 2, Rules 3.3(a), 3.3(a)(1) (11 Dec. 2018); *see also* AFI 51-110, Atch 7, Standard 3-2.8(a) ("It is unprofessional conduct for a trial counsel intentionally to misrepresent matters of fact or law to the court.").
[194] AFI 51-110 at Ch. 8, Rule 8.4(c); *see United States v. Lewis*, 42 M.J. 1, 4 (C.A.A.F. 1995) (finding counsel are ethically required to be candid with the courts when they make factual assertions).
[195] *See* AFI 51-110, Atch 2, Rules 3.3(a)(1) (A judge advocate "shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."); AFI 51-110, Atch 7, Standard 3-2.8(a) ("It is unprofessional conduct for a trial counsel intentionally to misrepresent matters of fact or law to the court.").

This Court has reviewed a similar case involving the same trial counsel in *United States v. Brissa.*[196] The same Capt C.P. served as trial counsel at SrA Brissa's court-martial. In *Brissa*, this Court held that the assistant trial counsel committed prosecutorial misconduct when he "knowingly made a false statement to the court-martial or, having learned of its falsity, failed to correct the error."[197] However, the Court concluded the appellant in that case could not "demonstrate material prejudice to his substantial rights."[198] The Court asserted that "[a]lthough Capt C.P.'s license was suspended, the Government was also represented by Maj JP, a senior trial counsel who was properly detailed, certified, and sworn."[199]

This case is distinguishable from *Brissa* because at SSgt Csiti's preliminary hearing, Capt C.P. was the *sole* trial counsel. There was not another trial counsel who had been properly detailed, certified, and sworn.[200] Not only did Capt C.P. represent the Government as the sole trial counsel at the hearing, admitting evidence and making an argument, but he also drafted a legal memorandum making assertions and analysis of law as to the admissibility of specific evidence.[201] In contrast to *Brissa*, SSgt Csiti did not plead guilty—his trial was litigated. Additionally, SSgt Csiti has alleged other errors by Capt C.P. and by the military judge (see Issue II).[202]

Capt C.P.'s conduct was severe. Serving as trial counsel with a suspended law license and asserting that he had not acted in any manner that might tend to disqualify him from the preliminary hearing—even though his law license had been suspended almost a year prior—is severe misconduct. The military judge did not take any curative efforts. Finally, as highlighted above in

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[196] 2023 CCA LEXIS 97 (A.F. Ct. Crim. App. 27 Feb. 2023).
[197] *Id.* at *14-15.
[198] *Id.* at *15.
[199] *Id.*
[200] PHO Ex. 8, Part 1 of 2, 01:46-02:11.
[201] App. Ex. XXIII, p.14-15.
[202] *See Brissa*, 2023 CCA LEXIS 97, at *15-16.

Issue I, the weight of the evidence did not support a conviction.

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

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on 22 January 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	No. ACM 40386
Staff Sergeant (E-5) **DANIEL R. CSITI**, USAF, *Appellant.*	)	Before a Special Panel 21 February 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER STAFF SERGEANT CSITI'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE A.H. WAS CAPABLE OF CONSENTING—AND DID CONSENT—TO SEXUAL ACTIVITY WITH STAFF SERGEANT CSITI?

II.

WHETHER THE MILITARY JUDGE ERRED IN DENYING STAFF SERGEANT CSITI'S MOTION TO DISMISS FOR A DEFECTIVE PREFERRAL AND A DEFECTIVE PRELIMINARY HEARING WHEN THE SOLE TRIAL COUNSEL WAS NOT LICENSED TO PRACTICE LAW?

III.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY FALSELY REPRESENTING THAT HE HAD NOT ACTED IN ANY MANNER THAT MIGHT TEND TO DISQUALIFY HIM FROM STAFF SERGEANT CSITI'S PRELIMINARY HEARING?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

A.H. testified at the court-martial. (R. at 216.) She was stationed at Malmstrom AFB from April 2017 through July 2021, and she met Appellant in April or May 2017. He was her missile feeding trainer and they then became close friends. (R. at 217.) They would hang out at least once per week. A.H. has a three-year-old son. (R. at 218.) A.H. considered Appellant her son's godfather. Appellant had expressed a romantic interest in A.H., but she rejected him, multiple times, and told him it "wasn't going to happen." Once, when she was pregnant, A.H.'s ex-husband left her without support and without many friends. Appellant was a very good emotional support person for her and helped A.H. buy things for her son. When she was five to seven months pregnant, Appellant told her he (Appellant) had feelings for her. (R. at 219.) After A.H. told Appellant it wasn't going to happen, they stopped talking for a couple of months. There were as many as five incidents when she rejected Appellant. (R. at 220.)

On 21 May 2021, A.H. had plans to go out to dinner. (R. at 229.) The plan was to have a "girl's night out" with Ms. N.S. and SSgt N.A. SSgt N.A. is not a girl but he was often included in girl's night. (R. at 241.) Initially, Appellant was going to part of girl's night, but A.H. told him he could not be a participant. Then, when A.H.'s babysitter fell through, she asked Appellant to watch her son. (R. at 242.) Prosecution Exhibit 2 is a set of text messages between A.H. and Appellant in which he agrees to her request to babysit her son. (R. at 243-44.) Appellant came over to A.H.'s house on Malmstrom Air Force Base at approximately 1730 hours. While getting ready, A.H. drank homemade mead, which Appellant would make and bring over to her house on occasion. (R. at 245.) A.H. drove to the restaurant, where she had a glass of wine. (R. at 246.) After eating three-quarters of her pizza, A.H. threw up

and then continued to drink two to three glasses of wine. She felt too intoxicated to drive, so SSgt N.A. drove her home, which was 10 to 15 minutes from the restaurant. (R. at 247.) A.H. could not recall getting out of SSgt N.A.'s car, but she remembered being in her kitchen and talking with Appellant. A.H. had "hard seltzer" alcoholic beverages. Appellant told her she had three, four, or five hard seltzers. (R. at 248.) SSgt A.H. was "[p]retty intoxicated" and did not recall everything.

The next thing she remembered was waking up in the morning in her bed. She was completely naked, which is unusual, because she usually sleeps with clothes on. It was also unusual that the sheets were not on the bed. (R. at 249.) A.H. woke up and felt sore in her vaginal area. She got dressed and went downstairs. Her son was in his bedroom, and Appellant was still in her house. Appellant was acting a little bit more quietly than usual. A week later, A.H. invited Appellant over for dinner. A.H. was drunk. She threw up and continued drinking. (R. at 250.) A.H. recorded the conversation with Appellant on her phone because he told her he had performed oral sex on her when she was drunk. (R. at 251.) A.H. felt shocked. It had been a whole week, and she had no indication it had happened. She would not have wanted him to perform oral sex on her. A.H. was not attracted to Appellant, and she had told him nothing would ever happen between them besides friendship. (R. at 252.) If A.H. is going to have sex, she grooms herself and has better hygiene. (R. at 252-53.) There were no circumstances in which A.H. would have agreed to Appellant performing oral sex on her, even if she was very intoxicated and her inhibitions were low. When Appellant told A.H. what he had done the prior week, she made recordings of the rest of the conversation, what are four clips on the CD in Prosecution Exhibit 3. (R. at 253.)

A.H. testified about the contents in the recordings on Prosecution Exhibit 3 from 21 May 2021, during which Appellant told her that her body was "perfect," and she responded, "Show me." However, A.H. did not recall such a conversation from 21 May 2021. (R. at 256.) However, she would not have said something like that. (R. at 257.)

A.H. confirmed the authenticity of photographs OSI agents took of her house. (R. at 257-59.) One of the photographs, on page 5 of Prosecution Exhibit 4, depicts a dent in the wall in the dining room area, where she hit when she fell over her chair on 21 May 2021. (R. at 260.)

During OSI's investigation of Appellant, they asked A.H. to make a recording with him on 29 May 2021. (R. at 262.) The recording was admitted as Prosecution Exhibit 5. (R. at 263-64.) In the recording, Prosecution Exhibit 5, Appellant stated the following: When A.H. got dropped off by SSgt N.A., he (Appellant) helped A.H. into the house (Pros. Ex. 5, 02:24-02:34),[1] and then they sat on the floor between the kitchen and the laundry room floor (id., 02:36-02:47). For about an hour, they talked on the floor about how Appellant was coming off as more and more "pissed" about watching her son, until A.H. decided she wanted to go to bed. (Id., 02:50-03:11). Then, Appellant helped A.H. to go upstairs. (Id., 03:12-03:14). While A.H. changed, Appellant watched TV and had a slice of pizza. (Id., 03:15-03:22.) Then A.H. came back down, and they talked more about Appellant being angry about watching her son. (Id., 03:24-03:37.) A.H. sat in one chair, and they talked about SSgt K.I., her boyfriend at the time, and how things were not going well between her and her boyfriend. (Id., 03:37-03:57.) Then, A.H. leaned on the chair, and it tipped over, causing the dent in the wall, so he carried her elsewhere. (Id., 03:58-04:17.) Appellant said on the recording that A.H. was drunk and laughed. (Id., 04:18-04:22.) He agreed that she was "fucked up." (Id., 04:23-04:33.) After they

[1] Throughout this Answer, time citations are to the locations in the recordings' timer.

made a few more jokes about SSgt K.I., Appellant joked that his own body was better, A.H. said her body was not great, and Appellant said her body was perfect. (Id., 04:34-04:57.) A.H. then told Appellant, "Show me." (Id., 04:58-05:02.) Then, A.H. took off her pants and her panties. (Id., 05:03-05:07.) They kissed for a few moments and Appellant "went down orally" (performed oral sex on her) on the couch. (Id., 05:18-05:34.) It was about one minute and then A.H. pushed Appellant away with one leg and said she had to pee. 05:37-05:45; 16:53-16:58. Appellant asked A.H. if she wanted to put her panties back on, and she nodded, so he helped her put her underwear back on. (Id., 5:47-05:55; 16:59-17:17.) Then, A.H. sat back down, Appellant asked her if she had to pee, and A.H. responded in the negative, said she was just tired, and sat back down. She laid down and he put a blanket over her because she "knocked out quick." (Id., 05:46-06:13). Appellant slept on the ground where the carpet meets the wood, with a pillow, for a couple of hours and then onto the couch, where she later woke him up to get her truck. (Id., 06:13-06:35.) Appellant denied anything else happened. A.H. told Appellant she needed to know if she needed "Plan B" and said she woke up sore. He denied putting anything into her. (Id., 06:36-07:14.) He said, "That's why I'm worried. I don't know what else I did. . . . . I never inserted. I never came." (Id., 07:15-07:49.) When confronted about how Appellant could tell how "gone" drunk A.H. was, he said, "And that's where it was my fault for not telling myself, 'No.' And to just back away from it instead." (Id., 08:16-08:45). Appellant told A.H. she had three or four Truly's (alcoholic beverages) after she returned home on 21 May 2021. (Id., 08:46-08:59.) Appellant apologized to A.H. (Id., 12:34-14:32.) During the apology, Appellant said, "However you deemed it to be. If you were to make a phone call or something, I did what I did." (Id., 13:58-14:09.)

During cross-examination, A.H. confirmed that, by 2018, she and Appellant were "hanging out all the time," and she considered herself to be best friends with Appellant. They confided in each other. In 2019, he bought things for her baby and her household. (R. at 277.) Appellant was her "go to" person. He frequently stayed at her house. (R. at 278.) Appellant often stayed at A.H.'s house when she had been drinking. (R. at 279.) They were best friends, except for a couple of months in 2019 when he wanted a romantic relationship with her, but he respected that boundary. (R. at 280.) In 2018, A.H. was 115 pounds and five feet tall. Every time she drank, which was multiple times per week, she drank to the point of being drunk. She frequently experienced gaps in her memory from alcohol consumption. (R. at 281.) During a party in February or March 2020 at A.H.'s house, when people were giving lap dances to others at the party, A.H. chose to give one to Appellant. (R. at 302-04.) When A.H. danced with Appellant, she intentionally did so in a comical, not sexual, way. (R. at 333.) During the lap dance A.H.'s boyfriend at the time was there, and she was laughing because she danced for Appellant as a joke. (R. at 336-37.)

In May 2021, A.H. had been dating SSgt K.I. for quite a while, but he had recently transferred to the Presidio in California. (R. at 305.) When A.H. vomited on 21 May 2021 after drinking wine and eating pizza, it was intentional to avoid the calories of the pizza. (R. at 309.) Back at her home, the "spiked seltzers" Appellant offered her, and she drank, were about five percent alcohol, close to the level in a beer. (R. at 311-12.)

On 28 May 2021, during the dinner when Appellant eventually told A.H. about their sexual contact on 21 May, A.H. had induced herself to vomit to avoid having alcohol in her system. (R. at 322.) After Appellant told A.H. what happened, she asked him to leave, and she called the Security Forces and her boyfriend. (R. at 323.) She continued to drink and was

intoxicated when law enforcement came to interview her. (R. at 323-325.) In 2021, A.H. drank daily to the point of intoxication and had memory gaps. (R. at 325.) It was common for A.H. to drink daily, to have memory gaps, and to black out from alcohol. (R. at 326.) It was not uncommon for A.H. to have said something or done something that she did not remember. (R. at 328-29.) However, it was not possible that A.H. asked Appellant to show her that she was attractive or that she pulled her own pants down. (R. at 331.)

SSgt N.A. testified at the court-martial. He was stationed at Malmstrom AFB from December 2016 to December 2021. A.H. was his supervisor when he started there. (R. at 349.) SSgt N.A. was with A.H. and Ms. N.S. during the girl's night on 21 May 2021. They were at dinner from 1700 or 1730 hours until 2000 or 2030 hours. (R. at 355.) A.H. had three or four glasses wine with dinner. She was tipsy, laughing and giggling in his car. (R. at 356.) SSgt N.A. drove SSgt A.H. home because he could tell she had too much to drink to drive. (R. at 356-57.) While sitting in her driveway and listening to music in SSgt N.A.'s car, A.H. was slurring "here and there." (R. at 357.) Appellant came out of the house to help A.H. from the car to her house. (R. at 358.) On cross-examination, SSgt N.A. testified A.H. swayed from side to side when walking from the restaurant to his car. (R. at 360-61.)

TSgt L.E. testified at the court-martial. (R. at 387.) He described a conversation he had with Appellant in 2020 about Appellant's feelings for A.H. (R. at 388.) Appellant told TSgt L.E. Appellant cared about A.H., but she did not reciprocate with him. (R. at 389.)

Ms. N.S. testified about the May 2021 incident. (R. at 417.) Ms. N.S. had alcohol with A.H. a significant number of times. On the night in May 2021, Ms. N.S. could tell A.H. was drunk because she (A.H.) "spaced out," saying something and looking somewhere else, and then becoming quiet. (R. at 418-19.) A.H. was swaying when she walked to the

bathroom in the restaurant. A.H. continued to drink after she came back from the bathroom to the table, possibly three more glasses of wine. (R. at 419.)

During the defense case, victim's counsel brought to the military judge's and parties' attention a concern related to A.H.'s trial testimony. (R. at 459-62.) That is, the military judge had earlier asked A.H. if she remembered the conversation she had with Appellant when she woke up the morning after the sexual assault. She had testified that she did not remember. However, A.H. testified, when called to testify in the defense case, that she misspoke and, when testifying during the government's case, did recall the conversation with Appellant. (R. at 468.) Thus, A.H. admitted that she had lied in her earlier testimony because she wanted to cover up her own misconduct in leaving her young child alone when she went with Appellant to get the truck and pick up breakfast from a restaurant. (R. at 469, 478-79.)

SSgt T.M. testified at the court-martial regarding the 2018 charged incident. (R. at 494-97, 500-01.) He also testified about the 2018 time that Appellant and A.H. danced with their bodies close, with her touching Appellant's body, with her legs hooked around Appellant's legs, and with her grinding her rear into Appellant's front at the Buckle Up bar. (R. at 497-500, 501.)

Dr. E B testified for the defense as an expert in forensic psychology. (R. at 503, 507.) She described how drinking alcohol creates disinhibition that increases with intoxication, causing the person to act more on their impulses, and reduces attention and memory. (R. at 507-09.) The highest levels of intoxication can lead to confusion, stupor, and passing out. (R. at 509.) Ms. B testified regarding alcohol tolerance, which prevents some people, especially chronic drinkers, from showing symptoms of intoxication until a much higher level of intoxication. (R. at 511.) She also testified regarding blacking out, which is an impact on long-term memory from quickly rising blood alcohol content, and how a person can make decisions during a black-out. (R.

at 511-17.) Ms. B also testified regarding false memories, confabulation, retrospective bias, and source memory errors. (R. at 517-22.)

On cross-examination, Ms. B testified about the ability to remember more clearly if an unusual, emotional, or traumatic thing takes place. (R. at 523-24.) She confirmed that slurred speech and balance problems are associated with alcohol-induced impairment. (R. at 528.)

ARGUMENT

I.

APPELLANT'S CONVCTION WAS LEGALLY AND FACTUALLY SUFFICIENT WHERE APPELLANT KNEW THE VICTIM REJECTED ANYTHING BUT A PLATONIC FRIENDSHIP WITH HIM, APPELLANT KNEW THE VICTIM WAS ALREADY INTOXICATED WHEN HE PROVIDED HER WITH ADDITIONAL ALCOHOLIC BEVERAGES, AND APPELLANT KNEW AND SHOULD HAVE KNOWN SHE WAS INCAPABLE OF CONSENTING TO THE SEXUAL ACT HE COMMITTED UPON HER.

Standard of Review

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

Law

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (2018). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal

sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

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

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

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

Pending before the Court of Appeals for the Armed Forces is the impact of the new Article 66 on the courts' review of factual sufficiency. That is, they have granted review of the issue of

whether, as the Navy-Marine Court of Criminal Appeals held, there is a rebuttable presumption of guilt on appeal:

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

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

Analysis

In this case, the evidence overwhelmingly demonstrates Appellant had for several years wanted a romantic relationship with A.H. but she rejected him; that A.H. drank to high levels of intoxication daily and Appellant knew it; that A.H. was "fall-over drunk" on 21 May 2021 and Appellant knew it; that Appellant saw his opportunity to have sexual contact with A.H.; that Appellant plied A.H. with yet more alcohol beverages; and that Appellant took advantage of A.H. and committed a sexual act upon her when she was incapable of consenting and he knew it and certainly should have known it.

The Specification of the Charge for which Appellant was found guilty alleged:

> [T]hat [Appellant], did, at or near Malmstrom Air Force Base, Montana, on or about 21 May 2021, commit a sexual act upon [A.H.] by causing contact between his mouth and her vulva, when

> [A.H.] was incapable of consenting to the sexual act due to impairment by alcohol, and that condition was known or reasonably should have been known by [Appellant].

ROT, Vol. 1, DD Form 458, Charge Sheet, Entry of Judgment; R. at 597.

For the court-martial to find Appellant guilty of sexual assault under Article 120, UCMJ, the United States was required to prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon A.H., (2) A.H. was incapable of consenting to the sexual act due to impairment by alcohol, and (3) Appellant reasonably should have known of that condition. *See* Manual for Courts-Martial (2019 ed.), pt. IV, para. 60.b.(b)(2)(f). The term "incapable of consenting" means the person is (A) incapable of appraising the nature of the conduct at issue; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue. Id. at para 60.a.(g)(8).

Appellant argues A.H. was not only was capable of consent, but she did in fact consent to sexual activity with him. (App. Br. at 7.) He asserts in his false, self-serving version of events that (1) A.H. invited him to have sexual contact by saying, "Show me," after he confirmed that she had a nice body; and (2) A.H. took off her pants and underwear to engage in sexual activity with Appellant. Id. at 9. Appellant's repeating seven times in his Assignment of Errors the story of A.H. taking off her pants and underwear (App. Br. at 3, 9, 11, 12, 13, 14, 16) does not make it any more truthful than telling it just once. Appellant claims A.H. "demonstrated, through her words and actions over the course of the evening, that she was capable of consenting to sexual activity." (App. Br. at 9.) The military judge was able, during witness testimony, to view the facial expressions, postures, and bodily movements, and hear vocal tones, volume, and cadence, and in his guilty verdict he inherently found A.H. credible, and Appellant's account not credible.

The evidence elicited at trial, including testimony and recordings, demonstrates Appellant's cover story to be fiction. Appellant had wanted a relationship with A.H. for several years, but she had no such interest. (R. at 219, 388-89.) In fact, a few years prior to Appellant's crime, A.H. had broken off the friendship with him for a couple of months when he expressed his romantic interest in her and she told him it was "never going to happen." (R. at 219-20, 252, 279.)

On the other hand, Appellant was A.H.'s best friend for several years. (R. at 217, 277-80.) He was as familiar as any of her drinking buddies that A.H. drank alcohol to intoxication multiple times a week. (R. at 281, 325.) She would slur her words, sway when walking, change her demeanor, and black out. (R. at 281-82, 325, 328-29, 354, 357, 419.)

On 21 May 2021, Appellant knew A.H. was going out and drinking. He was initially part of the planned night out, but when her babysitter fell through, A.H. convinced Appellant to stay at her home and watch her son. (R. at 242.) Appellant provided A.H. with "strong" homemade mead before she went out with friends. (R. at 245.) Appellant knew that A.H. had to be driven home by SSgt N.A. because A.H. was too drunk to drive. (R. at 247, 356-57; Pros. Ex. 5, 02:24-02:34.)[2] Appellant came out of the house to assist A.H. into her house (R. at 358), and she had been swaying as she walked that night. (R. at 360-61, 419.)

How did Appellant help his intoxicated friend A.H.? He gave her three to five more "Truly" hard seltzer alcoholic drinks. (R. at 248, 311-312; Pros. Ex. 5, 08:46-08:59.) Appellant saw A.H. so drunk that she fell from her chair into the wall, denting the wall. (R. at 260;

[2] Appellant claims A.H. "[d]emonstrated executive function" because "she knew she should not drive due to her consumption of alcohol and asked [SSgt] N.A. for a ride." (App. Br. at 10.) To the contrary, it was SSgt N.A. who could see that she was intoxicated and offered her the ride. (R. at 356.)

Pros. Ex. 4, p. 5; Pros. Ex. 5, 03:58-04:13.) Then, Appellant admitted he carried her. (Pros. Ex. 5, 04:13-04:16.) He could tell she was so drunk, it caused him to laugh during the recording when he confirmed it, and he could see she was "fucked up." (Id., 04:16-04:35.)

A.H. testified she would never have agreed to sexual activity even if intoxicated. (R. at 253.) She testified (1) she did not recall the "show me" conversation, (2) she would not say such a thing, and (3) it was not possible she would have taken off her pants and underwear for Appellant. (R. at 256-57, 331.) In light of A.H.'s past rejection of Appellant, and her actions after the sexual assault, the military judge correctly believed A.H.'s testimony and disbelieved Appellant's story.

A.H.'s actions right after learning of Appellant's sexual act upon her demonstrated her resolve in rejecting him. Immediately after learning from Appellant that he had committed a sexual act upon her the prior week, she recorded the rest of the conversation (R. at 251; Pros. Ex. 3), told him to leave, and then contacted law enforcement and made a second recording at their direction (R. at 262-63, 323; Pros. Ex. 5), corroborating her lack of consent.

Appellant mischaracterizes how much A.H. remembers and how much she does not remember, arguing, "There is only a short period of time in which [A.H. claimed she did not remember the events of the evening – the actual sexual conduct." (App. Br. at 10.) It was actually a lengthy period of time of several hours she could not recall. She remembered getting out of SSgt N.A.'s car, then talking with Appellant in her kitchen and drinking hard seltzers. (R. at 247-48.) The next thing she recalled was waking up the next morning, naked and feeling sore in her vaginal area, and going downstairs to find Appellant and her son still sleeping. (R. at 249-50.)

In a telling portion of the recorded conversation between Appellant and A.H., when she confronted him about how "gone" drunk she was, Appellant said, "And that's where it was my

fault for not telling myself, 'No.' And to just back away from it instead." (Pros. Ex. 5, 08:16-08:45). Appellant knew A.H. was too drunk to consent, and he knew he should not have committed a sexual act upon her. Appellant also demonstrated his consciousness of guilt when he apologized and said he understood if A.H. would call law enforcement on him, "However you deemed it to be. If you were to make a phone call or something, I did what I did." (Id., 13:58-14:09.)

The evidence was legally sufficient because a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, would find Appellant knew and certainly should have known A.H. was incapable of providing consent. Additionally, this Honorable Court should find the evidence was factually sufficient, because the Court should not be "clearly convinced the finding of guilty was against the weight of the evidence." The weight of the evidence shows that A.H. was incapable to consenting and that Appellant knew it. Since the findings were legally and factually insufficient, this Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS FOR ALLEGED DEFECTIVE PREFERRAL AND ALLEGED DEFECTIVE PRELIMINARY HEARING WHERE TRIAL COUNSEL'S LAW LICENSE HAD BEEN SUSPENDED BUT HE WAS STILL AN OFFICER AND DESIGNATED AS A JUDGE ADVOCATE.

Additional Facts

In defense counsel's motion to dismiss (App. Ex. XXIII), Appellant represented the following facts, with which trial counsel agreed (App. Ex. XXIV) and the Military Judge adopted in his findings (App. Ex. XXV):

1. In 2019, Capt C.P. was licensed to practice law in the State of Tennessee. He received his commission and a direct appointment to [the] Judge Advocate

General's Corps on 13 January 2020, and was designated a Judge Advocate in September 2020.

2. On or About 15 March 2021, Capt C.P.'s license was suspended by the Tennessee Bar. It remains suspended to [the day of Appellant's motion]. He did not inform the Air Force of his Bar license being suspended, and represented during his annual certification that he was licensed and in good standing. He continued to perform Judge Advocate functions.
3. On 29 November 2021, Charges were preferred in this case by Lt Col [C.A.P.]. Capt C.P. swore in [the accuser] for the preferral. (See Charge Sheet.)
4. On 26 January 2022, an Article 32 hearing was held. (Atch.) Capt C.P. represented the Government as the sole trial counsel in the Art 32 hearing. In addition to admitting evidence and argument, he drafted a legal memorandum making assertions and analysis of law as to the admissibility of specific evidence. (Atch.)
5. On 5 March 2022, the Malmstrom AFB Staff Judge Advocate became aware that Capt C.P.'s license was suspended. He was removed from all legal responsibilities at the time, and continues to work in a different, non-legal office to present day. He is still a designated Judge Advocate and Commissioned Officer.

App. Ex. XXV, p. 1. Ultimately, the military judge found the defense failed to demonstrate Capt C.P. improperly administered the oath to Appellant's accuser during preferral or failed to meet the requirements to represent the government at the Article 32 hearing. Id., pp. 3-4.

Standard of Review

This Court reviews a military judge's rulings on motions to dismiss for abuse of discretion. United States v. Douglas, No. ACM 38935, 2017 CCA LEXIS 407, at *19 (A.F. Ct. Crim. App. 15 Jun. 2017) (unpub. op.) (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (internal citation omitted). The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. Id. Where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted. Id.

Law

1. Designation as a "Judge Advocate"

The term "judge advocate" means an officer of the Judge Advocate General's Corps of the Army, the Navy, or the Air Force. Manual for Courts-Martial, Article 1, para. 13(A).

"Only TJAG [The Judge Advocate General] is authorized to designate [Regular Air Force] . . . officers as judge advocates and remove that designation." Air Force Instruction (AFI) 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development*, para. 6.2.1 (29 Nov. 2018):

> To be designated as a judge advocate, officers must . . . [b]e a graduate of a law school that was accredited or provisionally accredited by the American Bar Association at the time of graduation; and . . . [b]e in active (or equivalent) status, in good standing, and admitted to practice before the highest court of a United States (US) state, commonwealth or territory, or the District of Columbia.

Id. at paras. 6.2.2, 6.2.2.1, 6.2.2.2. "Once designated, a judge advocate must maintain current eligibility to actively practice law before the highest court of the jurisdiction where they are licensed." *Id.* at para. 6.31.

A judge advocate's designation or certifications or both may be withdrawn for good cause, including *inter alia* "fail[ure] to maintain professional licensing standards." AFI 51-101, paras. 7.3, 7.3.1. A staff judge advocate or other Air Force Judge Advocate General Corps supervisor "submit[s] recommendations to withdraw a judge advocate's designation, certification, or both through judge advocate supervisory channels to AF/JA." *Id*. at para. 7.5.

> When TJAG receives a recommendation or has sufficient basis to consider withdrawal, the judge advocate is notified of the proposed action and is afforded an opportunity to present information to show cause why the action should not be taken. The judge advocate will be given at least three duty days to respond. TJAG makes the final decision on withdrawal of designation or certification.

Id. "An officer whose designation has been withdrawn is not authorized to perform the duties of a judge advocate . . . unless authorized by TJAG." *Id*. at para. 7.

Air Force Instruction (AFI) 51-110 states that TJAG may dispense with an initial review and formal inquiry and, after affording the attorney written notice and an opportunity to respond in writing, may take action in a case where the attorney has been disbarred or suspended from the practice of law, by any Federal, State, or local bar. (AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development,* para. 8.3.2 (29 Nov. 2018, as amended by DAFI51-101_DAFGM2022-01, reissued 2 Jun. 2022).)

Changes in Licensing After Admission to Practice

Once an attorney is found competent and admitted to practice law in a licensing jurisdiction, subsequent changes to his or her bar membership status do not render that counsel incompetent or disqualified. In re Ruffalo, 390 U.S. 544 (1968), citing Theard v. United States, 354 U.S. 278 (1957). A lawyer whose license has been suspended for failure to pay dues still may "serve as 'counsel' within the meaning of the Sixth Amendment. *Id.* What matters for constitutional purposes is that the legal representative was enrolled after the court concluded that he was fit to render legal assistance. Id. In Reese v. Peters, 926 F.2d 668 (7th Cir. 1991), the 7th Circuit specifically said that a lawyer whose license had been suspended for failure to pay dues still may serve as "counsel" within the meaning of the Sixth Amendment. Id. at 670.

Detailing as Trial Counsel

Trial Counsel and assistant trial counsel detailed for a special court-martial and assistant trial counsel detailed for a general court-martial must be determined to be competent to perform such duties by the Judge Advocate General, under such rules as the President may prescribe. Article 27(c)(2), UCMJ; 10 U.S.C. § 827(c)(2).

Any commissioned officer may be detailed as trial counsel in special courts-martial if that person (i) is determined to be competent to perform such duties by the Judge Advocate General; and (ii) takes an oath in accordance with Article 42(a), certifies to the court that the person has read and is familiar with the applicable rules of procedure, evidence, and professional responsibility, and meets any additional qualifications the Secretary concerned may establish. R.C.M. 502(d)(1)(B).

"Any person detailed as trial counsel or assistant trial counsel for a SPCM [Special Court-Martial] must be designated as a judge advocate under AFI 51-101 . . . ." Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, para. 10.3.2.2 (18 Jan. 2019).

For preferral of charges, R.C.M. 307(b)(1) requires, "The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths."

For hearings pursuant to Article 32, UCMJ, R.C.M. 405(d)(2) requires, "A judge advocate, not the accuser, shall serve as counsel to represent the Government." AFI 51-201, para. 12.2.2.1, similarly states, "A judge advocate, who is not the accuser, serves as counsel to represent the United States."

Analysis

In this case, the parties agree that Capt C.P. was, at the time he swore Appellant's accuser to the Charges during preferral, and when he represented the government at the Article 32 preliminary hearing, a commissioned officer and a designated Judge Advocate. Considering these and other material facts agreed upon by the parties and adopted by the military judge, Appellant cannot now claim the military judge's findings were clearly erroneous. As the military judge announced during his oral ruling, "While Captain [C.P.] may rightly be subject to other

disciplinary consequences for the choices he made, those choices and the suspension of his license do not appear to automatically disqualify him from performing the functions as a judge advocate for purposes of the UCMJ." R. at 177.

Moreover, considering this Court's decision in United States v. Brissa, No. ACM 40206, 2023 LEXIS CCA 97 (A.F. Ct. Crim. App. 27 Feb. 2022), *pet. denied*, 83 M.J. 388 (C.A.A.F. 2023) (unpub. op.), and the statutes and regulations cited above in this Answer, Appellant cannot demonstrate the Military Judge erroneously applied the law.

Regarding preferral, R.C.M. 307(b)(1) does not require the person administering the oath to the person preferring the charges to be a Judge Advocate. Rather, they must merely be a commissioned officer, which Capt C.P. was on the day of preferral (and continues to be).

Regarding the preliminary hearing pursuant to Article 32, UCMJ, Capt C.P. was a Judge Advocate at the time of the hearing (and continues to be), as required by R.C.M. 405(d)(2)and DAFI 51-201, para. 12.2.2.1. Thus, the preliminary hearing was not defective. This Court should deny this assignment of error.

III.

EVEN IF TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE STATED THAT HE HAD NOT ACTED IN ANY MANNER THAT MIGHT TEND TO DISQUALIFY HIM FROM APPELLANT'S PRELIMINARY HEARING, WHERE TRIAL COUNSEL'S LAW LICENSE HAD BEEN SUSPENDED BUT HE WAS STILL DESIGNATED AS A JUDGE ADVOCATE, APPELLANT SUFFERED NO PREJUDICE.

Standard of Review

Prosecutorial misconduct is a question that this Court reviews *de novo*. United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). *See* Brissa, 2023 CCA LEXIS at *5.

Law

Appellant's Burden to Demonstrate Prejudice

Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g. a constitutional provision, a statute, a Manual Courts-Martial rule, or an applicable professional ethics canon. United States v. Pabelona, 76 M.J. 9 (C.A.A.F. 2017) (internal citation omitted). It is described as behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness that should characterize the conduct of such an officer in the prosecution of a criminal offense. Id.

If an appellate court finds prosecutorial misconduct occurred, the next step is to assess for prejudice. A finding of prosecutorial misconduct does not automatically result in relief for an appellant. Instead, relief is merited only if the misconduct "actually impacted on a substantial right of the accused." Pabelona, 76 M.J. at 12 (quoting United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005). "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial.'" Fletcher, 62 M.J. at 184 (internal citation omitted).

Analysis

This Court in Brissa assumed for purposes of its analysis that Appellant had demonstrated prosecutorial misconduct. 2023 CCA LEXIS at *15. The Court then concluded the appellant "cannot demonstrate material prejudice to his substantial rights." Id. The Court noted:

> Military appellate courts have applied the Article 59(a), UCMJ, material prejudice standard even in cases where trial counsel was actually ineligible to participate in the court-martial. *See, e.g.*, Wright v. United States, 24 C.M.A. 290, 2 M.J. 9, 10-11, 52 C.M.R. 1 (C.M.A. 1976) (noting Government conceded trial counsel had fraudulently obtained certification and was not qualified, but testing for prejudice and finding none); United States v. Bressler, No. ACM 38660, 2016 CCA LEXIS 746, at *10-11 (A.F Ct. Crim. App. 16 Dec. 2016) (unpub. op.) (finding no prejudice to

> appellant where trial counsel was also accuser); United States v. Roach, No. ACM S31143 (rem), 2011 CCA LEXIS 94, at *5-7 (A.F. Ct. Crim. App. 19 May 2011) (unpub. op.) (testing trial counsel's failure to take oath required by Article 42(a), UCMJ, for material prejudice).

Id. at *16-17. Thus, this Court found, the appellant in Brissa had not demonstrated he was entitled to relief.

Although there is no evidence on the record that Capt C.P. definitively knew his license had been suspended at the time of the Article 32 hearing, the United States agrees that the incident was concerning. But like in Brissa, Appellant suffered no prejudice from Capt C.P.'s participation in various stages of his court-martial.

Appellant seeks to distinguish his case from Brissa, arguing, "[A]lthough Capt C.P.'s license was suspended, the Government was also represented by Maj JP [in Brissa], a senior trial counsel who was properly detailed, certified, and sworn." App. Br., p. 26 (citing Brissa, 2023 LEXIS CCA at *15). Appellant emphasizes Capt C.P. was the sole counsel at his preliminary hearing, that Capt C.P. drafted a legal memorandum regarding admissibility of certain evidence for the preliminary hearing officer, and Appellant pleaded not guilty and litigated the case on the merits. However, Appellant failed to allege any specific prejudice or to address or acknowledge the cases this Court cited in Brissa. Additionally, Capt C.P. was replaced by other trial counsel for Appellant's court-martial, as opposed to Brissa, for whom Capt C.P. participated as assistant trial counsel. And, as we pointed out in Brissa, an appellant is not entitled to a qualified trial counsel. To the contrary, an appellant would likely benefit from an incompetent or unqualified prosecutor (even if only disqualified for delinquent bar fees); however, the requirement for a qualified prosecutor was no doubt put in place for the benefit of the Government.

Appellant's assignment of error for having a prosecutor at his Article 32 hearing who had his bar license suspended for unpaid bar fees is unsupported by statute or case law. Appellant has failed to demonstrate prejudice, and this Court should deny his request for relief.

CONCLUSION

The United States respectfully requests this Honorable Court deny the relief Appellant requests and, instead, affirm the findings and sentence.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 February 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **DANIEL R. CSITI**, United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before a Special Panel No. ACM 40386 27 February 2024

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

COMES NOW, Appellant, Staff Sergeant (SSgt) Daniel R. Csiti, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the United States' Answer to Assignments of Error, filed on 21 February 2024 (hereinafter Gov. Ans.). SSgt Csiti primarily rests on the arguments contained in the Brief on Behalf of Appellant, filed on 22 January 2024, and submits additional arguments for the issues listed below.

I.

Staff Sergeant Csiti's conviction for sexual assault is legally and factually insufficient because A.H. was capable of consenting—and did consent—to sexual activity with Staff Sergeant Csiti.

1. If SSgt Csiti's version of events is "false," then what evidence is the Government relying on for his conviction?

The Government brandishes SSgt Csiti's brief as a description of "his false, self-serving version of events."[1] If his version of the events is false, then what evidence is the Government relying on for his conviction? Not a single person who testified at trial offered an eye-witness account of the facts and circumstances that occurred surrounding the alleged sexual act. A.H.

[1] Gov. Ans. at 12.

claimed she had no memory of any sexual activity with SSgt Csiti.[2] If SSgt Csiti was not telling the truth, then this Court cannot know what exactly happened that night.

The only version of events offered at trial comes from the recordings of SSgt Csiti, introduced by the Government as evidence for consideration by the court-martial.[3] A.H. claimed she "would not have consented" to SSgt Csiti performing oral sex on her and she "[did not] think" it was possible for her to give the impression that she was consenting to sexual activity with SSgt Csiti.[4] But A.H. "[did not] actually remember anything about what happened."[5] Regardless of what A.H. claims, in a sober state of mind, what she would or would not have done, she *did not remember what happened* so she cannot speak to any version of events surrounding the sexual act between her and SSgt Csiti.

A.H. responded to SSgt Csiti's comment that her body was "perfect" by saying, "[S]how me." And while "show me" in isolation might be suggestive but still subject to multiple interpretations, her affirmative and immediate follow-up of taking off her pants and underwear was clear: She was giving consent. She was capable of consenting, and did consent, to sexual activity with SSgt Csiti. His conviction for sexual assault is legally and factually insufficient.

2. A.H. made her own independent decision to drink alcohol on the night of the alleged incident, and SSgt Csiti did not ply her with drinks.

The Government's description of the facts concerning A.H.'s consumption of alcohol does not align with the testimony and evidence presented at trial. Whereas the Government's brief alleges that SSgt Csiti "provided SSgt A.H. with 'strong' homemade mead *before she went out*

[2] R. at 252.
[3] *See* Pros. Ex. 3 and 5.
[4] R. at 252-53, 331.
[5] *Id.* at 331-32.

with her friends,"[6] then "saw his opportunity to have sexual contact with [her]," and took advantage of her,[7] there is nothing in A.H.'s testimony, or in the entire record, that suggests that SSgt Csiti brought over mead to A.H. on the night she was going out with her friends. Rather, in response to trial counsel's question, "What did you have to drink?" A.H. responded only that "I believe I had mead, homemade mead . . . [SSgt] Csiti used to make mead. So he would bring some over on occasion."[8] As such, it appears the mead was something SSgt Csiti had made in the past, A.H. likely already had it at her house, and A.H. *made an independent decision* on 21 May 2021 to drink the mead already in her home.

Grasping for facts that do not exist in the record in an effort to tie SSgt Csiti to A.H.'s inability to consent, the Government also asserts SSgt Csiti essentially fed A.H. hard seltzer alcoholic drinks after she returned home from the girls' night. But what A.H. testified to at trial is that she "had . . . [a] couple of Trulys,"[9] she had "no memory of being forced to take a Truly," and if she had said "no," she was "confident [she] wouldn't have received a Truly."[10] A.H. was in her own home, drinking alcohol in her own kitchen.[11] SSgt Csiti was not feeding or plying her with drinks; A.H. admitted at trial that she was a heavy drinker with a high tolerance for alcohol,[12] and on 21 May 2021, she was drinking alcohol of her own volition.

3. There is no evidence to suggest SSgt Csiti knew A.H. was "too drunk to drive" home.

Finally, the Government seeks to turn what N.A. knew about A.H.'s intoxication to mean that *SSgt Csiti* "knew," but without the facts to back up that claim. The Government cites A.H.'s

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[6] Gov. Ans. at 13. (emphasis added).
[7] *Id.* at 11.
[8] R. at 245.
[9] *Id.* at 248.
[10] *Id.* at 311.
[11] *Id.* at 310-11.
[12] *Id.* at 281, 325, 327.

testimony that she felt "too intoxicated to drive on [her] own"[13] and N.A.'s testimony that he offered to drive A.H. home, but neither of these prove that SSgt Csiti knew why N.A. was driving A.H. home. SSgt Csiti wasn't at the restaurant.[14] He was at her house, focused on babysitting her son for her.[15] There is no evidence to suggest he had any idea how much A.H. drank while she was at the restaurant or what her intoxication level was when she left dinner, let alone why N.A. drove her home. A.H. testified she had to pass through a checkpoint to get on base to her home.[16] Even after just one or two drinks, a person can decide not to drive, especially knowing they must enter a military installation and go through a checkpoint.

N.A. testified that A.H. was "tipsy"[17] and "coherent"[18] when they left the restaurant and she did not "necessarily need[ ] assistance" getting from N.A.'s car to her front door.[19] A.H. even testified she "recognize[d] that [she] should not drive"[20] and "asked N.A. to give [her] a ride [home],"[21] clearly demonstrating executive function and the ability to conclude she should not drive herself home. N.A. said that SSgt Csiti came outside to help A.H. inside because he is "just that nice of a person sometimes to help out . . . as friends, and best friends, it was just helping her out."[22] SSgt Csiti told A.H. that he went outside to help her carry in a pizza.[23] But none of the testimony or evidence offered at trial suggests that SSgt Csiti *knew* A.H. was "too drunk to drive" home or that he had any reason to know what her intoxication level was when she returned home.

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[13] Gov. Ans. at 3; R. at 247.
[14] R. at 241.
[15] *Id.*
[16] *Id*. at 309-10.
[17] *Id*. at 360.
[18] *Id*. at 356.
[19] *Id*. at 376.
[20] *Id*. at 309.
[21] *Id*. at 310.
[22] R. at 376.
[23] Pros. Ex. 3 (Clip 10 at 06:42-06:49).

The state in which someone decides to exercise caution and not drive after drinking is not the same as where they lose the ability to consent to sexual activity. A.H. may have been intoxicated on 21 May 2021, but that does not mean she was incapable of consenting to sexual activity. SSgt Csiti received an invitation to engage in intimate, sexual activity of some kind with A.H., and by A.H. She walked and talked like she knew what she was doing; SSgt Csiti's conviction cannot stand, given A.H.'s explicit manifestation of her capability, and actual decision, to consent. Even if this Court finds A.H. was incapable of consenting, SSgt Csiti could not reasonably have known A.H.'s level of intoxication or any potential inability to consent.

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

II.

The military judge erred in denying Staff Sergeant Csiti's motion to dismiss for a defective preferral and a defective preliminary hearing when the sole trial counsel was not licensed to practice law.

The Government misstates SSgt Csiti's argument from his brief. SSgt Csiti does not claim the military judge's findings or conclusions of law were erroneous; SSgt Csiti is asserting the military judge misapplied the law to the facts.[24] The military judge was incorrect when he stated that "the suspension of [Capt C.P.'s] license do[es] not appear to automatically disqualify him from performing the functions of a judge advocate for purposes of the [Uniform Code of Military Justice]."[25] Attorneys must be *both* qualified "and" designated by The Judge Advocate General (TJAG) as a judge advocate to perform judge advocate functions.[26] When Capt C.P. no longer

[24] "An abuse of discretion occurs when a military judge . . . erroneously applies the law." *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citation omitted).
[25] R. at 177.
[26] 10 U.S.C § 9063(g); Air Force Instruction (AFI) 51-110, *Professional Responsibility*, para. 11.2.2 (11 Dec. 2018).

had an active license, he was no longer qualified to perform judge advocate functions,[27] regardless of whether he was still designated as a judge advocate.

The Government incorrectly states that the person administering the oath for preferral of charges "must merely be a commissioned officer."[28] Case law and statutes tell us otherwise. The individual administering the oath must be "authorized to administer oaths,"[29] which is governed by Article 136, UCMJ, 10 U.S.C. § 836. Although judge advocates are listed under Article 136, UCMJ, as persons who are authorized to administer oaths, Capt C.P. was unqualified to be a judge advocate or to perform judge advocate functions. This includes administering oaths for preferral or acting as trial counsel at Article 32, UCMJ, preliminary hearings.

Lastly, the Government's reference to case law surrounding changes in licensing after an attorney is admitted to practice is not relevant to this assignment of error. The only binding precedent the Government cited was case law from the Supreme Court of the United States, which essentially states that disbarment by a state court is not conclusively binding on federal courts.[30] The case law cited from the Court of Appeals for the Seventh Circuit[31] is not binding on this Court, but more importantly, does not speak to the issue SSgt Csiti is raising. SSgt Csiti is not asserting his defense counsel ("counsel" within the meaning of the Sixth Amendment[32]) were not qualified, nor is he asserting Capt C.P. was disbarred from federal courts. SSgt Csiti asserts that Capt C.P.

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[27] Judge advocates "must maintain current eligibility to actively practice law before the highest court of the jurisdiction where they are licensed." AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development*, para. 6.3.1 (29 Nov. 2018).
[28] Gov. Ans. at 20.
[29] *Frage v. Moriarty*, 27 M.J. 341, 343 (C.M.A. 1988) (quoting 10 U.S.C. § 830(a)(2)).
[30] Gov. Ans. at 18 (citing *In re Ruffalo*, 390 U.S. 544 (1968) (citing *Theard v. United States*, 354 U.S. 278 (1957))).
[31] Gov. Ans. at 18 (citing *Reese v. Peters*, 926 F.2d 668 (7th Cir. 1991)).
[32] U.S. CONST. AMEND. VI.

was no longer qualified to be a *judge advocate*, as dictated by 10 U.S.C. § 9063(g) and AFI 51-110. The case law cited by the Government referencing disbarment from federal courts and "counsel" within the meaning of the Sixth Amendment is not relevant to the question of whether a person is qualified to be a judge advocate.

Judge advocates must be qualified and designated in order to perform judge advocate functions.[33] Capt C.P.'s loss of an active law license rendered him unqualified. His administration of the oath for preferral of charges was without authority, rendering the preferral unsworn and, in turn, defective. Additionally, Capt C.P.'s sole representation of the Government at the preliminary hearing was without authority, rendering the hearing defective. The military judge erred by denying SSgt Csiti's motion to dismiss for defective preferral and a defective preliminary hearing.

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

III.

Trial counsel committed prosecutorial misconduct by falsely representing that he had not acted in any manner in any manner that might tend to disqualify him from Staff Sergeant Csiti's preliminary hearing.

The Government claims SSgt Csiti "suffered no prejudice from Capt C.P.'s participation in various stages of his court-martial."[34] However, as SSgt Csiti originally asserted in his brief, he did demonstrate Capt C.P.'s prosecutorial misconduct materially prejudiced his substantial rights.[35]

Should this Court conclude SSgt Csiti did not suffer any specific prejudice, SSgt Csiti requests this Court view Capt C.P.'s misconduct through the lens of general prejudice. The

[33] 10 U.S.C § 9063(g); AFI 51-110, para. 11.2.2.
[34] Gov. Ans. at 22.
[35] *See* SSgt Csiti Assignment of Error III, Brief on Behalf of Appellant.

military is, "by necessity, a specialized society separate from civilian society."[36] An officer acting as a representative of the United States without proper qualifications, or who makes a false statement before a tribunal, damages the public's trust in the military justice system.[37] "The administration of justice relies upon the integrity of attorneys, who act as officers of the court. Making false statements to a court harms the public and the legal profession."[38]

Similar to apparent unlawful command influence, Capt C.P.'s prosecutorial misconduct created an "intolerable strain on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances of the case, would harbor a significant doubt about the fairness of the proceeding."[39] Capt C.P.'s misconduct was severe enough so as to "necessitate[] the invocation of the Court's supervisory authority to protect the integrity of the military justice process."[40]

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

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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[36] *Parker v. Levy*, 417 U.S. 733, 743 (1974).
[37] *See* American Bar Association Rule 8.4(d) ("It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice.").
[38] *In re Hansmeier*, 942 N.W.2d 167, 173 (Minn. 2020) (internal quotations and citations omitted).
[39] *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotations omitted).
[40] *United States v. Underwood*, 47 M.J. 805, 812 (A.F. Ct. Crim. App. 1997) (citations omitted).

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on 27 February 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant