UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 9 February 2022, Appellant was convicted, contrary to his pleas, by a military judge sitting as a general court-martial of one specification of sexual assault upon KE, one specification of abusive sexual contact upon IE, and one specification of abusive sexual contact upon KG, all in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920, *Manual for Courts-Martial, United States* (2019 ed.). Appellant was sentenced to a dishonorable discharge, confinement for 34 months, reduction to the grade of E-1, and a reprimand. On 1 March 2022, in his Decision on Action memorandum, the convening authority "approved the sentence in its entirety," and further stated he considered matters submitted by Appellant under Rule for Courts-Martial (R.C.M.) 1106 and "the [v]ictims under R.C.M. 1106a [sic]."

Under R.C.M 1106A(a), a victim may submit matters to the convening authority for that authority's consideration in deciding whether to take action on an accused's sentence of a court-martial. If a victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). Matters submitted by a victim under R.C.M. 1106A are required to be attached to the record of trial for appellate review. R.C.M. 1112(f)(3).

The record reflects that on 9 February 2022, KG and IE both indicated they did not intend to submit matters for the convening authority's consideration, but KE stated that she did intend to do so. On 1 March 2022, the convening authority's staff judge advocate indicated that KE did submit matters, but KG and IE did not.

Appellant's case was docketed with this court on 28 March 2023. Review of the record of trial revealed that the record does not contain KE's matters or a receipt from Appellant for KE's matters.

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

ORDERED:

Not later than **20 April 2023**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand this record for correction.*

FOR THE COURT

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

* The court also notes that the DD Form 490 (May 2000), *Front Cover*, omits Appellant's date of arraignment (16 December 2021), and inaccurately annotates the start date of his trial on the merits (1 February 2022).

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' RESPONSE TO SHOW CAUSE ORDER**
v.	)	Panel No. 1
Airman First Class (E-3) WILLIAM C.S. HENNESSY United States Air Force *Appellant*	)	No. ACM 40439
	)	20 April 2023

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

Background

On 7 April 2023, this Court ordered the Government to show good cause as to why this record of trial (ROT) should not be remanded for correction. This Court identified that although the record suggests that victim KE intended to submit matters to the convening authority, KE's matters were not included in the record of trial. (Show Cause Order, dtd 7 April 2023, at 1.) A receipt from Appellant for KE's matters was also missing. (Id.) For the reasons discussed below, this Court should not remand this case for correction.

Additional Facts

Undersigned counsel has reviewed the Air Force Appellate Operations Division's (JAJG's) copy of the ROT and determined that KE's matters, 4 pages, dated 18 February 2022, were included in Volume 5. The ROT docketed with the Court (as well as JAJG's copy) does contain Appellant's rebuttal to KE's matters – a one page document, dated 27 February 2022. (Submission of Matters in Rebuttal – [KE], dtd 27 February 2022; ROT, Vol. 5.) In the rebuttal, Appellant does not allege that any information in KE's matters was improper and does not contest any facts in those matters. (Id.)

With the filing of this Response to Show Cause Order, the United States is also simultaneously moving to attach a declaration from assistant trial counsel on Appellant's case. (Declaration of Captain D A , dtd 18 April 2023). In his declaration, Capt A attests to the authenticity of three attachments: (1) KE's 4-page submission of matters; (2) the certificate of service of KE's matters on trial defense counsel, and trial defense counsel's receipts; and (3) a memorandum to Appellant, dated 23 February 2022, serving him with KE's matters, with an acknowledgment of receipt by Appellant, dated 24 February 2022. (Id. at Attachments 1-3.)

Argument

Rule for Courts-Martial 1112 provides for matters that comprise the "contents of the record of trial" (R.C.M. 1112(b)) and for matters that must be attached to the certified record of trial for appellate review (R.C.M. 1112(f)). Under R.C.M. 1112(c), a court reporter must certify that the ROT contains all the items required under R.C.M. 1112(b). According to R.C.M. 1112(d)(2), a record of trial is complete if it complies with the requirements of R.C.M. 1112(b). If it is incomplete, a superior competent authority may return the record to the military judge for correction. R.C.M. 1112(d)(2). The implication of R.C.M. 1112(d)(2) is that a record is not "incomplete" if it is merely missing attachments for appellate review enumerated in R.C.M. 1112(f). Thus, if such attachments are missing from the certified ROT, formal correction under R.C.M. 1112(d)(2) is not required.

Matters submitted by a victim to the convening authority under R.C.M. 1106A are required to be attached to the certified record of trial for appellate review. R.C.M. 1112(f)(3). The absence of these matters from the ROT does not require formal correction under R.C.M. 1112(d)(2). The accused's receipt for post-sentencing victim matters is not specifically

enumerated as being required as an attachment to the ROT under R.C.M. 1112(f). But DAFMAN 51-203, *Records of Trial*, 21 April 2021, para. 1.4.3 and Item 25c on the ROT Assembly Checklist from the *Virtual Military Justice Deskbook* together create a requirement for the defense counsel or accused's receipt of the victim's post-sentencing matters to be attached to the ROT. Still, failure to attach Appellant's receipt to the ROT is not the type of error that requires formal correction under R.C.M. 1112(d)(2).

Since there is no requirement for formal correction under R.C.M. 1112(d)(2) in this case, this Court should grant the United States' motion to attach and consider KE's victim matters and the accused's receipt of those matters as if they were properly attached to the record under R.C.M. 1112(f). Capt A has attested to the authenticity of the documents, and this Court has no reason to question that the documents are not what they purport to be.

Even if this Court does not consider Capt A ' submissions as properly attached to the record for purposes of R.C.M. 1112(f), this Court can still use the documents to determine that Appellant has suffered no prejudice from their absence in the originally docketed ROT. *See* United States v. King, 2021 CCA LEXIS 415, at *29 (A.F. Ct. Crim. Appl. 16 Aug 21) (unpub. op.) (considering matters attached during appellate review for the purpose of deciding whether the government had rebutted the presumption of prejudice from a substantial omission to the record of trial). Here, Appellant has suffered no prejudice, because this Court can still fully review Appellant's convictions and sentence under Article 66, UCMJ. This Court can now review the matters submitted by KE, which, in any event, Appellant did not complain were improper and did not contest as factually erroneous in his rebuttal statement. Moreover, the docketed ROT already contains Appellant's rebuttal of KE's matters, so this Court can rest

assured that Appellant was properly served KE's matters and given the opportunity to respond, as required under R.C.M. 1106A.[1]

FOR THESE REASONS, this Court should not remand this record for correction.

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

[1] In a footnote, this Court's Show Cause Order also notes errors in the court-martial dates on the front cover the ROT. Although these errors are regrettable, they do not prejudice Appellant, because the correct dates of the court-martial proceedings are contained elsewhere in the ROT.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 20 April 2023.

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

20 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO ATTACH DOCUMENT
v.	)	ACM 40439
Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)	Panel No. 1

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to this motion:

Declaration of Capt D A , dated 18 April 2023, with 3 attachments (9 pages total)

The attached declaration is responsive to the Show Cause Order issued by this Court on 7 April 2023. This Court ordered the government to show good cause why Appellant's record of trial should not be remanded for correction. The attachments to Capt A ' declaration contain the items this Court identified as being missing from the record of trial (ROT) and are therefore relevant to answering this Court's show cause order. This Court may consider this declaration and attachments under United States v. Jessie, 79 MJ 437, 445 (C.A.A.F. 2020), because whether Appellant's ROT is complete is an issue "raised by materials in the record." Under Jessie, this Court may consider matters from outside the record, if they relate to "issues raised by materials in the record but not fully resolvable by those materials." Id. The attached matters will help this Court resolve the issue of whether the ROT is complete such that this Court can complete its Article 66, UCMJ review of the court-martial.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach Document.

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 20 April 2023 via electronic filing.

MARY ELLEN PAYNE
Associate Chief, 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 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 20 April 2023, the Government submitted a motion to attach the following document(s) to the record: Declaration of Capt D A dated 18 April 2023, with three attachments. The Appellant did not file opposition to the motion.

The court has considered Government's motion and the applicable law. The court grants the motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachment(s) until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 1st day of May, 2023,

ORDERED:

Government's Motion to Attach is **GRANTED**.

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. Airman First Class (E-3) **WILLIAM C. S. HENNESSEY** U. S. Air Force *Appellant*	**NOTICE OF APPEARANCE** Before Panel No. 1 No.ACM 40439 Date Filed: 8 May 2023

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

The Appellant has retained the undersigned.

I understand the Court has already taken some action in the case and would appreciate a copy of any filings and Orders and the name of the military counsel who represented the Appellant during the prior actions.

Respectfully submitted,

Philip D. Cave
Cave & Freeburg, LLP

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies were emailed to the Court and the Directors of Government Appellate Division and Defense Appellate Divisions on the email date.

Philip D. Cave
Cave & Freeburg, LLP

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40439
WILLIAM C.S. HENNESSY	)	
United States Air Force	)	19 May 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **26 July 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 19 May 2023.

Respectfully submitted,

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

19 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 19 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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SECOND)**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40439
WILLIAM C.S. HENNESSY	)	
United States Air Force	)	19 July 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 August 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 19 July 2023.

Respectfully submitted,

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

20 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 1

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

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

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

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 20 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40439**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 16 August 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 September 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 16 August 2023.

Respectfully submitted,

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

17 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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 17 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 15 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, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 October 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 3 in this case, undersigned counsel has filed the Grant Brief in *United States v. Flores* (ACM 40294) with the Court of Appeals for the Armed Forces (CAAF) and the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324). Undersigned counsel planned and coordinated the 10th Annual Joint Appellate Advocacy Training (JAAT), which was held . There was a scheduled . Undersigned counsel also had scheduled and approved leave . Undersigned counsel has two Reply Briefs due to this Court in *United States v. Emerson* (ACM 40297), calculated as being due 20 September 2023, and in *United States v. Dugan* (ACM 40320), calculated as being due 21 September 2023.

On 27 July 2023, the CAAF also granted an issue for review in *United States v. Guihama* (ACM 40039) with a brief originally due 28 August 2023, but now due 27 September 2023. Finally, the Reply Brief in *United States v. Flores* (ACM 40294) is due to the CAAF on or before 30 September 2023. Should this Court grant undersigned counsel's two motions for withdrawal of appellate defense counsel in *United States v. Henderson* (ACM 40338) and *United States v. Cook* (ACM 40333), there would only be one case before this Court with priority over the present case:

1. *United States v. Pratschler*, ACM S32743: The trial transcript is 141 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, two defense exhibits, four appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 15 September 2023.

Respectfully submitted,

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

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 17 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, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 November 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 22 cases, with eight initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 4 in this case, undersigned counsel has filed: the Reply Brief on Behalf of Appellant in *United States v. Dugan* (ACM 40320); the Grant Brief in *United States v. Guihama* (ACM 40039) with the Court of Appeals for the Armed Forces (CAAF); an Application for Extension of Time to File Petition for Writ of Certiorari in *United States v. Smith* (ACM 40013) with the Supreme Court of the United States (SCOTUS); and the Reply Brief in *United States v. Flores* (ACM 40294) with the CAAF.

Undersigned counsel is finishing the Supplement to the Petition for Grant of Review in *United States v. Cabuhat* (ACM 40191) for the CAAF and currently preparing for oral argument in *Flores* before the CAAF scheduled for 7 November 2023. Undersigned counsel also expects to have a Reply Brief on Behalf of Appellant due in *United States v. Douglas* (ACM 40324) to this Court on or before 27 October 2023 and a Reply Brief in *Guihama* due to the CAAF on or before 6 November 2023. Next, undersigned counsel will finalize the Petitions for Writ of Certiorari in *United States v. Witt* (ACM 36785) and in *Smith* due to the SCOTUS. Then, this is my first[1] priority case before this Court.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

[1] Maj Blyth's first priority case before this Court is *United States v. Cook* (ACM 40333) as lead counsel on the case.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 17 October 2023.

Respectfully submitted,

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

18 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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 18 October 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 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 17 October 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 19th day of October, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **23 November 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, continue to 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*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 15 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, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 December 2023**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 19 cases, with seven initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 5 in this case, undersigned counsel has filed: the Petition and Supplement to the Petition for Grant of Review in *United States v. Cabuhat* (ACM 40191) with the Court of Appeals for the Armed Forces (CAAF); the Reply Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324); the Reply Brief in *United States v. Guihama* (ACM 40039) with the CAAF; and the Petition for Writ of Certiorari in *United States v. Witt* (ACM 36785) with the Supreme Court of the United States (SCOTUS). Undersigned counsel also presented oral argument before the CAAF in *United States v. Flores* (ACM 40294).

Undersigned counsel is finishing the Petition for Writ of Certiorari in *United States v. Smith* (ACM 40013). Next, undersigned counsel will turn to the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) due to the CAAF. Then, this is my first priority case before this Court.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 15 November 2023.

Respectfully submitted,

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

16 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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 16 November 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	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WILLIAM C.S. HENNESSY	)	No. ACM 40439
United States Air Force	)	
Appellant	)	20 November 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed materials:

1) Transcript pages 30-50; and the closed sessions' audio recording. These transcriptions and audio are of closed sessions litigating issues related to Military Rule of Evidence (Mil. R. Evid.) 412, were attended by trial and defense counsel, and were ordered sealed by the military judge. R. at 433.
2) Appellate Exhibits II-V and XLII were motions, related evidence, and a ruling under Mil. R. Evid. 412. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 433.
3) Preliminary Hearing Officer (PHO) Exhibits 5 and 9 were sealed by the PHO. PHO Exhibit 5 is the Government's Motion to Admit Mil. R. Evid. 412. PHO Exhibit 9 is the recording of the Mil. R. Evid. 412 closed session. PHO Exhibit 5 was reviewed by trial and defense counsel and the closed session recorded in PHO Exhibit 9 was attended by both as well.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant. Civilian appellate defense counsel is available to travel to Joint Base Andrews to conduct his review of the sealed material.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 20 November 2023.

Respectfully submitted,

HEATHER M. CAINE, 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 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 20 November 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine Appellate Exhibits II–V and XLII, transcript pages 30–50, as well as Preliminary Hearing Officer (PHO) Exhibits 5 and 9 from the Article 32, UCMJ, 10 U.S.C. § 832, report.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds Appellant's counsel has made a colorable showing that review of the above referenced sealed materials is necessary for a proper fulfillment of appellate defense counsel's responsibilities to their client. This court's order permits counsel for both parties to examine these sealed exhibits and transcript pages.

Accordingly, it is by the court on this 28th day of November, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibits II–V and XLII**, **transcript pages 30–50**, and **PHO Exhibits 5 and 9** from the Article 32, UCMJ, report, subject to the conditions provided below. To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the sealed materials may photocopy, photo-

graph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WILLIAM C.S. HENNESSY	)	No. ACM 40439
United States Air Force	)	
Appellant	)	12 December 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following additional sealed materials:[1]

1) The closed session's audio recording regarding transcript pages 30-50.[2] The closed session involved litigating issues related to Military Rule of Evidence (Mil. R. Evid.) 412, which was attended by all parties and the military judge. R. at 29.
2) Appellate Exhibits VI-XIII were additional motions and evidence related to Mil. R. Evid. 412. These matters were reviewed by all parties and the military judge. R. at 15-18.
3) Appellate Exhibits XXV-XXVII were motions related to Mil. R. Evid. 513. These motions were reviewed by all parties and the military judge. R. at 24-25.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities,

[1] Undersigned counsel's prior consent motion did not cover all sealed materials.
[2] The prior consent motion requested to review the audio recording, but the Court's Order did not explicitly give authorization for counsel to review it.

undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant. Civilian appellate defense counsel is available to travel to Joint Base Andrews to conduct his review of the sealed material.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 12 December 2023.

Respectfully submitted,

HEATHER M. CAINE, 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 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 12 December 2023, counsel for Appellant submitted a second Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine Appellate Exhibits VI–XIII and XXV–XXVII, as well as the audio recording corresponding to transcript pages 30–50.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds Appellant's counsel has made a colorable showing that review of the above referenced sealed materials is necessary for a proper fulfillment of appellate defense counsel's responsibilities to their client. This court's order permits counsel for both parties to examine these sealed exhibits and transcript pages.

Accordingly, it is by the court on this 15th day of December, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibits VI–XIII and XXV–XXVII, as well as the audio recording corresponding to transcript pages 30–50**, subject to the conditions provided below. To view the sealed materials, counsel will coordinate with the court.

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

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 15 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, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 January 2024**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 19 cases, with nine initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 6 in this case, undersigned counsel has filed the Petition for Writ of Certiorari in *United States v. Smith* (ACM 36785) with the Supreme Court of the United States (SCOTUS). Undersigned counsel also had three days of prescheduled leave after the Thanksgiving holiday and spent around 18 hours preparing for and assisting in moots.

Undersigned counsel intends to file the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF) early next week. Then, this is my first priority case before this Court. Undersigned counsel has reviewed part of the sealed material in this case and will schedule time next week to complete review of the sealed material given this Court's recent grant of the second Consent Motion to View Sealed Material.

Civilian counsel has the following matters pending: *Byrne* (AFCCA); *Hennessy* (AFCCA); *Ramirez* (AFCCA) (not confined); *Shafran* (CGCCA) (not confined); *Rudometkin* (ACCA); and several Article 32, UCMJ, hearings to be scheduled. Civilian counsel awaits a Government Answer in *Henderson* (AFCCA) and *Hansen* (ACCA). He also has to make a personal visit to appellants at Naval Consolidated Brig, Charleston, SC.

During the current extension, civilian counsel completed the following actions: an additional assignment of error in *Shafran* (CGCCA) subsequent to the grant of a motion to reconsider their en banc decision; additional assignments of error and *Grostefon* errors in

Rudometkin (ACCA) subsequent to CAAF's remand for a full Article 66, UCMJ, review; and a brief in *Henderson*.(AFCCA). He also made a personal visit to appellants at the Naval Consolidated Brig, Miramar, CA.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 Appellate Government Division on 15 December 2023.

Respectfully submitted,

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

19 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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.

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

JOCELYN Q. WRIGHT, 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 19 December 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 11 January 2024

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, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 10 days, which will end on **1 February 2024**. The record of trial was docketed with this Court on 28 March 2023. From the date of docketing to the present date, 289 days have elapsed. On the date requested, 310 days will have elapsed.

On 9 February 2022, at a general court-martial convened at Spangdahlem Air Base, Germany, Appellant was found guilty, inconsistent with his pleas, of one charge and three specifications of Article 120, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 4 March 2022. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 34 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 1 March 2022.

The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 21 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 7 in this case, undersigned counsel filed the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF). There were then followed by undersigned counsel's three days of prescheduled leave at the beginning of the year. Undersigned counsel also spent around 6 hours preparing for and assisting in moots.

This is undersigned counsel's first priority case before this Court. Undersigned counsel has reviewed all of the sealed material and intends to complete review of the rest of the record today. Several potential issues have been identified and civilian defense counsel has begun drafting. The additional 10 days would allow undersigned counsel to finish review of the record, draft additional assignment(s) of error, and collaborate with civilian defense counsel on completion of the Brief on Behalf of Appellant.

Civilian counsel has the following matters pending: Reply in *United States v. Hansen* (ACCA); *Byrne* (AFCCA); *Hennessy* (AFCCA); *Ramirez* (AFCCA) (not confined); *Shafran* (CGCCA) (not confined); *Rudometkin* (ACCA); and several Article 32, UCMJ, hearings to be scheduled. Counsel is responding to a partial answer and awaits a full Government Answer in *Henderson* (AFCCA) and an additional Answer in *Rudometkin* (ACCA).

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. BRUHA, 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 Appellate Government Division on 11 January 2024.

Respectfully submitted,

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

16 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WILLIAM C.S. HENNESSY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40439 Panel No. 3

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 310 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.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 16 January 2024.

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 40439**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
William C.S. HENNESSY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 11 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 10 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 17th day of January, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **1 February 2024**.

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

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

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

No. ACM 40439

BRIEF ON BEHALF OF APPELLANT

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

Counsel for Appellant

PHILIP D. CAVE
Cave & Freeburg

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. William C. S. HENNESSY Airman First Class (E-3) U. S. Air Force *Appellant*	BRIEF ON BEHALF OF APPELLANT No. ACM 40439 Panel 3 1 February 2024

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

Issues Presented

I.

WHETHER SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE THEORY UPON WHICH IT CHARGED—THAT K.E. DID NOT CONSENT AS OPPOSED TO BEING ASLEEP OR INCAPABLE OF CONSENTING DUE TO INTOXICATION.

II.

WHETHER THE GOVERNMENT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY CONVICTING HIM UNDER A THEORY OF CRIMINALITY ABSENT FROM THE CHARGE SHEET.

III.

WHETHER TRIAL COUNSEL IMPROPERLY ARGUED THAT K.E. WAS NOT COMPETENT TO CONSENT DUE TO BEING IN A BLACKED-OUT STATE.

IV.

WHETHER THE APPELLANT'S CASE SHOULD BE DISMISSED BECAUSE OF THE DILATORY POST-TRIAL PROCESSING.

V.

WHETHER THE CONSTITUTION GIVES THE APPELLANT A RIGHT TO A UNANIMOUS GUILTY VERDICT.

VI. [1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A CHALLENGE TO SSGT S.L.G. FOR IMPLIED BIAS.

VII.

WHETHER THE TRIAL COUNSEL COMMITTED AN ACCUMULATION OF ERRORS DURING THE FINDINGS ARGUMENT TO THE APPELLANT'S PREJUDICE.

Statement of the Case

1. On 9 February 2022, a panel with enlisted representation convicted the Appellant, contrary to his pleas, of sexual abusive contact with K.G., sexual assault upon K.E., and, on divers occasions, sexual abusive contact with I.E in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] (Entry of Judgment [EOJ].) The military judge sentenced the Appellant to a dishonorable

[1] Issues VI and VII are raised in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

[2] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.) [2019 *MCM*]. Here, *Manual for Courts-Martial*, *United States* (2016 ed.) [2016 *MCM*] applies to Specification 1 involving sexual abusive contact with K.G. since the charged timeframe was between on or about 1 March 2018 and on or about 31 March 2018.

discharge, confinement for 34 months,[3] reduction to the grade of E-1, and a reprimand. (*Id.*, R. at 1190.)[4] On 1 March 2022, the convening authority approved the sentence in its entirety and further stated he considered matters submitted by the Appellant "under R.C.M. 1106 and the [v]ictims under R.C.M. 1106a [sic]." (Convening Authority Decision on Action [CADA].) The convening authority also issued a reprimand. (R. at 1190.) The convening authority denied the Appellant's request for deferment of the reduction and forfeitures. (CADA.)

2. On 28 March 2023, the Appellant's case was docketed. However, on 7 April 2023, the Appellee was Ordered to show cause why the case should not be remanded to complete the record. On 20 April 2023, the Appellee answered the Order and moved to attach the missing documents. The Court accepted the Answer and granted the Motion to Attach on 1 May 2023.

Statement of the Facts

The Government charged the Appellant with sexually assaulting K.E. "without her consent." (Charge Sheet at 1.)

1. K.E.'s Testimony.

The Appellant and K.E. first met through Instagram[5] when the Appellant direct messaged her. (R. at 666.) They had previously matched on Tinder.[6] (*Id.*) The

[3] The military judge sentenced the Appellant to 30 months for Specification 2. He sentenced him to one month for Specification 1 and three months for Specification 3—all to be served consecutively.
[4] The Appellant elected sentencing under the post 1 January 2019 rules. (R. at 11.)
[5] Instagram is a social media platform wherein individuals may direct message or "chat" with each other through their profiles.
[6] Tinder is a dating website.

two exchanged SnapChat[7] information and continued talking for about a week. (R. at 666-67.) They made plans to meet in person at the Appellant's dorm to "hang out." (R. at 667-68.) K.E. met the Appellant at his dorm on 8 June 2019 around 1500-1600. (R. at 668.) When the Appellant held K.E.'s hand with interlaced fingers, she did not pull away. (R. at 670.) The first time the Appellant leaned forward to kiss K.E. she leaned the opposite direction. (R. at 670-71). K.E. let the Appellant kiss her the second time he tried when he put his hand on her cheek. (R. at 671.) It did not last long, because she pulled away. (*Id.*) At some point while in the dorm room, the two of them discussed a concert that was happening that night. (R. at 673.) K.E. was not sure who brought it up first, but she stated she wanted to go, but her friends were busy so she did not have anyone to go with. (*Id.*) The Appellant messaged later that he was sorry if he was moving too fast. (R. 672.) K.E. appreciated that the Appellant apologized and agreed to hang out with him later. (*Id.*)

Later that night they went to a concert. (R. at 673.) K.E. arrived around 1915 or 1920. (R. at 674.) The concert was at the E Club. (*Id.*) K.E. spent around three hours there during which time she drank at least 4-5 drinks. (R. at 676, 712.) At the end of the night, the Appellant asks K.E., "So my room or yours?" (R. at 679.) K.E. first responded, "You go to yours and I'll go to mine." (*Id.*) The Appellant responded, "Okay." (*Id.*) K.E. was not sure if she was "buzzed or drunk" when she left the E Club. (R. at 681.) K.E. did not remember leaving the E Club, but she did remember the

[7] SnapChat is a social media platform wherein individuals may share "snaps" with all of their friends and/or with specific people and may also "chat" with their friends.

Appellant offering to give her a piggyback ride. (R. at 681-82.) K.E. told the Appellant "yes." (R. at 682.) K.E. testified that she assumed the Appellant would take her back to her room, but also acknowledged that the Appellant did not know where she lived. (*Id.*)

Her next memory after getting on the Appellant's back was of the two of them on the Appellant's bed. (*Id.*) K.E. testified, "I woke up and we were in his room and he's having, like, sex with me, but I just opened my eyes and it's going on." (*Id.*) She was wearing her top and bra, but her pants and underwear were off. (*Id.*) K.E.'s legs were on the Appellant's shoulders. (R. at 683.) K.E. looked down and saw the Appellant's penis going in her vagina. (R. at 684.) K.E. started panicking in her mind, because she "didn't know how [they] got to that point." (R. at 685.) She then "decided to fake sleep to get him to stop." (*Id.*) K.E. "faked sleep" by closing her eyes and turning her head to the right to face the Appellant's wall. (*Id.*) In response to K.E. "faking sleep," the Appellant called K.E.'s name twice trying to get her attention or to get her to wake up. (*Id.*) He then said, "Oh, no," and started to "shake [her] shoulder to continue to try to get [her] to wake up or open [her] eyes." (*Id.*) When K.E. did not open her eyes, the Appellant walked away. (R. at 686.) K.E. thought he might have gone to the bathroom. (*Id.*) K.E. then opened her eyes and started to gather her stuff. (*Id.*) When the Appellant came back, he saw K.E. gathering her stuff and K.E. said she needed to go because H.P. needed her. (*Id.*) The Appellant told K.E. she should stay and sleep on his bed while he slept on the couch. (*Id.*) K.E. replied, "No, she really needs me" while pretending to text H.P. (*Id.*)

Instead of calling H.P., the first person K.E. called after she left was K.B. (R. at 689.) K.E. testified she was feeling scared, confused, and a little angry. (R. at 690). K.E. testified that she called K.B. because "on Messenger when you initially become friends with someone on Facebook, like it'll tell you, like, oh, waive to your friend or say hi to your new friend. And so he was at, like, the top of my Messenger list, and I just – I panicked and I called him." (R. at 690.)

2. K.E. and K.B. History.

K.E. and K.B. had hung out a few times in groups before the night of the alleged assault. (R. at 584-85.) K.E. told S.L. she had a crush on K.B. prior to that night as well. (R. at 633.) The night of the alleged assault, K.B. saw K.E. at the E Cub for the Sick Puppies concert with Appellant. (R. at 585-86.) After K.E. called K.B., she met him, and as she walked up to him, she started crying hysterically. (R. at 587-88). She told K.B. she was raped. (R. at 588, 691.) K.E. then embraced K.B., catching him off guard, and embraced him for five minutes. (R. at 588.) K.B. waited with K.E. for about 20 to 30 minutes for S.L., H.P., and L.V. to arrive. (R. at 588-89.) During that time, K.B. continued to comfort and hold K.E. (R. at 589.) After that night, K.E. continued to call K.B. to confide in him and talk regularly many times in person. (R. at 593.) The conversations led to the beginning of a relationship between the two. (R. at 594.) K.B. and K.E. started dating in September 2019 and dated for two years thereafter. (R. at 594, 581.)

The Friday before the trial started, K.E. met with K.B. at the E Club. (R. at 596). Witnesses S.L. and L.V. were there with them as well. (*Id.*) K.B. met with

defense counsel the Saturday before trial. (*Id.*) K.B. talked to K.E. the same day as well. (*Id.*)

3. The Government's Case.

The Government called outcry witnesses before K.E. testified in the case in chief. (R. at 555.) During their testimony, the military judge allowed testimony from three people[8] under the excited utterance exception that K.E. said she was raped. (R. at 562-63, 611-14, 645-46.) Over the Defense objection, the Government had S.L. testify that K.E. reacted emotionally when seeing the Appellant at the E Club some months after the alleged assault. (R. at 617-26.) The military judge also allowed the Government to offer testimony as to what emotions the witnesses that K.E. spoke with were themselves experiencing the night of the alleged assault. (R. at 582-84, 614.)

4. The Version of the Alleged Assault that K.E. told K.B.

K.E. told K.B. that she went back to the Appellant's dorm room with him. (R. at 579.) K.E. said she sat on the Appellant's futon and fell asleep. (R. at 579-80, 591.) K.E. told him when she woke up, the Appellant was having sex with her. (R. at 591.) She then got up, pulled her pants back on, and ran down the hill, which was when she called K.B. (R. at 579.) K.E. also told K.B. that prior to her leaving, the Appellant asked her if something was wrong and she told the Appellent, "no." (R. at 592.)

[8] K.B., S.L., and L.V.

5. The Version of the Alleged Assault that K.E. told S.L.

S.L. and K.E. were "very close friends." (R. at 604.) They would see each other either every weekend or every other weekend and for holidays and birthdays. (*Id.*) S.L. was dating L.V. (R. at 605-06.) K.E. told S.L. that K.E. met a guy at a concert and "didn't know how to say no." (R. at 614.) K.E. said she wished S.L. had been there, because then she would have had someone to find to leave with. (*Id.*) K.E. told S.L. she had been drinking a little bit, went back to the guy's room, and felt tired so she fell asleep. (*Id.*) Specifically, K.E. said she remembered being in the Appellant's room. (R. at 635.) K.E. said she remembered laying on the Appellant's bed. (*Id.*) K.E. said she remembered deciding to take a nap. (*Id.*) S.L. testified that "when [K.E.] woke up things were happening, and she said when it was over, she quietly got up, put her clothes on, and ran back to the dorms, and then that's when she called [S.L.]." (R. at 614.) It took almost five times of S.L. trying to convince K.E. to report the alleged assault before K.E. actually went forward and reported. (R. at 631.)

6. The Version of the Alleged Assault that K.E. told L.V.

L.V. was in the room when K.E. told the group she met the Appellant at the E Club. (R. at 650-51.) They then went back to his room to hang out and had some drinks. (R. at 652.) K.E. said she then blacked out. (*Id.*) When she woke up, the Appellant was penetrating her. (*Id.*) K.E. said she told the Appellant to get off but he would not until he climaxed. (R. at 652-53.) She also said that when the Appellant did that, she asked why he would do that and at the end of the interaction, the Appellant laughed. (R. at 653-544.)

7. Doctor K.R.'s Testimony.

Dr. K.R. testified about alcohol blackouts. (R. at 1042.) Essentially, when one consumes a large amount of alcohol in a short period of time, the hippocampus does not transfer short-term memories into long-term memory. (*Id.*) Two examples given were when one drinks shots or mixed drinks quickly. (*Id.*) "[Y]ou're dealing with what's going on right in front of you, but you don't remember it later because that part of the brain [(hippocampus)] whose job it is to move that to the long-term memory so you remember it later is basically asleep." (R. at 1043.) There are two basic types of blackouts. (*Id.*) The first is an en bloc blackout or an absolute blackout where no short-term memories are transferred to long-term memory. (*Id.*) The second is a fragmentary blackout where most of the memories are gone, but bits and pieces are transferred into long-term memory. (*Id.*) The bits and pieces from a fragmentary blackout is sometimes referred to as flashbulb memories. (*Id.*)

People regularly misuse the term "blackout" since what they really mean is passed out. (*Id.*) Being passed out is when one drank so much that they become unconscious, which is not a blackout. (*Id.*) A blackout is a "very specific type of alcohol effect." (*Id.*) Those in a blackout are still conscious. (*Id.*) In fact, it is really hard to tell if someone is in a blackout since they typically do not exhibit signs or symptoms as someone who has been drinking. (R. at 1043-44.) Whereas someone who has drank so much they fell asleep or became unconscious is considered passed out. (R. at 1044.)

People are also capable of engaging in complex behaviors while in a blackout as long as they knew how to do it before the blackout. (*Id.*) For instance,

people in blackouts have been able to drive a car, fly an airplane, or even perform surgery. (*Id.*) The person in a blackout does not know they are in a blackout at the time. (R. at 1044-45.) They only learn they were in a blackout when they later cannot remember anything that happened for that period of time. (R. at 1045.) "But since you're operating with this little piece of your brain gone to sleep, but not the other manifestations of alcohol it would be really hard for anybody to tell that you were in a blackout." (*Id.*) There is no particular Blood Alcohol Concentration (BAC) that associated with a blackout. (R. at 1048.) On can get to a blackout slowly or rapidly, it depends on the person. (*Id.*) Research shows you are at a higher risk of blacking out if you have blacked out before. (R. at 1050-51.) Those in a blackout can still have conversations with other, climb flights of stairs, buy their own drinks, and even engage in consensual sexual activity. (R. at 1054.)

8. Trial Counsel Argued K.E. Could Not Consent because She was "Not Competent."

Trial counsel started closing argument with:

> Members, as part of this case, you met three different women. Three different women from three completely different walks of life. These people have absolutely nothing in common except for the accused and what he did to them. He kept pushing. He kept pressing. He kept pressing their boundaries again and again and again. They're telling him no, verbally and non-verbally. But he just keeps pressing.

(R. at 1076.)

Trial counsel told the members that the law given to them by the military judge tells them Appellant is guilty. (R. at 1080.) Again, trial counsel stated the law tells the members the Appellant is guilty of Specification 2 of the Charge. (R. at 1086.)

When describing the second element of the Specification, trial counsel defined "consent" as "a freely given agreement from a competent person." (R. at 1091.) Trial counsel argued K.E. was not competent, that she had been out drinking, and that she is blackout drunk. (*Id.*) Again, he said "[s]he is blackout drunk. She is not a competent person." (*Id.*) Trial counsel argued "As her intoxication goes up, so does her incapacitation, so does her blackout, and one of the signs of incapacitation or one of the signs of being drunk is you're tired." (R. at 1093.)

When addressing K.E. pretending to sleep once she realized what was happening, trial counsel stated the Appellant "does not get a medal because he stopped when he thought the girl was finally comatose. He gets convicted of sex assault because he broke the law." (*Id.*) Trial counsel later returned to the issue of consent. (R. at 1098.) He referred to Defense's questions of K.E. on cross examination regarding her being blacked out and how she could have consented. (*Id.*) Trial counsel asserted that K.E. did not consent and that "she wasn't competent." (*Id.*)

Trial counsel ended closing argument stating:

> Members, you heard from three completely different women, from three completely different walks of life. They have all told you how the accused refused to respect their boundaries. How he just kept pushing and pushing and pushing, despite the fact that they're all telling him in their own ways, 'No.'

(R. at 1099.)

Argument

I.

SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE THEORY UPON WHICH IT CHARGED—THAT K.E. DID NOT CONSENT AS OPPOSED TO BEING ASLEEP OR INCAPABLE OF CONSENTING DUE TO INTOXICATION.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); *United States v. McAlhaney*, 83 M.J. 164, 399 (C.A.A.F. 2023).

Law and Analysis

The Government did not prove the Appellant sexually assaulted K.E. without her consent, or at a minimum, that the Appellant did not have a reasonable mistake of fact as to K.E. consenting.

1. Specification 2 of the Charge is Legally Insufficient.

The Government's theory of the case was that K.E. was not competent to consent because she was blacked out due to intoxication. This runs afoul of *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016), which recognized the distinction between the obligation of proving the "legal inability to consent" from proving the alleged victim "did not, in fact, consent." 75 M.J. at 84. Further, *United States v. Sager*, 76 M.J. 158, 162-63 (C.A.A.F. 2017) demonstrates that the canons of statutory construction leads to the conclusion that the theory of without consent under Article

120(b)(2)(A), is separate and apart from incapable of consenting due to impairment by an intoxicant under Article 120(b)(3)(A).

Article 120(b)(2)(A) states that any person subject to this chapter who commits a sexual assault upon another person without the consent of the other person is guilty of sexual assault. (*See* Table *infra*.) Separately, Article 120((b)3)(A) addresses any person subject to the chapter committing sexual assault upon another person when the other person is incapable of consenting to the sexual act due to impairment by intoxication. (*Id.*) While the definition of consent is under Article 120(g)(7), the definition of incapable of consenting is under Article 120(g)(8). (*Id.*) Under that theory of criminal liability, there is an additional element that must be proved—a mens rea that the appellant knew or reasonably should have know a certain point. Such was not proven or even attempted to be proven in this case.

(b) SEXUAL ASSAULT.—Any person subject to this chapter who— (1) commits a sexual act upon another person by— (A) threatening or placing that other person in fear; (B) making a fraudulent representation that the sexual act serves a professional purpose; or (C) inducing a belief by any artifice, pretense, or concealment that the person is another person; (2) commits a sexual act upon another person— (A) without the consent of the other person; or (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to— (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.	(7) CONSENT.— (A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent. (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1). (C) All the surrounding circumstances are to be considered in determining whether a person gave consent. (8) INCAPABLE OF CONSENTING.—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.

The CAAF held in *Sager* that the lower court erred when it found that "'asleep, unconscious, or otherwise unaware that the sexual act is occurring'[9]. . .created a single theory of criminal liability. . . ." *United States v. Sager*, 76 M.J. at 159 (*quoting* Article 120(b)(2), UCMJ, 10 U.S.C. § 920(b)(2)). Instead, the plain reading of the language makes clear that "otherwise unaware" means a different manner of being unaware than from asleep and from unconsciousness. *Id.* at 162. Further, the

[9] The same language is used in the *2019 MCM* for Article 120(b)(2)(B).

ordinary meaning of each reflect different and separate theories of liability or criminality. *Id.*

Here, after viewing the evidence in the light most favorable to the prosecution, no rational trief of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). Simply put, the Government did not prove the theory of criminal liability that it charged. The Government focused instead on other theories working in tandem with each other. This is not legally sufficient for proof that Appellant sexually assaulted K.E. without her consent.

Instead, K.E. testified to being "asleep" during the sex and telling multiple others that she fell asleep and woke up to the Appellant having sex with her. This of course was not in line with K.E.'s testimony regarding the Appellant's response when she then pretended to be asleep—he stopped, called her name, shook her shoulder, and walked away when she did not respond. Regardless, trial counsel did not focus on K.E. being "asleep" in his closing argument, but instead focused on K.E. not being "competent" due to her being in a blackout. Testimony regarding a blackout state came from the Defense witness, Dr. K.R., who stated that those in a blackout state can still engage in consensual sexual intercourse. The Government did not prove K.E. did not consent or that at a minimum, the Appellant did not have a reasonable belief as to K.E. consenting.

2. Specification 2 of the Charge is Factually Insufficient.

K.E. testified that when she woke up she was on the Appellant's bed. When she looked down, she saw the Appellant's penis penetrating her. She testified that she panicked because did not know how they came to be that way. Not that she panicked because she had said no or not consented to sex and he did it anyway. She panicked because she did not know how they got in that position or to a point where they were having sex. Her response was to pretend to be asleep, which she did by closing her eyes and turning her head towards the right side of the room. At which point, Appellant shook her shoulder and called her name over and over. When K.E. did not respond, Appellant said, "oh no," and left the room.

A review for factual sufficiency involves "a fresh, impartial look at the evidence," adopting "neither a presumption of innocence nor a presumption of guilty" in order to independently determine whether the evidence constitutes proof beyond a reasonable doubt for each required element. *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (*quoting United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). Here, with a fresh, impartial look at the evidence, it is clear that Appellant did not see K.E. with her eyes closed or he would not have that reaction when she closed her eyes. Here, it is clear that when the Appellant saw/believed K.E. was sleeping or had her eyes closed, he was alarmed—he shook her, called her name, and attempted to wake her up. When the Appellant did not see K.E. "wake up" he left her within seconds. These facts, testified to by K.E., show that the Appellant reasonably believed

K.E. was consenting prior to her pretending to be asleep. Testimony from Dr. K.R. supports the Appellant's reasonable belief as well. Having enough alcohol on board to be blacked out does not mean the person is unable to consent to sex and can appear to others to be competent.

The Government did not prove beyond a reasonable doubt that K.E. did not consent to sex with the Appellant. Further, after weighing the evidence in the record of trial and making allowances for those who personally observed the witnesses, this Court cannot be convinced of the Appellant's guilt on the theory charged beyond a reasonable doubt. At a minimum, the Government did not prove beyond a reasonable doubt that the Appellant did not have a reasonable mistake of fact as to K.E. consenting.

WHEREFORE, the Appellant respectfully requests that this Honorable Court set aside and dismiss Specifications 2 of the Charge, and set aside the segmented sentence to 30 months' confinement and the unitary sentence to a mandatory dishonorable discharge.

II.

THE GOVERNMENT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY CONVICTING HIM UNDER A THEORY OF CRIMINALITY ABSENT FROM THE CHARGE SHEET.

Standard of Review

Whether an accused was denied his due process right to fair notice is a question of law reviewed *de novo*. *See United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008). Questions of statutory interpretation are reviewed *de novo*. *Sager*, 76 M.J. at 161.

Law

Due Process Considerations

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. V. This "Due Process" clause precludes the government from convicting an accused of an offense for which he has not been charged. *See United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Marshall*, 67 M.J. 418, 421 n. 3 (C.A.A.F. 2009)); *see also Ober*, 66 M.J. at 405 ("An appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact."). "Thus, when all of the elements are not included in the definition of the offense of which the defendant is charged, then the defendant's due process rights have in fact been compromised." *Girouard*, 70 M.J. at 10 (citation, internal quotation marks, and alterations omitted).

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *United States v. Teffeau*, 58 M.J. 62, 67 (C.A.A.F. 2003) (quoting *Dunn v. United States*, 442 U.S. 100, 106–07 (1979)). "[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *See Dunn*, 442 U.S. at 107. Rather, as the Supreme Court has recognized, "it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. (citation omitted).

Due process requires that "[t]o prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added). The CAAF has likewise observed that "the government controls the charge sheet" and "[t]he defense [is] entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

The Structure of Article 120, UCMJ

Article 120, UCMJ, contains multiple theories of culpability for sexual assault. Article 120(b)(2)(A), UCMJ, addresses the commission of a sexual act without the other person's consent. A different subsection prohibits the commission of "a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring[.]" Article 120(b)(2)(B), UCMJ. Yet another subsection proscribes the commission of "a sexual act upon another person when the other person is incapable of consenting due to impairment by any . . . intoxicant . . . when that condition is known or reasonably should be known by the person." Article 120(b)(3)(A), UCMJ. The disjunctive "or" separates Article 120(b)(2)(A) and (B), UCMJ.

Distinctions Between Charging Theories Under Article 120, UCMJ

In *Riggins*, the CAAF noted the difference between the burden to prove facts which establish an individual's "*legal inability to consent*" and the burden to prove that an individual "*did not, in fact, consent*." *United States v. Riggins*, 75 M.J. 78, 84

(C.A.A.F. 2016) (emphasis in original). One year later, in *Sager*, the CAAF held that the words "asleep, unconscious, or otherwise unaware"—also separated by "or"—represent three distinct theories of liability.[10] 76 M.J. at 162. The CAAF concluded that to hold otherwise would violate the surplusage canon of construction because it would render language within the same statutory scheme superfluous. *Id.*

Prejudice

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732–33 (1993). Constitutional error is tested for prejudice under the standard of "harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal citation omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (internal quotations and citation omitted). "An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of might have contributed to the conviction." *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (internal quotations, citations, and alterations omitted). The Government bears this burden. *Riggins*, 75 M.J. at 85.

[10] *Sager* and *Riggins* interpreted the 2012 version of Article 120, UCMJ. 76 M.J. at 159; 75 M.J. at 80. While each of the three theories at issue here were once part of the same section, *see* Article 120(b), UCMJ (2012 *MCM*), they are currently spread over two different subsections. Article 120(b)(2), (b)(3)(A), UCMJ (2019 *MCM*). This does not undermine any of the arguments raised.

Analysis

The Government charged the Appellant with committing a sexual assault upon K.E. "without her consent." Charge Sheet. Yet, K.E. testified that she woke up in his room, and the Appellant was penetrating her vulva with his penis. (R. at 682.) In fact, K.E. recounted to several outcry witnesses that she had gone to the Appellant's room fell asleep, and awoke to him penetrating her. (R. at 579-80, 591, 614, 635.) While the UCMJ provides an avenue for charging sexual assault when the other person is asleep (Article 120(b)(2)(B)), that is not what the Government charged the Appellant with.

Separately, the trial counsel argued in closing that K.E. could not consent because she was not competent to consent due to being in a blacked out state. (R. at 1128.) The closing argument came on the tail end of Dr. K.R. testifying for the Defense on blackouts. (R. at 1042, et. seq.) Dr. K.R. explained that when one is in a blackout state, they do not appear to be acting drunk which leads to others not knowing the person is blacked out. (R. at 1047.) Compounding that phenomenon is the ability of those in a blacked-out state to perform complex tasks as long as they knew how to do them before. (R. at 1044.) Dr. K.R. confirmed that people in a blackout can consent to sexual intercourse. (R. at 1054.) Contrary to that evidence (*see* Issue II *infra*), trial counsel essentially took the criminal theory of liability under Article 120(b)(3)(A) that K.E. was incapable of consenting due to impairment by an intoxicant in order to convince members to find the Appellant guilty. Trial counsel argued that K.E. had

drank so much alcohol that she was in a blackout due to the alcohol and was then "incompetent" to consent—using a word from the definition of "consent."

K.E.'s sworn testimony, the instructions to the members, and trial counsel's argument suggest the members convicted the Appellant under a theory of criminal liability absent from the charge sheet. Even a possibility that this occurred requires reversal. The Government cannot demonstrate this error was harmless beyond a reasonable doubt.

If Congress understood "without consent" as encompassing "incapable of consent" and "asleep" as theories of criminality, there would have been no reason to draft distinct theories of criminality in separate subsections of the statute. To illustrate the point further, Congress's decision to include a specific *mens rea* in Article 120(b)(3)(A), UCMJ, would serve no purpose if the prosecution is free to pursue a "without consent" theory that does not contain such a statutorily set forth *mens rea* in Article 120(b)(2)(A). As the CAAF observed when interpreting the 2012 version of Article 120, UCMJ:

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

United States v. McDonald, 78 M.J 376, 380 (C.A.A.F. 2019).[11]

[11] That the Government could effectively ignore a statutorily prescribed *mens rea* is cause for concern in and of itself. *See United States v. Wheeler*, 77 M.J. 289, 293

Moreover, if trial counsel is free to argue that K.E. was not a competent person and could not give consent due to being in a blackout brought on by alcohol, this undermines the framework devised by Congress. It fails to honor the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted), *superseded by statute as stated in Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020). Put simply, if Congress had intended for the Government to obtain sexual assault convictions on a "without consent" theory by arguing that the victim lacked the legal capacity to consent due to alcohol intoxication, or because she was asleep, then there would have been no point including Article 120(b)(2)(B) or (b)(3)(A) within the UCMJ.

Understanding this Court found otherwise in *Brassil-Kruger*,[12] the CAAF has granted on a similar issue in *United States v. Mendoza*, ARMY 20210647, 2023 CCA LEXIS 198 (Army Ct. Crim. App. 8 May 2023) (en banc), rev. granted __ M.J. ___, No. 23-0210/AR (C.A.A.F. Oct. 10, 2023) ("WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS LEGALLY SUFFICIENT.),[13] In *Mendoza*

(C.A.A.F. 2018) (noting that the Government may not use Article 134, UCMJ, to lessen its evidentiary burden at trial by circumventing a *mens rea* or removing a specific vital element from an enumerated offense).

[12] No. ACM 40223, 2022 CCA LEXIS 671, at *3 (A.F. Ct. Crim. App. 18 Nov. 2022) (unpub. op.) rev. denied 83 M.J. 316 (C.A.A.F. 2023). This Court found the specific issue of whether the Government violated the appellant's due process rights by charging him with sexual assault under a theory of lack of consent, but convicted him under a different theory did not warrant further discussion or warrant relief and cited *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

[13] Oral argument is yet to be scheduled at CAAF.

Senior Judge Walker's dissent focuses on *Sager* and also *United States v. Weiser*, 80 M.J. 635 (C.G. Ct. Crim. App. 2023).

The court should revisit *Brassil-Kruger*: (1) It does not matter that the CAAF denied a petition for review,[14] (2) the case involved instructions and not a challenge to the legal sufficiency of the proof, (3) the court failed to address the application of *Sager* and *Weiser* to the analysis of the several separate and independent theories of guilt as laid out in *Sager* and *Weiser*, (4) to quote Judge Walker, "The government cannot rely exclusively on the victim's lack of memory due to intoxication as a proxy for satisfying its burden to prove a lack of consent, which is what occurred in this case[, as a means to avoid or diminish the burden to prove lack of consent]." *Mendoza*, 2023 CCA LEXIS 198, at *15; and (5) the court should not fall into the trap the government set for itself, that "proof" of being in a black-out state was proof of a lack of consent, and (6) this court should take the opportunity to offer its view on the issue to CAAF in light of that court's consideration that the issue merits extended review. *Cf. United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

WHEREFORE, the Appellant respectfully requests that this Honorable Court set aside and dismiss Specifications 2 of the Charge, and set aside the segmented

[14] "[D]enial of a petition, although it allows the decision below to stand, does not suggest that we either agree or disagree with the merits of a lower court's resolution of the case." *United States v. McGriff*, 78 M.J. 487, 487 (C.A.A.F. 2019). *See also United States v. Carver*, 260 U.S. 482, 490 (1923); *Evans and Jordan v. Stephens, et al.*, 544 U.S. 942, n.1 (2005).

sentence to 30 months' confinement and the unitary sentence to a mandatory dishonorable discharge.

III.

TRIAL COUNSEL IMPROPERLY ARGUED THAT K.E. WAS NOT COMPETENT TO CONSENT DUE TO BEING IN A BLACKED-OUT STATE.

Standard of review

Prosecutorial misconduct and improper argument is reviewed de novo, "and where . . . no objection is made," for plain error." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018).

Law

A failure to timely object to an improper argument constitutes forfeiture of the objection. This court will then review plain error. Plain error is (1) error, (2) that is plain or obvious, and (3) that results in material prejudice to a substantial right of the accused. *Vorhees*, 79 M.J. at 6.

Analysis

> "*And he knew she was getting to the point where she's getting – where she's blacking out*."

(R. at 1079 (emphasis added).) There is no evidence to support the Appellant knew K.E. was blacking out. Rather, Dr. K.R. made it clear that a person could see a person and not know they were blacked-out. Later, the Government contradicted itself, with "It's hard to know what's going through a person's state of mind[.]" (R. at

1082.) That is a correct interpretation of the facts and likely contributed to confusion on the part of the members.

Trial counsel argued: "'I mean, I can't say what happened because I was blackout drunk.' That doesn't mean she consented. She wasn't competent to consent, and the circumstances tell you she couldn't have consented." (R. at 1128.) There is no evidence to support this argument about the lack of competence to consent while in a blackout state. The argument is misleading. Rather, medical science suggests there can be consent, not just a memory of that.

While blacked out, the hippocampus, the brain region responsible for memory formation, is temporarily impaired by alcohol. This means that while the person may be conscious and able to respond to external stimuli, they are not encoding any new memories of the experience. As a result, they may: (1) may speak coherently and even engage in complex discussions, but they will have no recollection of what was said afterwards, (2) may walk, drive, or even engage in sexual activity, but they will have no conscious control over their actions or any memory of them later, and (3) outwardly, they may show no obvious signs of being intoxicated, making it difficult for others to recognize that they are in a blackout.

> In summary, there is no objective or scientific method to verify the presence of an alcoholic blackout while it is occurring or to confirm its presence retrospectively. Even if such a method were available, valid, and reliable, an alcoholic blackout would not negate mens rea as the experimental studies reviewed here report that only short-term memory is impaired and other cognitive functions—planning, attention, long-term memory required to form criminal intent—are not impaired.

Mark R. Pressman and David Caudill, *Alcohol-Induced Blackout as a Criminal Defense or Mitigating Factor: An Evidence-Based Review and Admissibility as Scientific Evidence*. 58 J. FORENSIC SCI. 932 (2013).[15]

> From a review of 26 empirical studies, Pressman and Caudill (2013) concluded that only short-term memory is impaired during a blackout and that other cognitive functions, such as planning, attention, and social skills, were not affected. Because cognitive functions other than memory are not necessarily impaired during a blackout (Pressman and Caudill, 2013), a critical question is whether or not people are responsible for their behavior while in a blackout.

Reagan Wetherill and Kim Frome, *Alcohol-induced blackouts: A review of recent clinical research with practical implications and recommendations for future study*. 40 ALCOHOL CLIN. EXP. RES. 922 (2017).[16]

The information is relevant to a defense of mistake, even if not sufficient to establish consent as a stand-alone proposition. The Government improperly argued facts not in evidence—that one cannot consent during a blackout—and the opposite of which was in evidence—Dr. K.R.'s testimony that one can consent to sex during a blackout. There is also nothing in the definion of "consent" that was instructed on by the military judge that being blacked out meant one is not "competent." Such argument muddied the waters of what was required to be proved by the Government beyond a reasonable doubt. This was plain or obvious error that resulted in the material prejudice to a substantial right of the Appellant.

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[15] Available at: https://arizonaforensics.com/wp-content/uploads/2017/05/ART-Pressman2013.pdf.
[16] Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4844761/.

WHEREFORE, The Appellant respectfully requests that this Honorable Court set aside and dismiss Specifications 2 of the Charge, and set aside the segmented sentence to 30 months' confinement and the unitary sentence to a mandatory dishonorable discharge.

IV.

THE APPELLANT'S CASE SHOULD BE DISMISSED BECAUSE OF DILATORY POST-TRIAL PROCESSING.

Additional Facts

The Appellant is confined at the Naval Consolidated Brig, Charleston, South Carolina.

1. The Appellant was sentenced on 9 February 2022.

2. The Entry of Judgment was signed on 4 March 2022.

3. As of 25 April 2022, the court reporter had provided Area Defense Counsel (ADC) a transcript draft up through the 2 February 2022 court session.[17] (ADC/CDC email of 25 April 2022.)

4. On 19 May 2022, ADC reported: "still waiting for a big chunk of the transcript to review." (ADC/CDC email of 19 May 2022.)

5. On 2 September 2022, ADC advised that "I've completed the defense's review of the draft verbatim transcript. The court reporter let me know that he is still

[17] The post-trial chronology does not identify the number of in-court hours measured by the FTR-Gold program to gauge the time required to transcribe the in-court proceedings.

waiting on about 400 pages to be reviewed by the trial counsel." (ADC/CDC email of 9 February 2022.)

6. On 10 September 2022, the transcript was "certified."

7. On 10 October 2022, C.D.C. contacted the trial counsel about the record's status but received no acknowledgment or answer. (CDC/Gass/Pruitt email of 10 October 2022.)

8. On 14 October 2022, C.D.C. contacted the Deputy Staff Judge Advocate (DSJA), and was advised they were still awaiting a certified transcript from the court reporter. (DSJA/CDC email of 19 October 2022).

9. On 19 October 2022, the court reporter contacted the ADC.

> *Attached is the certificate of review. I apologize for the delay in getting this to you.*
>
> *Captain A : please print and use ink to sign and date, and use the date of 10 September 22 to reflect when you completed your review. Then scan and send back to me.*
>
> *Major C.Z.: same instructions, but please use the date of 2 September 22.*

(CR/ADC email of 19 October 2022).[18]

10. On 7 March 2023, ADC contacted the DSJA for a status update on the record and filing with this Court. (ADC/DSJA email of 7 March 2023). On 8 March 2023, the NCOIC SJAO told ADC that the record had been "dropped on the ADC shared folder. (NCOIC/ADC email of 8 March 2023.)

[18] The Appellant does not allege that any date discrepancies were an effort to improperly back-date or date an event.

11. On 21 March 2023, the Air Force Liaison, Navy Consolidated Brig Charleston, asked the Appellant if he had received his copy of the trial record. He told the Appellant that the "Spangdahlem legal office" wanted to know why the Appellant had not returned a receipt for his record copy.

12. On 24 March 2023, the Appellant's parents notified CDC that the Appellant had received his trial record. (Hennessy/CDC email of 24 March 2023.)

13. On 30 March 2023, CDC was informed that a second record copy was received, with CDs attached. (Hennessy/CDC email of 30 March 2023.)

14. CDC had been monitoring this Court's public website docket. Unfortunately, the case was not showing as docketed, so a query to the Clerk advised that the case was docketed on 28 March 2023 and of the subsequent corrective measures.

15. On 1 May 2023, this Court (and counsel) possessed a complete record.

16. The time elapsed from 4 March 2022 to 28 March 2023 is (325+121) 446 days (alternatively, 28 March 2023 would be 412).

17. There is a post-trial chronology in the record, but there is no explanation for the delay between the transcript's certification on 10 September 2022 and receipt by the court on 28 March 2023. The chronology does not indicate the AF/JAT assigned suspense date for completion of the transcript. ¶14.19.3., Dept of the Air Force Manual 51-203 (DAFM), Records of Trial, 2021.

Standard of Review

Claims of excessive post-trial delay are reviewed de novo. *United States v. Moreno*, 63 M.J. at 135.

Law

> Despite the limiting function of Article 59(a), multiple sources of authority grant an appellant the right to post-trial processing without unreasonable delay. One of them is the Due Process Clause of the Fifth Amendment to the Constitution which states, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." A second authority is Article 66(d)(2), UCMJ, which authorizes service courts of criminal appeals to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record . . . ."

United States v. Winfield, 83 M.J. 662, 664 (Army Ct. Crim. App. 2023) (en banc).

The Court of Appeals for the Armed Forces usually applies the *Barker v. Wingo*, 407 U.S. 514 (1972), factors to analyze post-trial delay. However, no single factor is required to find a due process violation. Instead, it is a balancing of facts and circumstances. No finding of prejudice is required. And this Court may also grant relief under its UCMJ Art. 66, 10 U.S.C. § 866, powers. *United States v. Toohey*, 63 M.J. 353, 361-362 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006).

Where post-trial delay is found to be unreasonable but not a due process violation, this Court still has "authority under Article 66[(d)(1), UCMJ,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). *See*

also, *Winfield*, 83 M.J. at 664-65 (Army Ct. Crim. App. 27 Apr. 2023) (referring to UCMJ Art. 66(d)(2), 10 U.S.C. § 866(d)(2).

Analysis

The Appellant requests that this Court dismiss the charges against him because of unreasonable egregious delay in forwarding his record to the court. In the alternative, the Appellant asks that he be granted significant post-trial confinement credit as a remedy for the error.

"Delay by the convening authority in acting on the record of conviction by a court-martial has been the subject of critical comment for a number of years." *Dunlap v. Convening Authority*, 48 C.M.R. 751, 753 (C.M.A. 1974). Yet issues of post-trial delay continue to be a regular feature of the appellant litigation—*plus ça change*. CMA created a rebuttable presumption aligned with the Article 10 presumption. In creating the presumption, the court stipulated that the Government will have to satisfy a "heavy burden to show diligence, and in the absence of such a showing, the charges *should be dismissed*." *Id*. at 138 (emphasis added).

The post-trial process in the days of *Dunlap* was burdensome at the field level. *See* ¶85.b., *Manual for Courts-Martial*, *United States* (1969). For example, the Staff Judge Advocate's advice required a summary of witness testimony and legal analysis of issues raised by the defense under Article 38(c), UCMJ, 10 U.S.C. § 838(c). The verbatim record of the trial was created on a typewriter using carbon paper while typing to make the requisite number of copies. Over time, Congress and the President

have amended the post-trial requirements to make them less burdensome. Judge Maggs commented on some of those changes in *Moreno*.

> In the Military Justice Act of 2016, Congress enacted a host of changes addressing post-conviction processing and appeals. A major goal of these changes was "to simplify and expedite processing of court-martial convictions." These changes are highly pertinent. As one example, Congress granted the Secretary of Defense authority to promulgate standards for "[c]ase processing and management" and the "[t]imely, efficient, and accurate production and distribution of records of trial within the military justice system." The authority that Congress has directed the Secretary of Defense to exercise arguably overlaps with the authority this Court felt necessary to assume for itself when the Court announced many of the rules and standards in *Moreno*. As another example, Congress has eliminated the requirement that the military judge authenticate the record of trial (now requiring the court reporter to certify the record). The former requirement of authentication by the military judge was the source of the greatest delay in this case. Regardless of what we say about such a delay today, I hope that it will not be seen again.

United States v. Anderson, 82 M.J. 82, 89 (C.A.A.F. 2022) (Maggs J., concurring) (citations omitted). As the Appellant's case demonstrates, the delay in authenticating the record has been transferred from the military judge to the court reporter with no appreciable gain in processing times.

While not the subject of a separate assignment of error, this court should consider whether the fault lies with The Judge Advocate General's personnel hiring and assignment practices for court reporting duty. After all, that is the office charged with ensuring an appellant has a speedy post-trial review through the assignment of sufficient personnel and resources. The failure to timely docket the Appellant's case cannot lie at the chief judge's feet because they can only make do with the personnel assets made available. CAAF has, at times, made it clear that administrative or

personnel difficulties are no excuse. *See, e.g., United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011) ("personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay."); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003) ("caseloads are a result of management and administrative priorities" "subject to the administrative control of the Government. To allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the rights of appellants.").

Perhaps this Court will adopt the admonition of the Army court,

> At our level, the well-intended 150-day limit established by *Brown* has done nothing in appellant's case—and little, if anything, in far too many other cases—to accelerate the post-trial process. Therefore, *Brown's* 150-day timeline is overruled. . . . Instead, we will scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing, including those less than 150 days. . . . We do not presume to be prescriptive in this regard. Nonetheless, we are consistently interested to know about a case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, *court reporter availability* and utilization for transcription, and *resource shortfalls* (e.g., insufficient throughput capacity despite court reporter regionalization).

Winfield, 83 M.J. at 665-66.

Should the court decline to dismiss the charges, the Appellant asks for an Order of 180 days of post-trial confinement credit as a reasonable remedy for dilatory Government actions.

Three *Barker*[19] factors are relevant.

[19] *Barker v. Wingo*, 407 U.S. 514 (1972).

1. The amount of delay here favors the Appellant and is singularly a reason to grant the relief requested.

2. The significant delays are attributable to preparing the trial record, and are not justifiable balanced against the Appellant's due process interests. The factor favors the Appellant. The substance of the delay is attributable to transcription time. (The Appellant does not take issue with personal leave and absences for medical reasons.)

Yet in the Appellant's case, we see over a month while the reporter was teaching at The Judge Advocate General School, traveling and reporting in a court-martial case at Shaw Air Force Base, South Carolina, within the Continental United States, and activities relating to a permanent change of station to Joint Base Andrews,[20] with the almost immediate assignment to court reporting at Joint Base Andrews, then traveling across the country to Luke Air Force Base, Nevada,[21] and then back across the country for two other cases at Joint Base Andrews. The Appellant's documents further expand upon the effects of the court reporter's schedule. The scheduling is circumstantial evidence that there is a lack of court reporting support to ensure timely records of trial.

Assignment to discharge boards appears to be another factor in the Appellant's case. The assigned Court Reporters' primary duty is to support courts-martial.

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[20] It is common knowledge and experience among those who have completed at least one overseas PCS that the administrative, personal, and travel, issus are significant and likely take up much of a persons time; followed by the check-in process at the new duty station and the personal need to arrange housing.

[21] For *United States v. Byrne*.

¶14.19.5, Dept. of the Air Force Manual 51-203, Records of Trial (DAFM), requires that transcription duties should take priority over all non-court reporting duties assigned to court reporters at the base level because they are a Priority 1 tasking, compared to discharge boards which are Priority 6 taskings. ¶14.21.2.1.; 14.21.2.6., DAFM.

There is no documented effort to reassign the Appellant's case to another court reporter. That was done in *United States v. Byrne*, although it does not appear another reporter was assigned in *Byrne*. (Attachment B.) The taskings with court reporting duties within CONUS (and associated time and travel from overseas) added to the time it took to prepare the transcript.

The DAFM is part of creating a centralized management system within AF/JAT designed to "support the Air Force's worldwide mission, workload, and the best interests of the Air Force." However, it is silent about ensuring timely post-trial processing of a convicted servicemember's trial record. ¶ 4.7.1. If the court reporter's chronology exemplifies the work assignments of other court reporters, that indicates a systemic problem.

The failure to timely docket the Appellant's case cannot lie at the chief judge's feet because she or he can only make do with what personnel assets are available to them. Instead, the issue here lies at the Headquarters level in creating what appears to be a systemic difficulty, for the senior leadership at headquarters is responsible for personnel accessions and assignments.

3. The Appellant did not say the magic words of "I want a speedy review." However, this factor is neutral for the following reasons.

a. The regular defense requests for a status on the trial record and docketing should be considered the functional equivalent of a "demand" for speedy docketing.

b. A demand for speedy docketing is unnecessary in the military. Every judge advocate and support staff are duty-bound to ensure the timely processing of court-martial records from preferral through putting the trial record in the mail, of which no judge advocate can claim they are unaware. *See Moreno*, 63 M.J. at 138 (The obligation rests upon the Government, and an appellant bears no responsibility for transmitting the record of trial to the Court. "Nor is it unreasonable to assume that a convicted person wants anything other than a prompt resolution of his appeal.").

Requiring an appellant to tell the Government, "I demand you do your duty," is rather trite. And it is (1) an exercise in shifting blame for the Government's failures and (2) distracts others from delving into the failures and their causes.

And lastly, granting the requested relief will improve the public perception of the Air Force's commitment to the timely and fair administration of military justice. (Note, in *Winfield,* the appellant was sentenced only to a bad conduct discharge. Therefore, the majority believed they could not set aside the punitive discharge. However, Judge Penland, writing for himself and Judge Arguelles, would have set aside the punitive discharge for the "OSJA's triumvirate of failures."

Making an example in the Appellant's case will avoid a situation where the CAAF might decide to step in as did its predecessor court.

WHEREFORE, the Appellant respectfully asks this Court to dismiss the charges or in the alternative, to grant 180 days of post-trial sentence credit for excessive and unreasonable delay in docketing his case.

V.

THE CONSTITUTION GIVES THE APPELLANT A RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

The Appellant elected trial by officer and enlisted members. (R. at 147.) The military judge instructed them, "[t]he concurrence of at least three-fourths of members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." (R. at 1130.) It is unknown whether the members convicted the Appellant by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Tovarchavez*, 78 M.J. at 462 (internal quotations omitted).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, the Appellant was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

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

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

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

Respectfully submitted,

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Cave & Freeburg, LLP

CERTIFICATE OF SERVICE

I certify that the original and copies of the foregoing were emailed to the Chief, Government Appellate Division, the Chief Defense Appellate Division, and this Court on 1 February 2024.

Cave & Freeburg, LLP

APPENDIX

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

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A CHALLENGE TO SSGT S.L.G. FOR IMPLIED BIAS.

Standard of review

"Although [the] standard of review is abuse of discretion for challenges based on actual bias as well as those based on implied bias, [the court] give[s] less deference to the military judge when implied bias is involved. *See generally United States v. White*, 36 M.J. 284 (1993)." *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997); *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997).

Law

There are three bases for the exclusion of a prospective member from sitting in judgment: (1) actual bias, (2) implied bias, and (3) inferred bias. Article 41, UCMJ, 10 U.S.C. § 841; *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998); Rule 912(f)(1)(N), RULES FOR COURTS-MARTIAL, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) (RCM/MCM).

The Court of Appeals for the Armed Forces has determined that Rule 912(f)(1)(N) includes challenges for both actual and implied bias. *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)).

a. *Actual bias*. The test is a subjective one and asks,

> whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" The existence of actual bias is a question of fact, and we consequently provide the military judge with significant latitude in determining whether it is present in a prospective member. That the military judge, rather than the reviewing court, has been physically present during voir dire and watched the challenged member's demeanor makes the military judge specially situated in making this determination.

United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997).

b. *Implied bias*.

> The test for implied bias is objective. Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced. We look to determine whether there is "too high a risk that the public will perceive" that the accused received less than a court composed of fair, impartial, equal members. We review rulings on challenges for implied bias under a standard that is less deferential than abuse of discretion, but more deferential than de novo review.

United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006) (citations omitted). When addressing implied bias, the military judge must also consider the liberal grant mandate established in *United States v. White*, 284, 287 (C.M.A. 1993).

> Implied or presumed bias is "bias conclusively presumed as a matter of law." It is attributed to a prospective juror regardless of actual partiality. In contrast to the inquiry for actual bias, which focuses on whether the record at voir dire supports a finding that the juror was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced. And in determining whether a prospective juror is impliedly biased, "his statements upon voir dire [about his ability to be impartial] are totally irrelevant."
>
> For this reason, a finding of implied bias does not rely on any questioning by the trial judge as to the prospective juror's assessment of his or her partiality. Accordingly, in the limited cases in which bias is

> properly presumed, the judge does not have to ask the juror if he or she could faithfully apply the law.

United States v. Torres, 128 F.3d 38, 45 (2d Cir. 1997) (citation omitted). *See also United States v. Schlamer*, 52 MJ 80, 93 (C.A.A.F. 1999) ("implied bias is viewed objectively, "through the eyes of the public."). Military judges and the parties tend to focus on the member as being biased and viewed objectively should be excused. Rather, implied bias focuses more appropriately on the public perception, which is effectively incorporated in there being a "substantial doubt" as to the fairness and impartiality requirement of RCM 912(f)(1)(N).[22] The requirement to focus on the public perception is often ignored or not sufficiently addressed at trial. *See also, United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); RCM 912(f)(4).

In *Velez*, the CAAF pointed out a distinction between limited challenges of implied bias *per se* and more common but permissible challenges of inferred bias. The court cited to *United States v. Torres*, 128 F.3d 38, 45-47 (2d Cir. 1997). "Suggestions of such a discretion on the part of the trial judge to infer bias can be found in prior cases." Id. citing *Dennis v. United States*, 339 U.S. 162 (1950); *Cf. United States v. Guyton*, ARMY No. 20180103, 2020 CCA LEXIS 462 *7, 2020 WL 7384950 (C.A.A.F Dec. 16, 2020).

[22] An appropriate analogy might be to the third factor of the *Liljeberg* test for a judicial recusal question. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Analysis

The Defense challenged Staff Sergeant S.L.G. for implied bias. He also knew MSgt C. (although slightly). (Over defense objection, MSgt C. did testify. (R. at 790.)) He knew of a friend or family member who had been a victim of sexual assault. (R. at 448, 456.) During individual voir dire, he said, "I have a cousin who, unfortunately, she was raped growing up. And then, my sister-in-law and my wife have both been molested growing up, and that was by their father. And I have a coworker – at least a past coworker at another base, who was basically molested – it wasn't a rape – by a different coworker at one time." (R. at 506.) He later said, "I think I was way more, like, I guess, sympathetic and caring just for her as – and her wellbeing and just kind of realizing how strong she is, 'cause just when I first met her, I would have never guessed that that had happened." (R. at 508.) Later when asked about his spouse, he said, "It's more when she brings it up, or – I mean, see stuff in the news or maybe we're watching a TV show that kind of involved something of that nature, and that's one – I'll kind of think about that, or kind of look over and she might be thinking about it too kind of thing. (R. at 512.) This point would be relevant in terms of assessing an alleged victim's behavior and demeanor during and after the alleged offenses. SSgt G. also raised the 'one drink' issue that has haunted alcohol-related sex offense cases. (R. at 510.)

In denying the challenge to SSgt S.L.G, the military judge did not sufficiently consider or apply the liberal grant mandate, nor did counsel ask him to. (R. at 533-534.) Further, the military judge did not state whether this was or was not a close

call. For this reason alone, the court should not defer to the military judge's ruling. After all, the standard is "'less deferential than abuse of discretion, but more deferential than de novo review.'" *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017). "In cases where less deference is accorded, the analysis logically moves more towards a de novo standard of review[,]" and "In cases where less deference is accorded, the analysis logically moves more towards a de novo standard of review." *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016).

The defense did not ask for nor did the military judge sua sponte offer a tailored instruction to address the possibility that one or more members may feel constrained by out-of-court statements along the lines of one drink means not consent.

The totality of the circumstances suggests that, under the liberal grant mandate, the military judge should have granted the challenge to SSgt G. *United States v. Nash*, 71 M.J. 83 (C.A.A.F. 2011).

WHEREFORE, the Appellant respectfully asks this Court to set aside the findings and sentence.

VII.

THE TRIAL COUNSEL COMMITTED AN ACCUMULATION OF ERRORS DURING FINDINGS ARGUMENT TO THE THE APPELLANT'S PREJUDICE.

The Appellant separately requests that the court consider other errors during argument which cumulatively deprived him of a fair trial.

> "Because the thing is the law as the military judge has instructed you tells you he is guilty."

(R. at 1080.) Here, the prosecution is putting the military judge's imprimatur on their argument, thereby implying that the military judge believes he's guilty, and so should they.

> When we talked way back at the very beginning of this process, do you remember the very beginning of this process? We – the attorneys had a lot of questions for you, and we talked about a lot of things during that process. And we talked to you about how people process events differently. And it's no different for victims of sexual assault.

(R. at 1094.) Questions and answers during voir dire are not evidence, yet here the prosecution is arguing that their questions in voir are evidence that the members can consider. This argument is a form of vouching.*United States v. Gant*, No. 21-3117, 2023 U.S. App. LEXIS 23100, at *5-6 (3d Cir. Aug. 31, 2023) (citations omitted); *Severson v. Christensen*, No. 1:20-cv-00429-REP, 2023 U.S. Dist. LEXIS 177392, at *107 (D. Idaho Sep. 29, 2023). And, there was no evidence to support what the prosecution was, in effect, arguing. After the prosecution rebuttal, the military judge did give a limited instruction about "evidence actually presented," however, this was insufficient.

> "So much has been taken from her because of him. Don't let them take her self-esteem as well."

(R. at 1127.) This is not an argument based on the facts, but rather is a call to convict the Appellant in order to compensate the victim for any trauma—that is a sentencing issue. Here the prosecution was seeking to inflame the emotions of the members.

WHEREFORE, the Appellant respectfully asks this Court to set aside the findings and sentence.

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. William C. S. HENNESSY Airman First Class (E-3) U. S. Air Force *Appellant*	APPELLANT'S MOTION TO ATTACH DOCUMENTS (Corrected) No. ACM 40439 Panel 3

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

In accordance with Rule 23.3(b). A.F. CT. CRIM. APP. R. 23.3(b)., the Appellant respectfully asks this Court to accept and consider

Attachment A

Declaration (with Attachments) of Major C.S.Z., the Appellant's trial defense counsel, relevant emails, and the Appellant's letter of 30 March 2023.

Attachment B

Court reporter chronology in *United States v. Byrne*, ACM 40391, pending before this court. The undersigned represent's Appellant B before this court.

Reasons to attach

The Appellant has raised an issue of dilatory processing of his record from the time of the Entry of Judgment to receipt by this court. The information contained in the attachments expands upon and clarifies various factual matters not available in the record of the trial itself.

Accepting the declaration and other documents does not offend *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). Supplementing the record here is similar to raising issues of the ineffectiveness of counsel. When the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), it did not reject using affidavits or declarations about counsel effectiveness. Initially, that is the only way under military appellate practice to advance and support a claim with relevant facts from outside the record. A similar approach is appropriate to allow an appellant to properly move the burden of producing some evidence of egregious delay to the Appellee to justify the delay.

WHEREFORE, the Appellant respectfully asks this Court to grant his motion.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

CERTIFICATE OF SERVICE

I certify that the original and copies of the foregoing were emailed to the Chief, Government Appellate Division, the Chief Defense Appellate Division, and this Court on 14 February 2024.

PHILIP D. CAVE
Cave & Freeburg, LLP

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman First Class (E-3) **WILLIAM C.S. HENNESSY**, USAF *Appellant.*	)	**UNITED STATES' MOTION TO FILE AMENDED ANSWER** Before Panel No. 3 No. ACM 40439 6 March 2024

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

Pursuant to Rule 23.3(n) of this Honorable Court's Rules of Practice and Procedure, the United States hereby moves to file an amended answer to assignments of error. The original answer to assignments of error was timely filed on 4 March 2024. Amendment is necessary because since it was filed, the government became aware the ACM number on page one of the answer is incorrect. In the amended pleading, page one is corrected to reflect the appropriate ACM number. No substantive changes are made in the amended pleading which is included with this filing.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion to file amended answer.

USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 6 March 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Airman First Class (E-3) **WILLIAM C.S. HENNESSY**, USAF Appellant.	)) **AMENDED UNITED STATES'**) **ANSWER TO ASSIGNMENTS**) **OF ERROR**))) Before Panel No. 3)) No. ACM 40439)) 6 March 2024

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

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COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 3
Airman First Class(E-3) **WILLIAM C.S. HENNESSY**, USAF Appellant.	)	No. ACM 40439
	)	4 March 2024

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

ISSUES PRESENTED

I.

WHETHER SPECIFICATION TWO OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

WHETHER THE GOVERNMENT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY CONVICTING HIM UNDER A THEORY OF CRIMINALITY ABSENT FROM THE CHARGE SHEET.

III.

WHETHER TRIAL COUNSEL IMPROPERLY ARGUED THAT K.E. WAS NOT COMPETENT TO CONSENT DUE TO BEING IN A BLACK-OUT STATE.

IV.

WHETHER APPELLANT'S CASE SHOULD BE DISMISSED BECAUSE OF DILATORY POST-TRIAL PROCESSING.

V.

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

VI.[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A CHALLENGE TO SSGT S.L.G. FOR IMPLIED BIAS.

VII.

WHETHER THE TRIAL COUNSEL COMMITTED AN ACCUMULATION FO ERRORS DURING THE FINDINGS ARGUMENT TO THE APPELLANT'S PREJUDICE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

In June 2019, K.E. (hereinafter "K.E.") was a stationed at Spangdahlem Air Base, Germany, having arrived there in March 2019. (R. at 663.) On 8 June 2019, K.E. did not know the Appellant very well, but the two had connected via Instagram and Snapchat in the beginning of during an exercise for Civil Engineering (CE) members where they learn about starting a base in a deployed located. (Id. at 665-66.)

On 8 June 2019, the two made plans to hang out in person at Appellant's dorm room. (Id. at 667-68.) K.E. arrived at Appellant's dorm room at approximately 1500 or 1600 hours. (Id. at 668.) Appellant opened the door to welcome K.E., who sat on Appellant's futon or couch. (Id. at 669.) Appellant sat down next to K.E. and they watched television side by side. (Id.)

[1] Issues VI and VII are raised in accordance with United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992).

Appellant and K.E. were talking to each other and Appellant began scooting closer to K.E. (Id.) Appellant attempted to grab K.E.'s hand, but K.E. did not grab it back. (R. at 668.) At that moment K.E. felt as though Appellant were moving too fast. (Id.) K.E. did not pull her hand away from Appellant, and he progressed to attempting to kiss K.E. (Id.) Appellant leaned toward K.E. and she pulled away; Appellant seemed to grasp that K.E. was not interested in kissing at that time. (Id. at 670-71.) Appellant, however, attempted to kiss K.E. again a few minutes later. (Id. at 671.) This time, Appellant grabbed K.E.'s face and K.E. let him kiss her briefly before she pulled away. (Id.) K.E. left Appellant's room within a half hour of that kiss. (Id. at 673.)

While in Appellant's dorm room, the two discussed attending a concert at the Enlisted Club (E Club) on base later that evening. (Id. at 672-73.) K.E. had wanted to go to the concert, but none of her friends were going. (Id. at 673.) Once K.E. was back in her own room, though, she received a text message from Appellant asking her to go to the concert with Appellant and his friends. (Id. at 674.) Appellant also text messaged K.E. to apologize for moving too fast, which K.E. was appreciative of, and so she agreed to go to the concert with Appellant. (Id. at 672-674.)

K.E.'s dorm is close to the E Club. (R. at 674.) She walked there and arrived at the concert at approximately 1915-1920. (Id.) When she arrived, Appellant was sitting in the patio area with his friends; he complimented K.E. on what she was wearing but they did not talk because his friends were there. (Id.)

K.E. was not completely sure how many drinks she had that night, but she recalled drinking Jack and Coke and knew she had more than one, possibly up to four in a span of at least three hours. (Id. at 677, 707-710.)

After the band finished playing and after Appellant and K.E. took a photo with the band, they were sitting at a table when Appellant asked K.E., "'So my room or yours?'" (Id. at 676, 679.) K.E. testified she has a "hard time saying no, so I was really awkward about it and I was like, 'You go to yours and I'll go to mine,'" which Appellant agreed to. (Id. at 679.) K.E. was not able to remember actually stepping out of the E Club, but at some point, the two left the E Club, and K.E. was feeling either buzzed or drunk from the alcohol. (Id. at 681.) K.E. was feeling tired and drunk, and Appellant gave K.E. a piggyback ride, assuming he would take K.E. to her room. (Id. at 682.) K.E. was not sure why she thought Appellant would take her to her dorm because Appellant did not actually know where K.E. lived. (Id.)

The next memory K.E had was waking up in Appellant's room and Appellant was having sex with K.E. (Id.) K.E. opened her eyes, and she realized she was on Appellant's bed, on her back, with no pants or underwear on, with her legs up on Appellant's shoulders; she noticed that the lights were off in the room but the television was turned on. (Id. at 682-83.) Appellant's penis was penetrating K.E.'s vagina as he thrusted into her, breathing heavily. (Id. at 684.) K.E. panicked. (Id. at 685.) She then pretended to be asleep to get Appellant to stop assaulting her, closing her eyes and facing his wall. (Id.) Appellant called K.E.'s name, said, "Oh, no," and shook K.E.'s shoulder to try to wake her up. (Id.) K.E. kept her eyes closed and Appellant stopped and walked away. (Id. at 686.) K.E. opened her eyes, got dressed right away and came up with a plan to leave Appellant's room, claiming one of her friends needed her. (Id.)

When K.E. left, she initially walked down the staircase, fearing Appellant might come after her, and then she started running when she got to the ground level. (Id. at 689.) K.E. went back to her dorm building and went to the restroom in the lobby area where she urinated and started to freak out and cry. (Id.) K.E. tried to call one of her female friends, S.L., but S.L. was

not on the base and lost the call with K.E. (Id. at 606-07, 689.) K.E., still frantic, called K.B., an acquaintance who she had a crush on, but who she did not have any prior relationship with. (Id. at 633, 690.) K.B. was a little confused and surprised to be getting a call from K.E., but he answered and heard K.E. sounding choked up, as though she was holding back tears. (Id. at 560.) K.E. disclosed to K.B. that Appellant raped her. (Id. at 691.) K.B. comforted K.E. and stayed with her until K.E.'s friend S.L. arrived. (Id. at 692.) S.L. recalled finding K.E. outside with K.B., crying intensely as she clutched on to K.B. (Id. at 609.) S.L. convinced K.E. to go back to her room. (Id. at 610.) K.E. recalled she and S.L. went to her dorm room and eventually another friend of K.E.'s, H.P., joined them. (Id. at 611, 692.) K.E. also remembered S.L.'s then boyfriend, L.V. showed up at her dorm. (Id. at 693.) K.E. disclosed to them what she recalled from that night[2] and they encouraged her to make a report to the Sexual Assault Response Coordinator (SARC). (Id. at 692-93.) K.E. did make a report and also obtained a forensic examination. (Id. at 694, 695.)

K.E. testified she did not believe she consented to the Appellant because she found that Appellant was moving too fast earlier in the day with just the kissing, stating, "… I don't see how I would have been okay with sex happening later on if I wasn't okay with kissing earlier on." (Id. at 782.)

[2] K.E. did not recall K.B. being present at her dorm room (R. at 692.), but K.B. testified he was there with K.E., S.L., H.P., and L.V. (Id. at 574.). S.L. testified she did not recall K.B. coming to the room. (Id. at 610.) L.V. testified he saw K.B., S.L., H.P., and K.B. in the room. (Id. at 645.)

ARGUMENT

I.

APPELLANT'S CONVICTION OF SPECIFICIATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THE THEORY UPON WHICH IT CHARGED – THAT K.E. DID NOT CONSENT.

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023). (internal citation omitted).

Law

Sexual assault in violation of Article 120, UCMJ requires these elements: (1) that the accused committed a sexual act on another person; and (2) that the accused did so without the consent of the other person. Manual for Courts-Martial, pt. IV, 60.b.(2)(d) (2019 ed.). Congress defined consent as:

> a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent.
>
> …
>
> A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

10 USCS § 920(g)(7)(A). "A sleeping or unconscious person, or incompetent person cannot consent…" 10 USCS § 920(g)(7)(B). "All the surrounding circumstances are to be considered in determining whether a person gave consent." 10 USCS § 920(g)(7)(C).

The military judge provided the following mistake of fact as to consent instruction for Specification 2 of the Charge to the members:

> Mistake of fact means the accused held as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual conduct. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts.
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> "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

(R. at 1065-1066.) *See also* R.C.M. 916(j)(1)

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).. "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016). (citations omitted). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)..

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 (C.A.A.F. 2017).. 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.

Analysis

A. Appellant's Conviction for Sexual Assault is Factually Sufficient.

The Government's theory in this case was that K.E. did not consent to sexual intercourse. (*Charge Sheet*, Vo1. 1.) The Government established lack of consent through the use of circumstantial evidence. *See*, e.g., United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015) (requesting members to draw inferences from such circumstantial evidence is a common aspect of court-martial practice).

The circumstantial evidence in this case consisted primarily of K.E.'s consistent rejection of Appellant's sexual physical advances as proof that K.E. did not consent to any sexual behavior on the evening of 8 June 2019. During their first in-person meeting Appellant tried to hold K.E.'s hand. (R. at 670.) K.E. rejected this overture by not reciprocating. (Id.) A few minutes later Appellant leaned over and tried to kiss her; K.E. again rejected this advance by leaning away from Appellant. (R. at 670.) Undeterred by the fact that K.E. leaned away to

avoid his kiss, Appellant "grabbed" her face so as to force a kiss from K.E. (R. at 671.) This evidence not only demonstrated that K.E. was not sexually interested in Appellant but also revealed Appellant's motive and intent to continue making sexual advances toward K.E. regardless of her consent.

At no point was any evidence introduced that would support a reasonable mistake of fact. There was no evidence of reciprocated physical contact, kissing, or flirting. During their first in-person meeting and throughout the evening K.E. expressed no sexual interest in Appellant. She did not hold his hand when he reached for her hand. When Appellant did in fact kiss K.E. he knew that she would likely pull away and that is why he had to grab her face. He also knew that he had upset her because he later sent her a text message and apologized stating that he was sorry if he was moving too fast. He also asked if they could "start over" and meet up that evening for a concert. (R. at 672.) While K.E. did agree to meet him at the E Club, this was far from a one-on-one romantic date that would contribute to any mistake of fact. (Id.)

When K.E. arrived at the enlisted club, she did not spend a lot of time speaking to Appellant because he was with his friends. (R. at 673- 674.) The few interactions at the enlisted club evidenced K.E.'s continued rejection of his physical and sexual advances. Despite the fact that K.E. was drinking, she declined Appellant's offer to buy her a drink. (R. at 706.) Later, when Appellant noticed that K.E. was on the phone and took the opportunity to place his hand on her lower back, she again rejected this advance by nudging him away. (R. at 680.) And she turned him down when he suggested they spend time alone together in one of their respective dorm rooms and instead tells him, "You go to yours, I'll go to mine." (R. at 679.) While K.E. did accept a piggyback ride from Appellant because she was tired and drunk; and she only accepted it because she assumed that he would bring her to her dorm room. (R. at 682.)

This circumstantial evidence, combined with the panic K.E. felt when she awoke and discovered Appellant having sexual intercourse with her, supported the finding that K.E. did not consent to sexual intercourse with Appellant. (R. at 685.) In addition, after the sexual intercourse, but before K.E. left his dorm room, Appellant asked K.E. whether he had done anything wrong. (R. at 730.) This question is indicative of Appellant's concern of having sexual intercourse with a person who he knew had not consented and expressed no sexual interest in him.

Appellant raised the defense of reasonable mistake of fact in that Appellant did not know that K.E. was asleep when having sex with her because K.E. testified that when she awoke to Appellant having sex with her, she feigned sleep. (App. Br. at 16.) At this point, Appellant called her name, attempted to wake her, and left her within seconds. (Id.) Appellant asserts that these facts are evidence that Appellant reasonably believed K.E. was consenting before she feigned sleep. (Id.) They are not.

Instead, these facts are consistent with Appellant having sexual intercourse with an individual who did not consent, and who was asleep during the sexual intercourse. K.E. testified that she *woke* to sexual intercourse. (R. at 682.) (emphasis added) There was no evidence that she consented before the intercourse started or that she was awake when it started. On the contrary, the only evidence was that K.E. was not interested in Appellant and wanted to go to her own dorm room. (R. at 679.) When she woke, she was awake for enough time to realize where she was, what was happening, and to devise an escape. (Id.) Appellant likely noticed when she awoke, noticed she did not protest, but panicked when she again he saw her again lose consciousness. These facts do not diminish Appellant's culpability or support a finding that there was a reasonable mistake of fact with respect to K.E.'s consent.

Appellant also asserts that K.E. was able to consent to sexual intercourse in a blackout state, and that this fact contributed to Appellant's reasonable mistake of fact with respect to consent. (App. Br. at 17.) While the Government generally agrees with the proposition that a person who is blacked out may be able to consent to sexual activity, there is no evidence that a person experiencing an alcohol blackout is *more likely to consent.* The defense expert testified that an alcohol blackout only impacts a very specific part of the brain – that which controls the formation of long-term memories. (R. at 1044.) There was no suggestion that someone would behave differently under an alcohol backout. Therefore, while K.E. could have consented to sexual intercourse, there is no evidence, direct or circumstantial to even suggest that she did. Instead, all the evidence supported a finding that she was not interested in Appellant and did not consent to sexual activity.

In sum, all the circumstantial evidence in this case supports the finding that K.E. was not sexually interested in Appellant and did not consent to sexual activity with Appellant. She affirmatively rejected every physical advance he made on the night in question. Accordingly, this Court should be convinced beyond a reasonable doubt of Appellant's guilt and should affirm his conviction.

B. Appellant's Conviction for Sexual Assault is Legally Sufficient.

The Government's theory in this case was that K.E. did not consent to sexual intercourse. (*Charge Sheet*, Vo1. 1.). Evidence that K.E. was drunk, tired, incapacitated or in a blackout state was relevant to the "surrounding circumstances" under the statutory consent instruction provided by the military judge with respect Specification 2 of the Charge. (R. at 1065.) Such evidence was also relevant to K.E.'s overall memory, perception, recollection, and credibility. And contrary to Appellant's assertion, this evidence did not transform the Government's theory of the

case nor its burden into proving a mens rea that the Appellant knew or reasonably should have known a certain fact. (App. Br. at 13.)

Excluding evidence of K.E.'s intoxication and potential alcohol blackout on the night in question would be tantamount to ignoring evidence required to be considered under the statutory definition of consent. The statutory definition of consent provides, *inter alia,* "[a] *sleeping*, unconscious, or incompetent person cannot consent" and that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." 10 U.S.C. 920(g)(7)(B)-(C) Taken as a whole, this instruction imparted to the panel a correct version of the law and that the Government retained the burden of affirmatively proving a lack of consent consistent with the offenses charged in this case. *See* United States v. Brassil-Kruger, 2022 CCA LEXIS 671, *21 (A.F. Ct. Crime. App. 2022). Accordingly, this evidence was properly admitted and argued by trial and defense counsel.

Trial counsel may argue evidence presented at trial (that a person could not consent because they were either asleep or incapacitated) even though such evidence may also appear to support a different theory of liability than what was charged (that a person did not in fact consent). United States v. Williams, 2021 CCA LEXIS 109 at *53-54, *58 (A.F. Ct. Crim. App. 2021). (evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent). In Williams, the evidence tended to show that the victim was incapable of consenting due to intoxication pursuant Article 120(b)(3)(A); here, the evidence tended to show that K.E. did not consent but was also incapable of consenting due to being asleep pursuant Article 120(b)(2)(B). *Compare* Williams, 2021 CCA LEXIS 109 at *53-54 to R. at 1128. In both cases, however, the United States successfully argued that the victim's condition, (whether it be asleep,

incompetent, or intoxicated), was relevant on the ultimate issue of consent. *Compare* Williams, 2021 CCA LEXIS 109 at *53-58 to R. at 1128. Given that this was a permissible use of the evidence under Williams, to the extent that it was part of the surrounding circumstances, it did not, as argued by Appellant, obligate the Government to prove that Appellant knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act is occurring. (App. Br. at 13.) This position is further supported by this Court's recognition that "there is a degree of logical evidentiary overlap in the Article 120, UCMJ, offenses…". Williams, 2021 CCA LEXIS 109 at *58.

Appellant asserts that the use of the evidence of blackout, intoxication, and competency runs afoul United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016) (App. Br. at 12.) It does not. In Riggins, the Government transformed the proof required by considering a lesser included offense that changed the burden of proof from the "legal inability to consent" to the alleged victim "did not, in fact consent." Riggins, 75 M.J. at 84. However, in this case, the burden of establishing K.E. did not consent remained consistent throughout the trial. Lack of consent was largely established by the use of circumstantial evidence that K.E. demonstrated no interest in Appellant that would give rise to consent or a mistaken belief as to consent. (R. at 670, 671-673, 679-680).

Appellant also relies on United States v. Sager, 76 M.J. 158 (C.A.A.F. 2017) for the proposition that "without consent" under Article 120(b)(2)(A), is separate and apart from "incapable of consenting" due to impairment by an intoxicant under Article 120(b)(3)(A). (App. Br. at 12-13). However, Sager, does not stand for the proposition that the relevant surrounding circumstances, such as intoxication, competency, and blackout must be ignored or excluded from consideration depending on the theory of criminal liability. As a result, evidence that K.E. may have been asleep when the sexual intercourse started; or that she experienced an alcohol blackout

are relevant and admissible for different theories of liability under Article 120 in much the same way that evidence that K.E. rejected every sexual or physical advance at every opportunity.

In sum, when drawing every reasonable inference from the evidence of record in favor of the prosecution, there is sufficient evidence to establish that Appellant committed a sexual act with K.E., the act was done without consent, and there was no reasonable mistake of fact as to whether K.E. consented. Since the evidence is both legally and factually sufficient, this Court should affirm Appellant's conviction.

II.

THE GOVERNMENT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS BECAUSE HIS CONVICTION WAS CONSISTENT WITH SPECIFICATION 2 OF THE CHARGE

Standard of Review

This Court reviews matters of statutory interpretation *de novo*. United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (*citing* United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016)).

Law and Analysis

Appellant asserts that the Government convicted him under a theory of sexual assault that was absent from the charge, namely that K.E. was asleep (*see* Article 120(b)(2)(B)). (App. Br. at 20.) It did not. Following the persuasive reasoning in Williams, Appellant was not convicted under a different legal theory from which he was charged, and as a result, there was no Due Process Clause violation.

Williams directly addressed this same due process argument and held that appellant was not denied due process even though the evidence presented at trial appeared to also supported a different theory of liability than what was charged. Williams, 2021 CCA LEXIS 109 at *53-54, *58. Although appellant was charged under a theory of sexual assault by bodily harm, the

evidence presented in Williams appeared to suggest that the victim was incapacitated due to alcohol as she "was just lying there on the floor…her arms were sprawled out to the sides of her…[a]nd her eyes were closed." Id. at *7. Importantly, the victim in Williams was unable to testify on the issue of consent even though the United States had charged a sexual assault by bodily harm, thus making consent a critical element of the offense. Id. at *54. As a result, the trial counsel in Williams relied "nearly exclusively" on the victim's "apparent inability to consent" as based on witness observations of the victim's "non-responsiveness." Id. at *54-55. In holding that there was no due process violation, this Court reasoned that "evidence tending to show a person *could not consent* to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not consent*…" and that there was a "degree of logical evidentiary overlap in the Article 120, UCMJ, offenses." Williams, 2021 CCA LEXIS 109 at *57-58 (emphasis added); *see also* United States v. Weiser, 80 M.J. at 635, 641-42 (C.G. Ct. Crim. App. 2020) (reasoning that the combination of the victim's alcohol consumption, intoxication, and fatigue were not intended to prove incapacity, but rather, were relevant "surrounding circumstances" on the element of consent).

Compared to Williams, the present case is a much weaker argument for a due process violation. Trial counsel relied on all the surrounding circumstances to prove that K.E. did not consent. (R. at 1091.) The surrounding circumstances were not limited to K.E.'s intoxication, fatigue, and blackout state. Instead, trial counsel, in his closing argument placed significant weight on the fact that K.E. consistently rejected every physical or sexual advance made by Appellant:

> Again, members, you have to look at all of the surrounding circumstances. All the surrounding circumstances from that night tell you she did not consent to him. She didn't want him holding her hand; she didn't want him kissing her face; she didn't want him

> holding her face; she didn't want him rubbing her back; she doesn't want him buying her drinks. She doesn't want him having sex with her. Based on all the surrounding circumstances, there was no freely given agreement by a competent person.

(R. at 1091.) Competency was therefore only one of the surrounding circumstances, whereas in Williams, it was the foundation of the Government's case. Williams, 2021 CCA LEXIS 109 at *53-54. Although trial counsel made the point that K.E. awoke to being sexually assaulted, he nonetheless used K.E.'s testimony, as described above, and the fact that she felt panicked or "made a run for it" when she awoke to find Appellant having sexual intercourse with her, and the fact that she immediately reported the offense. *Compare* R. at 1088-1090 to Williams, 2021 CCA LEXIS 109 at *54.

Moreover, based on the charge sheet, Appellant was in fact on notice of having to defend against the statutory definition of "consent," which included language that a "sleeping, unconscious, or incompetent person cannot consent." (R. at 1065.) As a result, the record as a whole demonstrates that Appellant was convicted for the offense for which he was charged, namely sexual assault without consent, as established by all of the circumstantial evidence surrounding the act.

Appellant next argues that by not charging Appellant under a theory that K.E. was either asleep or incapacitated, the Government was effectively able to sidestep the specific *mens rea* in Article 120(b)(3)(B) and (b)(3)(A) in that Appellant knew K.E. was either asleep or incapacitated. (App. Br. at 22.) However, this is not the case where the Government simply used the victim's lack of memory due to intoxication as a proxy for satisfying its burden to prove a lack of consent. *See* United States v. Mendoza, 2023 CCA LEXIS 198 * (Walker, J. dissenting) (Army Ct. Crim. App. 2023.) Instead, and as discussed above, there was significant

circumstantial evidence to support the finding that K.E. *did not consent* to the sexual activity separate and apart from being asleep or incapacitated. Stated differently, the fact that K.E. had been drinking and may have been asleep during the sexual assault were not the foundation of the Government's case or its theory. This evidence nevertheless remained relevant and admissible as the circumstances surrounding consent. Appellant's conviction is therefore supported with evidence directly relevant to consent, and as a result the Government did not impermissibly avoid a mens rea requirement.

Although the United States generally agrees with Appellant's interpretation of United States v. McDonald, 78 M.J. 376 (C.A.A.F. 2019) and Sager, these cases are less helpful than Williams and Weiser in that they fail to directly address the alleged due process violation raised by Appellant. To the extent that McDonald and Sager are pertinent to Appellant's due process argument, their relevancy is limited to the issue of statutory interpretation and the implication of superfluous and insignificant language. (App Br. at 22-24.) On this point, the military judge's instruction and the trial counsel's argument did not render the language in Article 120(b)(3)(B) and (b)(3)(A) superfluous and insignificant because the instruction and argument was not a matter of statutory interpretation as was the case in Sager, but rather, was authorized by separate statutory authority, namely 120(g)(7)(B), under the greater heading of "consent." Put differently, the military judge did not do any interpretation; rather, he simply read the statutory instruction for consent.

Moreover, the military judge's instruction and trial counsel's argument did nothing to change the two remaining, and very much distinct, theories of liability for sexual assault (sexual assault when the victim is asleep or incapacitated). Williams, 2021 CCA LEXIS 109 at *51-52; see also Weiser, 80 M.J. at 641 ("[t]his distinction is not blurred by the statutory admonition that

a 'sleeping, unconscious, or incompetent person cannot consent,' because that speaks to a legal inability to consent, not actual lack of consent."). For these reasons, Appellant's Due Process allegation is without merit and warrants no relief. This Court should deny this assignment of error.

III.

TRIAL COUNSEL PROPERLY ARGUED THE SURROUNDING CIRCUMSTANCES RELEVANT TO A DETERMINATION OF CONSENT.

Standard of Review

Improper argument is reviewed under a de novo standard. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When there is no objection, this Court reviews for plain error. Id. The burden of proof under plain error is on the appellant, who must show: (1) that there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused. Id. (quoting United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Law

Prosecutorial misconduct 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 cannon." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing Berger v. United States, 295 U.S. 78, 88, (1935)). In determining whether an argument is improper, this Court views the argument "within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting United States v. Young, 470 U.S. 1, 16 (1985). " [I]t is improper [for this court] to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238.

To determine whether a counsel's inappropriate comments rise to this level we consider: (1) the severity of the misconduct; (2) any curative measures taken; and (3) the strength of the government's case. United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). The severity of the misconduct is determined by (1) its frequency [of the misconduct]; (2) whether it persisted throughout the entirety of trial counsel's closing argument, including through the rebuttal; (3) the length of the trial; (4) the length of deliberation; and (5) curative instructions provided by the military judge. Id. at 184. When there is no objection to a comment made during argument, this Court reviews the argument for plain error. United States v. Andrews, 77 M.J. 393, 401 (C.A.A.F. 2018).

Analysis

A. "And he knows she was getting to the point where she's getting – where she's blacking out." (R. at 1079.)

Trial counsel's argument, that Appellant knew K.E. was "getting to the point" where she was "blacking out." was proper because it was a reasonable inference based on the evidence before the court. The evidence established that K.E. was drinking, and Appellant was in a position to monitor her alcohol intake. Accordingly, the inference that Appellant knew K.E. was blacking out was supported by the evidence.

Dr. K.R. testified that an "alcohol blackout" is a specific type of memory disturbance that's brought on by a unique consumption pattern of alcohol. (R. at 1042.) Dr. K.R. stated that the rapid consumption of alcohol in a short period may result in an alcohol blackout and that a person in such a state may not be able to retain short-term memory. (R. at 1042-1043, 1045.) Dr. K.R. differentiated being passed out, where a person is unconscious, from a blackout, and stated that it would "be really hard to tell if somebody was in a blackout, because they're not exhibiting typically the kinds of signs and symptoms that you would see with somebody who's

been drinking." (R. at 1043-1044.) But, if a blacked-out individual continues drinking, and their blood alcohol level continues to rise, the individual is eventually going to manifest the kinds of things that one usually sees when an individual is intoxicated such as slurring and stumbling and other signs of alcohol impairment. (R. at 1047.)

K.E.'s testimony established that she was drinking alcohol on the night in question and consumed approximately four-five "Jack and Cokes" in a period of approximately three-four hours. (R. at 676, 706, 709, 710, 712.) This slow rate of consumption would likely result in a person appearing visibly intoxicate because it did not fit the pattern for a blackout as described by Dr. K.R, i.e. "shots" and "chugging." (R. at 1042.) As a result, K.E. likely displayed the signs of intoxication. (R. at 1047.) She even testified that she felt, "buzzed," "drunk," and "tired." (R. at 681-682.) Her testimony also established that Appellant was in a position to monitor her alcohol consumption at the enlisted club. (R. at 670, 674, 680.) Notably, trial counsel is permitted to draw reasonable inferences fairly derived from the evidence. United States v. Bodoh, 78 M.J. 231, 237 (C.A.A.F. 2019) (internal citations omitted). Trial counsel's argument that Appellant knew K.E. was drunk or intoxicated, was exactly that, a reasonable inference derived from the evidence. Therefore, trial counsel's argument was proper and supported by the evidence.

The evidence supported an inference that Appellant knew K.E. was "getting to the point" where she is going to "blackout." (R. at 713, 779.) While Appellant may not have understood the exact psychological term and its implications, it is not unreasonable to assume that Appellant knew K.E. was "getting to the point" where she would experience some physical or mental impairment based on her consumption of alcohol. Accordingly, trial counsel's comment that

Appellant knew K.E. was "getting to the point" of a "blackout" was based on the testimony before the court and did not constitute plain error.

Even if this comment were error, it was neither severe nor obvious. As Appellant pointed out, trial counsel diminished the impact of this statement when he stated that "It's hard to know what's going through a person's state of mind[.]" (App. Br. at 25.) The severity of the comment was also diminished by the fact that this was the only time in the findings argument that trial counsel suggested that Appellant knew K.E. was in a blackout state. Lastly, Appellant has articulated no prejudice and states only that the argument likely contributed to the confusion on the part of the members. (App. Br. at 26.)

In sum, trial counsel's argument was supported by the evidence. However, should this Court find that the argument was error, the severity of the error was diminished by trial counsel's later argument, the fact that this assertion was only made one time, and the fact that Appellant has failed to demonstrate any prejudice. Accordingly, this Court should deny this assignment of error.

B. "I mean, I can't say what happened because I was blackout drunk. That doesn't mean she consented. She wasn't competent to consent, and the circumstances tell you she couldn't have consented." (R. at 1128.)

During closing argument trial counsel stated

> It's forcing facts to fit a narrative that's just not so. That wasn't – they asked the question, "Wasn't it true you could have consented,"[3] because it ignores everything else that happened, and again, it exploits a gap in her memory that she has to fill in by saying, "I mean, I can't say what happened because I was blackout drunk." That doesn't mean she consented. She wasn't competent to consent, and all the circumstances tell you she couldn't have consented.

[3] During cross examination of K.E., she testified that she was blacked out and did not remember portions of the evening. When asked if it was possible that she consented or said "yes" to having sexual intercourse but not remember, K.E. "it's possible." (R. at 780.)

(R. at 1128.)

Appellant asserts the above argument is error because it means that a person in a blackout stated is not competent to consent to sexual activity. (App. Br. at 26.) Appellant states that this assertion was not supported by the evidence and that it "muddied the waters." (App. Br. at 26-27.) Appellant's argument is without merit because it misreads the trial counsel's argument and fails to consider it in context.

First, trial counsel was not asserting that a person in a blackout stated is not competent to consent. Instead, the argument was that just because someone is in a blackout state, it does not mean that *they consented*. (emphasis added). This argument was in response to K.E.'s cross examination in which she admitted it was possible that she consented to the sexual activity but did not remember it. (R. at 780.) In this argument, trial counsel pointed out that just because K.E. was in a blackout state it does not mean that she consented to activity.

Second, the follow-on comments about her competence were not exclusively related to the blackout but should be considered in tandem with the evidence of the surrounding circumstances. K.E. testified that she consumed four-five drinks over the span of three to four hours. (R. at 676, 712.) She testified that at the end of the night she felt drunk and tired. (R. at 682.) There was also evidence that K.E. fell asleep because she testified that when she "woke," Appellant having sex with her. (R. at 682.) As a result, trial counsel's assertion that K.E. "wasn't competent to consent" and that "the circumstances tell you she couldn't have consented" are not exclusively related to the blackout but rather to the other surrounding circumstances in that K.E. was drunk, tired, and at one point asleep. These facts and trial counsel's argument are consistent with the military judge's instruction on consent in that "[a] sleeping, unconscious, or incompetent person cannot consent" and "[a]ll of the surrounding circumstances are to be

considered in determining whether a person gave consent." (R. at 1065.) That K.E. was tired, drunk, and at one point asleep are the surrounding circumstances and consistent with an argument that she may not have been competent to consent. Accordingly, trial counsel's argument is based on the evidence and proper.

Even if trial counsel's argument constituted error, there was no objection at trial and therefore, this assignment of error is subject to a plain error analysis. Any error based on this argument was not clear or obvious because trial counsel's argument was consistent with the permissible theory that just because K.E. was in a blackout state, that does not mean that she consented to any sexual behavior. Moreover, there is no evidence of prejudice to a substantial right of the Appellant. The military judge properly instructed the members with respect to the elements of the offense. (R. at 1064-1065.) Members were also instructed that the arguments of counsel were not evidence. (R. at 1075.) And instead of articulating a specific prejudice to a substantial right, Appellant asserts that trial counsel's argument may have "muddied the waters." (App. Br. at 26-27.) Accordingly, Appellant's assignment of error, even if error, does not meet the plain error standard.

In sum, trial counsel's argument that being in a blackout state does not mean that K.E. consented is a proper argument and consistent with the evidence. The comments on K.E. competency should be read in conjunction with all the surrounding circumstances and are indicative of a lack of consent. Accordingly, this Court should deny this assignment of error.

IV.

APPELLANT IS NOT ENTITLED TO MORENO RELIEF BECAUSE OF THE DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT WAS REASONABLE UNDER THE CIRCUMSTANCES.

Additional Facts

Appellant was arraigned on 16 December 2021; his court martial was conducted over a span of nine days from 1-9 February 2022. (*Court Reporter Chronology*, ROT. Vol. 5 at 1-4.) The final transcript totaled 1190 pages. (R. at 1190.) The court reporter completed the transcript in one-day increments – submitting each day to trial and defense counsel. (*Court Reporter Chronology*, ROT. Vol. X at 1-4.) The following table provides the day of trial, the date the court reporter sent it to trial and defense counsel and the day it was returned to the court reporter.

Trial day	**Sent (elapsed)**	**Rec'd from DC (elapsed)**	**Rec'd from TC (elapsed)**
1	24 Feb (16)	31 Mar (35)	9 May (74)
2	1 Apr (54)	29 Apr (28)	24 Aug (145)
3	25 May (106)	11 Jun (17)	17 Aug (84)
4	26 May (107)	12 Jun (17)	24 Aug (90)
5	31 May (112)	12 Jun (12)	29 Aug (90)
6	28 Jul (170)	31 Jul (3)	5 Sep (39)
7	30 Jul (172)	13 Aug (14)	6 Sep (38)
8	2 Aug (175)	2 Sep (31)	10 Sep (39)
9	15 Aug (188)	2 Sep (18)	10 Sep (26)
Transcript certified	22 Sep 2022		

(*Court Reporter Chronology*, ROT. Vol. 5 at 1-4.)

During the transcription period, the court reported served as the court reporter for six other courts martial and one discharge board. (Id.) He completed a permanent change of station from Spangdahlem Air Base, Germany, to Joint Base Andrews during the month of June. (Id.)

The paralegal responsible for assembling the record of trial at the Spangdahlem Legal Office received the certified transcripts for U.S. v. Hennessy and U.S. v Byrn on 22 October 2022 (approximately one month after the transcript was certified). (*TSgt R F*

Declaration, 28 February 2024.) She processed both records, including making copies and redactions from 27 October – 22 November 2022. (Id.) Once complete, she boxed the records of trial and delivered them to the post office. (Id.) However, the following day the post office instructed her that the boxes were too big, and the records would have to be re-packaged into smaller boxes. (Id.)

On 28 November 2022, both records of trial were mailed to the Air Force Military Justice Law and Policy Division (JAJM). (Id.) The tracking numbers associated with the records indicated that they were received by personnel at Joint Base Andrews in early December 2022. (Id.) In January 2023, the base legal office contacted higher headquarters (the numbered Air Force(NAF)) for an update. (Id.) When no update was received, both the base legal office and the NAF attributed the lack of any update to the arrival of new personnel at JAJM. (Id.) Both the base legal office and the NAF assumed they would receive an update soon. (Id.)

After receiving a "report card" for U.S. v Byrn on 28 February 2023, the base legal office and the NAF inquired as to the status of U.S. v. Hennessy because both records of trial had been sent at the same time. (Id.) JAJM indicated that they would search for the record of trial for U.S. v. Hennessy. (Id.) On 6 March 2023, JAJM informed the base legal office that it could not locate the record of trial despite the fact that the tracking number indicated that it had been delivered to Joint Base Andrews on 12 December 2022. (Id.)

In response to this discovery, the legal office made additional copies of the record of trial and sent them to JAJM on 10 March 2023. (Id.) The case was docketed with this Court on 28 March 2023. The number of days between the announcement of sentence and docketing with this Court is 412.

Standard of Review

This Court reviews de novo an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) *citing* United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

In Moreno, CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. Moreno at 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an entry of judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold: 150 days from the day the appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and a test to review claims of unreasonable post-trial delay evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

In order to find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and

integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66, UCMJ, because it allows courts of criminal appeals "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted). The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

Applying Livak, there is a facially unreasonable delay. From the conclusion of trial on 9 February 2022 to the docketing of Appellant's case with this Court on 28 March 2023, 412 days passed, which is more than the 150 days for a threshold showing of facially unreasonable delay. Since there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay, and Appellant suffered no prejudice.

1. Length of the delay

This factor weighs in favor of Appellant. While the length of the delay in this case is not "egregious," it is more than the 150-day benchmark outlined in Livak. *Cf.* United States v. Van Vliet, 2010 CCA LEXIS 279 (A.F. Ct. Crim. App. 23 August 2010) (unpub. op.) (finding 951-day delay "egregious" and "outrageous").

But even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief.

See generally United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis.

2. Reasons for the delay

This factor slightly weighs in the Appellant's favor. The Government provided detailed and specific reasons for the delay from the announcement of sentence to certification of the transcript (412 days). (*Court Reporter Chronology*, ROT. Vol. 5 at 1-4.) That the transcription process would take some time is reasonable under the circumstances given the fact that it was a nine-day trial plus an additional day for arraignment.; the transcript totaled over one thousand pages. (Id.) The court reporter proactively emailed each day of trial to counsel as it was completed to expedite the process. (Id.) Notably, "[t]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. at 533. While there was no charge of conspiracy, this case involved three victims and motion practice. And in some instances, it took counsel for both sides considerable time to review and return the transcript to the court reporter. (*Court Reporter Chronology*, ROT. Vol. 5 at 1-4.) The transcription process was further delayed by the fact that the court reporter was detailed to six other courts martial and completed a permanent change of station during the same period. (Id.)

Appellant cites United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011) for the proposition that personnel and administrative issues are not legitimate reasons justifying an otherwise unreasonable post-trial delay. (App. Br. at 33-34.) In Arriaga, post-trial processing was delayed

because senior captains were deployed, and trial counsel was out on maternity leave. Arriaga, 70 M.J. at 57. Appellant urges this Court to adopt the framework used by the Army in United State v. Winfield, 83 M.J 662 (Army Ct. Crim. App. 2023)[4] which would dispense with the 150-day presumption and instead look to a "case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization)." Winfield, 83 M.J. at 666. This case does not represent the same personnel issues as those present in Arriaga. And while the Government is not arguing that this Court should dispense with the 150-day presumption, the other factors relied upon in Winfield are relevant to this case to include the length of the trial, a trial with members, and a transcript that is over thousand pages. The Court in Winfield would also consider the court reporter's workload (six additional courts-martial) and the time it took defense and trial counsel to review and return the transcript for certification. Applying these factors, the delay from the end of trial to the court reporter's certification was reasonable.

Appellant takes issue with the fact that the court report spent time teaching at the Judge Advocate General School. (App. Br. at 35.) However, this additional duty is consistent with his primary duties and reasonable if the Air Force is going to maintain a cadre of competent Court Reporters to support courts-martial worldwide.

Appellant also points to the fact no outside help was requested to assist with the transcript and contrasts this case with United States v. Byrn where such assistance was requested. (App. Br. at 36.) The request for assistance in Byrn cuts in favor of the Government because the same

[4] Nearly 500 days elapsed between sentencing and docketing for a one-day judge alone trial. United States v. Winfield, 83 M.J. 662, 664

court reporter was assigned to both cases. It therefore demonstrates that the Government was seeking to lessen the workload on the court reporter for Byrn so that he could spend additional time on this case. Accordingly, the request in Byrn is evidence that the Government is taking reasonable steps to expedite the transcript in the face of a steep workload.

The remaining post-transcript delay (92 days) is not the result of the dilatory processing on behalf of the Government but instead the record not being received by JAJM despite the fact that the paralegal who mailed it received confirmation from the U.S. Post Office that the package was delivered to its destination. (*Technical Sergeant R F Declaration* 28 February 2024.) After the record was mailed to JAJM at the end of November 2022, the legal office assumed it would be processed by JAJM and eventually docketed with this Court. (Id.) It was not until the legal office requested an update that they realized that the record was never received. (Id.) Once this discovery was made, copies of the record of trial were completed and mailed within four days. (Id.)

As a result, there is no evidence of any "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. On the contrary, the transcription timeline demonstrates that all parties were working diligently to complete and certify the transcript given their respective workloads. The largest period of inaction, from 28 November 2022 to 28 February 2023 (92 days), was driven by the fact that the record was not received by JAJM and the base legal office's erroneous assumption that the record had been reviewed and processed. While the legal office could have followed up via email to make sure the record had been received, they did in fact have the tracking information indicating that it had been received; and there was no reason to suspect otherwise. In sum, while the delay may appear excessive, there

are legitimate reasons for the delay and while this factor favors Appellant, it does so only slightly.

3. Appellant's request for speedy post-trial processing

The Government agrees with Appellant that this factor is "neutral." The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). Appellant concedes he did not make a post-trial demand for speedy trial until he filed this brief; but instead, asserts that this is a "neutral" factor because the defense requests for the status of the trial records should be considered the "functional equivalent." (App. Br. at 37.) The Government agrees with the assessment given that the primary responsibility for speedy processing rests with the Government and the fact that the defense made these requests served to prod the Government into action.

4. Prejudice

This factor favors the Government because Appellant alleges no prejudice. (App. Br. at 31.) While the Government agrees with Appellant, that no actual finding of prejudice is required to grant relief for a due process violation, his inability to articulate any prejudice cuts against a claim that his due process rights have been violated because prejudice remains a factor to be considered. *See* Moreno, 63 M.J. 129 at 136 (finding prejudice in the form of oppressive incarceration and constitutional anxiety).

Appellant is not Entitled to Toohey Relief

When there is no finding of Barker prejudice, the Court will find a due process violation only when, in balancing the other three factors, the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362. A delay like the one in this case is not severe enough to taint public perception of the military justice system. It did not involve years of post-trial delay like in Moreno (over four years) or Toohey (over six years). Furthermore, "there is no indication of bad faith on the part of any of the Government actors." Anderson, 82 M.J. at 88. The government reasonably relied on package tracking information and failures in a delivery service would not cause the public to doubt the fairness and integrity of the military justice system.

Appellant Is Not Entitled to Tardif Relief

Appellant is not entitled to relief under Tardif. In Tardif, the Court of Appeals for the Armed Forces recognized that an appellate court may "grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardiff, 57 M.J. at 224. However, this authority to grant appropriate relief is "for unreasonable and unexplained post-trial delays." Id. at 220. Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id.

In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including: (1) How long the

delay exceeded the standards set forth in Moreno; (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay; (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline; (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and (6) Given the passage of time, whether the court can provide meaningful relief. United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

The delay in this case does not meet any one of the non-exhaustive Gay factors. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. It would amount to an appellate windfall which is not consistent with justice or good order and discipline, given the seriousness of the charge of which Appellant was convicted and the absence of governmental bad faith.

On the issue of institutional neglect, Appellant urges this Court to make an example of this case and avoid a situation where the CAAF might assert itself. (App. Br. at 38.) However, such an action would do little to change the post-trial processing of courts-martial because there is no evidence that the delay was the result of gross negligence. The only reasonable conclusion is that the delay in certifying the transcript and the mail delay were the result of a combination of the court reporter's workload and simple negligence. Appellant has failed to articulate any resulting prejudice or how granting any relief would be consistent the Gay factors. Accordingly, this Court should not grant any relief based on the timeliness of the Government post-trial processing.

In sum, while the delay between the conclusion of trial and the docketing of this case raises a presumption of unreasonable delay, there is a reasonable explanation for the delay and Appellant asserts no resulting prejudice. There is no evidence that granting relief under Toohey or Gay would serve to remedy any institutional neglect. Something that is not present in this case. As a result, this Court should not grant any relief based upon the Government post-trial processing.

V.

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

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 1130.) Appellant argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 39.) In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state

level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

Our Superior Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) *cert. denied,* 2024 U.S. LEXIS 827 (2024). . It rejected the same claims Appellant raises now. The Sixth Amendment right to a jury trial does not apply to courts-martial and therefore there is no requirement that a verdict be unanimous in courts-martial. Id. at 295. The court found that a non-unanimous verdict did not run afoul of the Due Process Clause's requirement that the government prove the defendant's guilt beyond a reasonable doubt. Id. at 299. The court also concluded that such a verdict was consistent with the protections under the Equal Protection Clause. Id. at 301.

In sum, this Court should apply our Superior Court's guidance under Anderson and deny Appellant's requested relief.

VI.[5]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE PROPERLY DENIED THE ACCUSED'S CHALLENGES FOR CAUSE AGAINST SSGT S.L.G. FOR IMPLIED BIAS.

Additional Facts

SSgt S.L.G. reported she[6] knew of similar victims of crimes that were alleged in Appellant's case. (R. at 506.) Specifically, SSgt S.L.G.'s cousin was raped; and her sister-in-law and her wife were molested by their father. (Id.) SSgt S.L.G. admitted she thought of their situations as she reviewed the Charge Sheet, but stated she was able to set aside her situation

[5] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[6] Appellant refers to SSgt S.L.G. as "he," but it is clear from the record SSgt S.L.G.'s pronoun is "she" and she is presumably female.

with each of them and just concentrate on the evidence in Appellant's case. (Id. at 512.) When asked why she felt she was able to do that, SSgt S.L.G. responded,

> I definitely believe in what [inaudible] and you as well have said like you're innocent until proven guilty. I try to be as open minded as possible. I'm not coming in here with some preconceived, like, notion that what is on the paper actually happened, and going forward – I think – I like to think that I'm a pretty honest person and just – I think I can be impartial with this.

(R. at 512-513.)

After questions by both trial counsel and trial defense counsel, the military judge asked SSgt S.L.G. one last question, "Do you feel like you could give this accused a full, fair, and impartial hearing?" to which SSgt S.L.G. replied, "Yes, sir." (R. at 518.)

The military judge heard arguments on challenges for cause for two additional panel members, one who also had an ex-wife who had been a victim of sexual assault. (R. at 522-526.) The military judge found that member had an implied bias due to the personal impacts that member suffered from the ex-wife's assault, which ultimately caused their marriage to end. (R. at 527.) The military judge noted that, "it's the surrounding circumstances that this court believes takes it to the level of implied bias, at least – at least in the sense of United States v. Clay[7] that tells us in close cases, which this is, that we need to apply the liberal grant mandate." (Id.)

With respect to SSgt S.L.G., the military judge ultimately ruled, "Implied bias does not exist here because this member was clear that she would be able to put the previous experience information that she had, put it aside, and base this case solely on the evidence presented in court and on the law instructed by me." (R. at 532-33.) When making his ruling on SSgt S.L.G.'s

[7] United States v. Clay, 64 M.J. 274 (C.A.A.F. 2007).

challenge for cause, the military judge contrasted SSgt S.L.G's responses to knowing three people impacted by similar offenses, to that of the other panel member who the military judge removed and as being distinguishable from the facts of a case like Terry.[8] (Id.) The military judge found that in those cases, there was a traumatic event that impacted the relationship while the relationship was ongoing. (Id.)

The military judge stated, "This is a situation in contrast in which SSgt S.L.G. was dating her wife … And interestingly, SSgt S.L.G. said that information kind of brought them closer together." (R. at 533.) The military judge also did not note anything about SSgt S.L.G.'s demeanor which would cause concern about her ability to be impartial. Ultimately, the military judge ruled, "For those reasons, I don't think an outsider looking into this system would have a substantial doubt as to her impartiality or have a question about the fairness of the system with regard to her sitting on the panel. So the challenge is denied." (Id. at 534.)

The military judge also addressed with SSgt S.L.G. the issue of whether a person can consent to sexual activity after having consumed any amount of alcohol. (Id. at 510.) The military judge asked where SSgt S.L.G. had heard that and when SSgt S.L.G. said it was from SAPR/SARC training, the military judge stated,

> What I'm going to tell you is what you may have learned in those briefings may not necessarily be the law. I will provide you – if you're on the panel I will provide the law in this case and it will be your responsibility to apply the law to the facts of this case. Does that make sense? … Do you think you can follow my instructions, based on – and put that out of your head and only follow my instructions on the law?

SSgt S.L.G. responded affirmatively to both of the military judge's questions. (Id.)

[8] United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007).

Standard of Review

A "military judge's ruling on a challenge for cause is given great deference." United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000). A military judge's decision on a challenge for cause for actual bias is reviewed for a "clear abuse of discretion." United States v. Quintanilla, 63 M.J. 29, 35 (C.A.A.F. 2006). An abuse of discretion has occurred "if the military judge's findings of fact are clearly erroneous." Id. A military judge's decision on a challenge for cause based on implied bias is reviewed pursuant to a standard that is "'less deferential than abuse of discretion, but more deferential than a de novo review.'" United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (*quoting* United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015)).

Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts. Dockery at 96.

Law and Analysis

"An accused enjoys the right to an impartial and unbiased panel." United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012). A court member "shall be excused" when that member "should not sit … in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances.'" United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (*citing* United States v. Strand, 59 M.J. 455, 456 (C.A.A.F. 2004)). Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias. United States v. Wood, 299 U.S. 123, 133 (1936).

Actual bias is defined as "bias in fact." United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (*quoting* United States v. Wood, 299 U.S. 123, 133 (1936). "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." Hennis at 384 *citing* Nash at 88. "Because a challenge based on actual bias involves judgements regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great discretion. Clay, 64 M.J. at 276 (*quoting* United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996)). One of the regulatory bases for finding bias includes when a member has "an inelastic opinion concerning an appropriate sentence for the offenses charged." *Discussion*, R.C.M. 912(f)(1)(N).

Implied bias, on the other hand, is "bias conclusively presumed as [a] matter of law." Hennis at 385 *citing* Wood 299 U.S. at 133. "Implied bias exists when most people in the same position as the court member would be prejudiced." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). It is evaluated objectively under the totality of the circumstances and "'through the eyes of the public,' reviewing 'the perception or appearance of fairness of the military justice system.'" Id. (*quoting* United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)). Where a military judge "recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." Clay at 277.

"…[I]f after weighing the arguments for the implied bias challenge the military judge finds it is a close question, the challenge should be granted." Peters, 74 M.J. at 34 . Although a military judge is not expected to provide dissertations on his or her decision on implied bias, the military judge does have to apply the right law. Id. "Incantation of the legal test without

analysis is rarely sufficient in a close case." Id. A military judge will be afforded less deference if an analysis of the implied bias challenge on the record is not provided." Id.

Appellant asserts the military judge erred in denying the challenge of implied bias for SSgt S.L.G because the military judge did not sufficiently consider or apply the liberal grant mandate, nor did counsel ask him to. (App. Br. at 45.) Appellant also takes issue that the military judge did not state whether this was a close call and that alone should direct this Court to give zero deference to the military judge's ruling. (Id. at 46.) However, the record demonstrates that the military judge had a clear understanding of the law with respect to challenges for implied bias and the liberal grant mandate.

When considering the military judge's comments about the challenge to a different potential panel member, he cited United States v. Clay and addressed the liberal grant mandate, establishing his knowledge of the law. When directly addressing SSgt S.L.G's challenge, he stated, "I don't think an outsider looking into this system would have a substantial doubt as to her impartiality or have a question about the fairness of the system with regard to her sitting on the panel." (R. at 534.) The language used by the military judge was from Townsend, 65 M.J. at 463, and makes clear the military judge was considering the proper legal framework to make his determination. If a military judge finds there is a close call, then the challenge should be granted, Peters, 74 M.J. at 34, but the failure to state it is *not* a close call on the record, does not demand the result Appellant requests. The military judge does not have to provide explanations on the record, but he does have to apply the right law. Id. Here, the military judge clearly did.

The military judge did not err when he denied the defense challenge. He found that SSgt S.L.G.'s cousin's situation was one SSgt S.L.G. did not know much about. (R. at 533.) The incident with her cousin happened long before SSgt S.L.G. met them. (R. at 531.) The military

judge noted it was someone in SSgt S.L.G.'s family but noted they text "here and there yearly." (R. at 533.) The military judge then addressed SSgt S.L.G.'s sister-in-law and noted they are not close and SSgt S.L.G. did not "really know any of the details of that." (Id.) With respect to SSgt S.L.G.'s wife, the military judge noted the incident happened long before the two had met and that the situation suffered by her wife was completely different from the case at hand. (R. at 531-532.) SSgt S.L.G.'s wife was molested by her father when she was growing up. (R. at 507.) Her situation is distinguishable from the current case where the allegations involved adult, alcohol involved, sexual assault amongst peers. Moreover, SSgt S.L.G. and her wife rarely discussed the topic; she stated that it was discussed when the first started dating, but now it was only brough up "once in a blue moon." (R. at 508.) The military judge noted too, that when it does come up, SSgt S.L.G.'s role was to just hold and comfort her wife. (Id.). In sum, the military judge concluded, "The situation here is just different from what those situations were." (Id.) Turning to SSgt S.L.G.'s demeanor, the military judge described her as reserved, said she didn't seem upset, and was able to compartmentalize. (Id. at 534.)

"A member is not *per se* disqualified because he or she or a close relative has been a victim of a similar crime." United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996). In Daulton, CAAF found that the miliary judge improperly denied a challenge for cause for a potential panel member on a sexual assault case, who had a sister and mother who were victims of sexual abuse. Daulton at 214. CAAF noted that the potential panel member's sister was approximately the same age as the victim in the case to be tried and that the potential panel member was shocked and disbelieving when learning of her sister's misfortune. Id. at 217-218. CAAF appreciated the military judge's assessment of the potential panel member's credibility, but ultimately found that asking her to serve as an impartial panel member was, "'asking too

much of both [her] and the system.'" Id. at 218 (citations omitted). Unlike the potential panel member in Daulton, SSgt S.L.G. had one close relative impacted by sexual abuse, her wife, and the other two she was not as close with (her cousin and sister-in-law). SSgt S.L.G. reported being largely unaffected by their victimization, other than providing supporting to her wife when needed.

All of the military judge's conclusions were based on his personal observations of SSgt S.L.G. and her responses to the inquiries from himself, trial counsel and trial defense counsel. The military judge articulated how those findings lead him to the ultimate determination that there was no implied bias and that an outsider looking into the system would not doubt her impartiality. Arguably, the military judge's failure to state that it was close case is because he did not think it was. Having applied the proper legal framework and analyzing the relationship between SSgt S.L.G. and each of the people she knew impacted by sexual abuse offenses, the military judge did not error when he denied the challenge for implied bias and this Court should dismiss Appellant's assignment of error.

Appellant also briefly raises the issue of SSgt S.L.G. having reported that she heard a person cannot consent to sexual activity if they have consumed any amount of alcohol. (App. Br. at 45-46.) Appellant states the defense did not ask for and the military judge did not sua sponte offer a tailored instruction about "one or more members may feel constrained by out-of-court statements along the lines of one drink means not consent." (Id. at 46.) This ignores the military judge's inquiry of SSgt S.L.G. on that very topic. The military judge addressed with SSgt S.L.G. what she may have heard in those briefings is not the law and ensured she could follow the law based on the instructions given to her by him. (R. at 510.) SSgt S.L.G. agreed

she could set aside anything she heard and follow the military judge's instructions (Id.) and therefore, no additional instructions to the member(s) were necessary.

For the above reason, Appellant's assignment of error on this issue should be denied.

VI. [9]

TRIAL COUNSEL DID NOT COMMIT AN ACCUMULATION OF ERRORS DURING THE FINDINGS ARGUMENT TO THE APPELLANT'S PREJUDICE.[10]

Additional Facts

During trial counsel's closing argument, he referenced the military judge's instructions to the members stating, "Now the military judge has instructed you on the law that actually applies in this case." (R. at 1079.) Trial counsel then went on to argue that the law the military judge had instructed the members on told the members Appellant was guilty. (Id. at 1080.) Trial counsel then identified the specification and elements and definitions as provided by the military judge. (Id.) Trial counsel then went on to argue about the evidence and testimony and how that worked in with the judge's instruction, concluding, "Members, the law tells you he's guilty of Specification 1." (Id. at 1083.)

Trial counsel also referenced voir dire telling the members,

> When we talked way back at the very beginning of this process, do you remember the very beginning of this process? We – the attorneys had a lot of questions for you, and we talked about a lot of things during that process. And we talked about how people process events differently. And it's no different for victims of sexual assault.

(Id. at 1094.)

[9] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[10] The United States will treat this as an "Improper Argument" issue and analyze it under that framework.

Trial defense counsel similarly reminded the jurors about their discussion during voir dire. Trial defense counsel stated, "Hold the government to their burden. You stated in voir dire you would. It's now time to do that." (R. at 1104.) Trial defense counsel later said:

> I would remind you in this moment of all the things we talked about in voir dire. That you can have different interpretations of the same conduct. That a person could lie about a matter, even though to an outside observer it would seem insignificant. You all agreed those are possibilities.

(R. at 1112-13.)

Trial defense counsel also referenced a photo of a victim asking, "Does this look like an anxious person? Does this look like an uncomfortable person? Does this look like a nervous person? No." (Id. at 1115.)

Trial counsel addressed in his rebuttal argument a photograph that the victim took of herself and posted to social media stating, "So she posted a picture about herself where she thought she looked good. So much has been taken from her because of him. Don't let them take her self-esteem as well." (Id. at 1127.)

There were no objections to trial counsel's argument.

Standard of Review

Improper argument is reviewed under a de novo standard. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When there is no objection, this Court reviews for plain error. Id. The burden of proof under plain error is on the appellant, who must show: (1) that there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused. Id. (quoting United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Law and Analysis

Prosecutorial misconduct is behavior that oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is defined as an action or inaction taken by a trial counsel in violation of a legal norm or standard. United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

Appellant's first contention is with trial counsel's summary that the "law as the military judge has instructed you tells you he is guilty," because, according to Appellant, this is the "prosecution putting the military judge's imprimatur on their argument, thereby implying that the military judge believes he's guilty, so should [the members]." (App. Br. at 46-47.) Appellant cites no law to support his position that applying the military judge's instruction to the facts and evidence of a case to argue in favor of their position that the government has met its burden of proof is impermissible. The military judge's instructions are intended to aid the members in the understanding of terms of art, to instruct the members on the elements of each offense and to explain any available defenses. United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (citations omitted). Accordingly, it would likely be nearly impossible to find such a precedent because trial counsel are fundamentally charged with articulating how the facts satisfy the elements of a particular offense. In order to accomplish this task, counsel is forced to refer to the military judge's instructions. And, if there is any inconsistency between military judge's instructions and their use by trial counsel, the members were cautioned that the military judge's version of the instructions prevail. (R. at 1075.) As a result, Appellant's assignment of error on this issue should be denied.

Appellant next turns to trial counsel's reference to voir dire and claims this is improper vouching. (App. Br. at 47.) A prosecutor improperly vouches when he (1) assures the jury that the testimony of a government witness is credible, and (2) . . . bases his assurance on either his claimed personal knowledge or other information not contained in the record." United States v. Gant, 2023 U.S. App. LEXIS 23100, *5-6 (3rd Cir. 2023). Trial counsel did not use his personal knowledge or other information not contained in the record to vouch for K.E. Rather, the statement that "people process events differently" was a reference to a trial counsel's voir dire question in which he asked the following.

> Now, people don't react the same way to every situation, and this can be the same or a victim of sexual assault. Is there anyone that thinks there could be a situation where a victim might not report a sexual assault right away?

(R. at 321.)

That people or individuals may respond differently to certain stimuli is a matter of common sense that requires no expert opinion or specific foundation. That there could be a situation where a victim might not report a sexual assault right away does not take creative imagination or any insight into the human condition. Trial counsel did not discuss criminology, victimology, or assert any special knowledge. *Compare* United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983) (trial counsel discoursed on the practices and fantasies of rapists, and when he described the attitudes of unrelated rape victims, he was not drawing upon legitimate inferences from evidence of record or appealing to the common sense of the court-martial). Instead, and in this case, trial counsel appealed to the common sense of the members in that two people may respond differently to a certain event, and that victims of sexual assault are no exception. Accordingly, trial counsel's reference to voir dire was not vouching and not error, much less plain error. Appellant's assignment of error on this issue should be denied.

Appellant lastly raises the issue of trial counsel stating "so much has already been taken from her because of him. Don't let them take her self-esteem as well," as being an argument not based on facts and as a call to inflame the emotions of the members. (App. Br. at 47.) Appellant overlooks that trial counsel's comment was in rebuttal, and trial counsel was responding to an issue brought up by trial defense counsel in his closing argument – that of how the victim appeared in one of her photos. (R. at 1115.) Trial defense counsel asked a question of whether the person in the photo appeared anxious, uncomfortable or nervous. (Id.) Trial counsel was responding to that inquiry in which the victim's appearance was under attack by asking the members to not allow Appellant to impact her self-esteem by calling into question how she appeared in those photos to discredit her testimony. Appellant argues trial counsel was attempting to inflame the emotions of the members, but trial counsel was merely addressing an issue raised by trial defense counsel. Appellant's assignment of error on this issue should be denied.

There were no objections by trial defense counsel to any of the three issues now raised on appeal. Therefore, this Court reviews for plain error. None of the assignments of error raised by Appellant constitute clear or obvious error. The first assignment of error is trial counsel applying the facts to the instructions as articulated by the military judge. The second of error is trial counsel relying on the common sense of the members in that people respond differently to events; and victims of sexual assault are no different. The third assignment of error is trial counsel's response to defense counsel's intimation that K.E. could not be a victim of sexual assault because she posted a photo on social media the night of the assault and did not appear anxious. None of these alleged assignments of error are clear or obvious.

Appellant has also failed to articulate material prejudice to a substantial right. Regarding the first assignment of error, trial counsel applied the facts to the instructions provided by the military judge, and there is no indication that the instructions were wrong or that the members convicted Appellant under an erroneous legal standard or used facts that were not in evidence. As a result, trial counsel's use of the military judge's instruction did not prejudice a substantial right of the Appellant.

The comment that "people process events differently" related to a comment in voir dire that victims of sexual assault may also respond differently and that there may be reasons that a victim may delay in reporting a sexual assault to authorities. However, in this case, there was no considerable delay in reporting the assault. There is no evidence that K.E. responded to the assault in an odd or peculiar manner. For example, she did not maintain a relationship with the Appellant after the assault. Instead, she distanced herself from the Appellant and acted consistent with how one would expect a victim to act. Therefore, even if trial counsel's reference to people processing events differently was made in error, it did not prejudice a substantial right because the statement was inapplicable to K.E.

Lastly, trial counsel's comments about the photo in that "so much has already been taken from her because of him. Don't let them take her self-esteem as well," was designed to counter defense counsel's argument that K.E.'s deportment in a photo on the night of the assault discredited her testimony. Trial counsel's argument did not prejudice a substantial right but instead urged the members to not use a pre-assault photo of K.E. to discredit her post-assault testimony.

For the above reasons, Appellant's assignment of error on these issues should be denied.

CONCLUSION

The United States respectfully requests this Honorable Court deny Appellant's claims and affirm the sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 6 March 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman First Class (E-3) **WILLIAM C.S. HENNESSY**, USAF *Appellant.*	)	**UNITED STATES MOTION TO ATTACH DOCUMENT** Before Panel No. 3 No. ACM 40439 4 March 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion: Appendix A – Technical Sergeant (TSgt) R P Declaration, dated 1 March 2024, (5 pages). Appendix B – Colonel Z E , Declaration, dated 4 March 2024 (5 pages).

In Assignment of Error IV, Appellant asserts he is entitled to relief because of the 412-day delay between the announcement of sentence and docketing with this Court. (App. Br. at 30.) The attached declaration from TSgt P is responsive to this assignment of error because it is directly related to the reasons for the delay. TSgt P served as a paralegal at Spangdahlem Air Base, Germany and was charged with assembling Appellant's record of trial. She described her workload when processing Appellant's record of trial and how much of the delay associated with the delay was the result of a delivery error. The declaration from Colonel E provides the United States Postal Service tracking histories for two records of trial.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact

determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

When the delay between the announcement of sentence and docketing exceeds 150 days, the reasons for the delay must be explored. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). The declaration from TSgt P is directly related to the reasons for the delay. Accordingly, since Appellant is allowed to raise this issue, the attached declaration is relevant and necessary to provide full context so this Court can address Appellant's assignments of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

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MARY ELLEN PAYNE
Associate Chief
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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 Appellate Defense Division on 4 March 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Airman First Class (E-3) **WILLIAM C. S. HENNESSY** United States Air Force *Appellant*	)	No. ACM 40439 21 March 2024

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

COMES NOW, Appellant, Airman First Class (A1C) William C. S. Hennessy, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this Reply to the Government's Answer, filed 4 March 2024.

Argument

1. The Government Continues to Argue Multiple Theories of Criminal Liability of Sexual Assault.

The Government combines three theories of criminal liability in its justification of the Appellant's convictions being legally and factually sufficient. Gov. Br. at 10. It conflates arguments that K.E. did not consent to advances by the Appellant earlier in the night as evidence that she did not consent later, yet also adds in that K.E. was blacked out when she got back to the room and came to in the middle of sex OR that K.E. was actually asleep when the sexual assault began and then woke up. Either the alleged sexual assault occurred when K.E. was asleep, which would require an additional element of proof, or not. The Government does not know, and they certainly never picked a specific theory of liability. Instead, they grouped three or more together. To be sure, one being in a blacked-out state can still consent to sexual activity—a point the Government now agrees is true. Gov. Br. at 11. The Government then goes on to burden shift in

its brief: "Therefore, while K.E. could have consented to sexual intercourse, there is no evidence, direct or circumstantial to even suggest that she did." *Id.* The Government has an *affirmative burden* to prove that K.E. did not consent given that is what it charged. It is not on the Defense to prove that K.E. did consent. Therein lies one issue with the Government charging without consent, but then harping on "circumstantial evidence" of several other theories of criminal liability—she was intoxicated leading to being incapable of consenting; she was blacked-out so she was not competent to consent; and/or she was asleep when the sexual intercourse started, so she was incapable of consenting. The Court of Appeals for the Armed Forces (CAAF) recently asked several questions on these issues recently (*see* para. 3. *infra*).

The Government argues the circumstantial evidence combined with K.E.'s feeling of panic "when she awoke and discovered Appellant having sexual intercourse with her, supported the finding that K.E. did not consent to sexual intercourse with Appellant." Gov. Br. at 10 (referencing R. at 685). There is no contention that K.E. felt panic when she "woke up" or "came out of a blackout" as the Government framed it. One who wakes up or comes out of a blackout would not have memory of how they got into that position—the very reasoning K.E. gave for why she was panicked when she woke up—but that does not mean that K.E. did not consent earlier when the sexual intercourse started, or that she did not consent which is what the Government must affirmatively prove.

The Appellant agrees that circumstantial evidence can be used to meet its burden. *See, e.g., United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). However, in this case, the circumstantial evidence only takes the Government part way to proof beyond a reasonable doubt and legal sufficiency. Bottom line: the Government had to affirmatively prove that K.E. did not consent.

Regardless, when trial counsel argued, "Members, she's not competent. She has been out drinking. She is blackout drunk," these are incapacity arguments, not circumstantial evidence arguments. R. at 1091. Trial counsel later said again, "She is not a competent person." *Id.* That along with the definition of consent involving a "competent person," it is reasonable the members were easily led into a conviction under multiple theories of criminal liability as opposed to the one charged by the Government. *See* Article 120(g)(7). While it may be that the Government intended to prosecute on a without consent theory, that is not how they presented the evidence of K.E. to the members. By inserting two other theories: incapacity and unconsciousness, the Government misrepresented to the members how they were to consider the evidence. Therefore, this court cannot be satisfied that the Appellant was properly convicted.

***2. The Government Claims there was No Evidence of Reasonable Mistake of Fact but Ignores the Glaring Fact that the Appellant Stopped* as soon as K.E. Pretended she was Asleep.**

The circumstantial evidence of lack of consent the Government points to is all from earlier in the night. The Government points to K.E. and the Appellant's first in-person meeting. Gov. Br. at 8. Stating K.E. rejected the Appellant by not reciprocating when he tried to hold her hand. *Id.* (citing R. at 670). Of note, K.E. testified she did not grab it back, because she felt it was going too fast not that she was not at any point interested in him. R. at 670. She also admits she did not pull her hand away. *Id.* The Government also claims, "there was no evidence of reciprocated physical contact, kissing, or flirting," but then also admits K.E. did accept a piggyback ride from Appellant. Gov. Br. at 9. While the Government states K.E. only accepted because she was tired and drunk, that disregards K.E.'s testimony. *Id.* K.E. told the Appellant, "Yes," when asked if she wanted a piggyback ride. R. at 682. She explained what she thought in her head—that he'd

take her to her room—but she did not communicate that with him and even acknowledged that the Appellant didn't even know where she lived. *Id.*

The Government claims that "at no point was any evidence introduced that would support a reasonable mistake of fact." Gov. Br. at 9. Contrary to this assertion, the Government at the trial level agreed that reasonable mistake of fact as to consent was "a fair defense." R. at 1057. The Government also ignores the most obvious evidence of the Appellant's reasonable mistake of fact defense—his reaction when K.E. suddenly starts recording memories, is scared because she does not remember how they came to be that way, and starts pretending to be asleep. At this point, K.E. moves her head and closes her eyes. The Appellant's response was to shake her and call her name. Then, when she does not appear to be waking up, he immediately walks away. The Government on appeal theorizes what the Appellant thought, but there was no evidence offered that "Appellant likely noticed when she awoke, noticed she did not protest, but panicked when she [(sic)] again he saw her again lose consciousness." Gov. Br. at 10. There was no evidence that the Appellant ever saw her previously lose consciousness. The only evidence was that when he saw her pretend to be asleep, he stopped, tried to wake her and when he couldn't, he walked away. While the Appellant contends the Government did not affirmatively prove that K.E. did not consent, at a minimum, this is clear evidence of a reasonable mistake of fact as to consent.

3. The CAAF Just Heard Oral Argument on this Issue.

The CAAF previously granted the issue of whether the appellant's conviction for sexual assault without consent was legally sufficient. On 5 March 2024, the CAAF heard oral arguments in the case.[1] If this Court finds the facts of this case legally sufficient to prove "without consent,"

[1] Oral Argument, *United States v. Mendoza*, No. 23-0210/AR, (C.A.A.F. 5 Mar. 2024), https://www.armfor.uscourts.gov/newcaaf/CourtAudio12/20240305B.mp3.

it will have deep ramifications—concerns the CAAF asked about in oral argument in *Mendoza*.[2] There would be no point in any other portion of Article 120(b) being charged. In fact, prosecutors could always only charge the general offense of without consent and then still be able to bring in evidence regarding all other theories of liability.

The CAAF also asked questions about *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017), during the oral argument in *Mendoza*. Specifically, Chief Judge Ohlson questioned how the Government's position reconciled with the CAAF's decision in *Sager*.[3] As the Chief Judge pointed out that in *Sager* the CAAF found a single enumerated provision in Article 120 which was simply separated by commas, were still three distinct theories of liability. *Sager*, 76 M.J. at 159. Chief Judge Ohlson contrasted that case with the issue in *Mendoza* (which also applies here) where there are enumerated provisions separated by semi-colons. The Appellant made this point in his opening brief and asks this Court to consider waiting to issue its decision in this case until the CAAF publishes its opinion in *Mendoza* as the issue seems to be dispositive for this case.

WHEREFORE, the Appellant respectfully requests that this Honorable Court set aside and dismiss the Specification 2 of the Charge, and set aside the segmented sentence to 30 months' confinement and the unitary sentence to a mandatory dishonorable discharge.

[2] Oral Argument at 23:05, *United States v. Mendoza*, No. 23-0210/AR, (C.A.A.F. 5 Mar. 2024), https://www.armfor.uscourts.gov/newcaaf/CourtAudio12/20240305B.mp3.
[3] Oral Argument at 19:20, *United States v. Mendoza*, No. 23-0210/AR, (C.A.A.F. 5 Mar. 2024), https://www.armfor.uscourts.gov/newcaaf/CourtAudio12/20240305B.mp3.

Respectfully submitted,

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Cave & Freeburg, LLP

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 21 March 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40439**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
William C.S. HENNESSY	)	**CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 3 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
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

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