IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	No. ACM 40455
JOHN D. KERSHAW,	)	
United States Air Force	)	23 June 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 Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **29 August 2023**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 53 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,

KASEY W. HAWKINS, 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 23 June 2023.

Respectfully submitted,

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

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 June 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40455**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
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* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 3 No. ACM 40455 22 August 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 September 2023**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

After Appellant's last motion for an enlargement of time, undersigned appellate defense counsel was detailed to this case on 25 July 2023 due to the permanent change of assignment of Appellant's previous appellate defense counsel, Maj Kasey Hawkins, effective 31 July 2023. Additional time is necessary for undersigned counsel to familiarize himself with the case in order to competently advise Appellant. A motion to withdraw from Maj Hawkins is expected to be forthcoming.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of

Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time for good cause shown.

Respectfully submitted,

FREDERICK J. JOHNSON, 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 22 August 2023.

Respectfully submitted,

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

24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 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 24 August 2023.

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

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40455**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 24th day of August, 2023,

ORDERED:

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
CADOTTE, ERIC J., Colonel, Senior Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

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,	)	**MOTION FOR WITHDRAWAL OF**
Appellee,	)	**APPELLATE DEFENSE COUNSEL**
	)	
v.	)	Before Special Panel
	)	
Staff Sergeant (E-5),	)	No. ACM 40455
JOHN D. KERSHAW,	)	
United States Air Force,	)	12 September 2023
Appellant.	)	

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to .
Undersigned counsel's primary duties in her new assignment do not afford sufficient time for continued competent representation of Appellant. Major Frederick Johnson has been detailed substitute counsel in undersigned counsel's stead and made his notice of appearance on 22 August 2023. Counsel have completed a thorough turnover of the record.

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

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

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
Chief, Military Justice Policy
Military Justice Law & Policy Division (JAJM)
1500 West Perimeter Road, Suite 1130
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2023.

Respectfully Submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Special Panel No. ACM 40455 21 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 October 2023**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

Undersigned appellate defense counsel was detailed to this case due to the permanent change of assignment of Appellant's previous appellate defense counsel, Maj Kasey Hawkins, effective 31 July 2023. Undersigned counsel made his initial appearance in this case on 22 August 2023. A motion to withdraw from Maj Hawkins is pending before this Honorable Court.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ.

The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time for good cause shown.

Respectfully submitted,

FREDERICK J. JOHNSON, 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 21 September 2023.

Respectfully submitted,

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

25 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 25 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	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FOURTH)**
	)	
v.	)	Before Special Panel
	)	
Staff Sergeant (E-5)	)	No. ACM 40455
JOHN D. KERSHAW,	)	
United States Air Force	)	20 October 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 November 2023**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening

Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined.

Counsel is currently representing 25 clients; 18 clients are pending initial AOEs before this Court.[1] Nine matters have priority over this case:

1) *United States v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel is preparing to present oral argument as lead counsel in this case to the Court of Appeals for the Armed Forces (CAAF) on 25 October 2023.

2) *United States v. Gause-Radke*, ACM 40343 – The record of trial is eight volumes consisting of 12 prosecution exhibits, six defense exhibits, 42 appellate exhibits, and four court exhibits; the transcript is 1167 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

3) *United States v. Gonzalez Hernandez*, S32732 – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibit, 31 appellate exhibits, and

[1] Since the filing of Appellant's last request for an enlargement of time, counsel filed an AOE in *U.S. v. Ollison*, ACM S32745, completed his review of the record of trial (except sealed materials) in *U.S. v. Taylor*, ACM 40371, prepared for oral argument, including two practice sessions, in *U.S. v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF, and participated in practice oral arguments for two additional cases.

two court exhibits; the transcript is 249 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

4) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record (except sealed materials, which he has an appointment to view on 23 October 2023).

5) *United States v. Brown*, ACM S32747 – The record of trial is three volumes consisting of five prosecution exhibits, 12 defense exhibits, and four appellate exhibits; the transcript is 139 pages. Undersigned counsel has not yet reviewed the record of trial in this case, but additional counsel has been detailed to assist with this case, has completed his review of the record of trial, and is researching possible assignments of error.

6) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the

transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 24 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Special Panel No. ACM 40455 20 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 a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 December 2023**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 18 clients are pending initial AOEs before this Court.[1] Eight matters have priority over this case:

1) *United States v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF – The record of trial is eight volumes consisting of 12 prosecution exhibits, six defense exhibits, 42 appellate exhibits, and four court exhibits; the transcript is 1167 pages. Undersigned counsel has petitioned the CAAF to grant review in this case and is drafting the supplement to the petition, which must be filed by 28 November 2023.

2) *United States v. Gonzalez Hernandez*, S32732, USCA No. 24-0030/AF – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibit, 31 appellate exhibits, and two court exhibits; the transcript is 249 pages. Undersigned counsel has petitioned the CAAF to grant review in this case and drafted the supplement to the petition, which must be filed by 28 November 2023.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared for and presented oral argument to the U.S. Court of Appeals for the Armed Forces (CAAF) as lead counsel in *U.S. v. Driskill*, ACM 39889 (f rev), USCA No. 23-0066/AF, assisted in the preparation and sat second chair for oral argument in *U.S. v. Jennings*, ACM 40282, participated in practice oral arguments for two additional cases, completed his review of the record of trial and began drafting the AOE in *U.S. v. Taylor*, ACM 40371, petitioned the CAAF for review and began drafting the supplement to the petition in *U.S. v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF, and petitioned the CAAF for review and drafted the supplement to the petition in *U.S. v. Gonzalez Hernandez*, ACM S32732, USCA No. 24-0030/AF. Additionally, counsel attended the Appellate Judges Education Institute Summit

3) *United States v. Lake*, ACM 40168 – The record of trial is 17 volumes consisting of 101 prosecution exhibits, 14 defense exhibits, and 135 appellate exhibits; the transcript is 1418 pages. Undersigned counsel is preparing to petition the CAAF to grant review in this case.

4) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record or trial and begun drafting the AOE in this case.

5) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court

exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fifth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

22 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Special Panel No. ACM 40455 20 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 a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 January 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 20 clients are pending initial AOEs before this Court.[1] Six matters have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has completed his review of the record or trial and is drafting the AOE in this case.
2) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.
3) *United States v. Stafford*, ACM 40131 – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel is reviewing this Court's

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the supplements to the petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in both *U.S. v. Gause-Radke*, ACM 40343, USCA No. 24-0028/AF, and *U.S. v. Gonzalez Hernandez*, ACM S32732, USCA No. 24-0030/AF; petitioned the CAAF for review and prepared and filed the supplement to the petition in *U.S. v. Lake*, ACM 40168, USCA No. 24-0047/AF; continued drafting the AOE in *U.S. v. Taylor*, ACM 40371; and participated in practice oral arguments for four additional cases.

recent opinion in this case in preparation for a potential petition to the CAAF for a grant of review.

4) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested sixth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 27 December 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	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (SEVENTH)**
	)	
v.	)	Before Special Panel
	)	
Staff Sergeant (E-5)	)	No. ACM 40455
JOHN D. KERSHAW,	)	
United States Air Force	)	19 January 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh 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 February 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

From 12-16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 20 clients are pending initial AOEs before this Court.[1] Five matters have priority over this case:

1) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.

2) *United States v. Stafford*, ACM 40131 – The record of trial is 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

3) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Taylor*, ACM 40371; reviewed the four-volume record and began drafting the AOE in *U.S. v. Myers*, ACM S32749; and participated in practice oral arguments for two additional cases.

transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested seventh enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Special Panel
Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)	No. ACM 40455 15 February 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 eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 March 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 2 years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 19 clients are pending initial AOEs before this Court.[1] Three matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed approximately half of the record of trial in this case.

2) *United States v. Smith*, ACM 40437 – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

3) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed the AOE in *U.S. v. Myers*, ACM S32749; petitioned the Court of Appeals for the Armed Forces (CAAF) for a grant of review and prepared and filed the supplement to the petition in *U.S. v. Stafford*, ACM 40131, USCA Dkt. No. 24-0080/AF; prepared and filed a reply to the Government's answer in *U.S. v. Taylor*, ACM 40371; prepared and filed a nine-page motion and a nine-page response to a government motion in *U.S. v. Bartolome*, ACM 22045; reviewed approximately half of the eight-volume record of trial in *U.S. v. Patterson*, ACM 40426; and participated in practice oral arguments for four additional cases. Additionally, counsel was heavily involved in the preparations for the Judge Advocate General's Corps 75th Anniversary Event.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested eighth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 February 2024.

Respectfully submitted,

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

20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 February 2024.

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 40455**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 15 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 21st day of February, 2024,

ORDERED:

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)** Before Special Panel No. ACM 40455 15 March 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 a ninth 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 April 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 319 days have elapsed. On the date requested, 360 days will have elapsed.

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 18 clients are pending initial AOEs before this Court.[1] Three matters have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument before this Court as lead counsel in this case on 21 March 2024.
2) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial, including sealed materials, and begun drafting the AOE in this case.
3) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Patterson*, ACM 40426; prepared and filed a reply to the Government's answer in *U.S. v. Myers*, ACM S32749; prepared for oral argument, including conducting a practice oral argument, in *U.S. v. Taylor*, ACM 40371; prepared and filed a citation to supplemental authority with the Court of Appeals for the Armed Forces in *U.S. v. Driskill*, ACM 39889 (f rev), USCA Dkt. No. 23-0066/AF; and participated in practice oral argument and preparation sessions for two additional cases.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested ninth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 March 2024.

Respectfully submitted,

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

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 March 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 40455**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
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 a Special Panel and referred to another Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Special Panel No. ACM 40455 15 April 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 a tenth 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 May 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 25 clients; 16 clients are pending initial AOEs before this Court.[1] Two matters have priority over this case:

1) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial, including sealed materials, and has almost completed drafting the AOE in this case.

2) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has reviewed approximately ninety percent of the record of trial, including sealed materials, in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately ninety percent of the four volume record of trial, including sealed materials, *in U.S. v. Zhong*, ACM 40441; drafted most of the AOE in *U.S. v. Patterson*, ACM 40426; presented oral argument to this Court as lead counsel and prepared and filed a brief on a specified issue in *U.S. v. Taylor*, ACM 40371; prepared and filed a motion to dismiss in *In re R.R.*, Misc. Dkt. No. 2024-02; and participated in practice oral argument sessions for one additional case.

informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested tenth enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 April 2024.

Respectfully submitted,

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

16 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's more than 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 two-thirds of the 18-month standard for this Court to issue a decision, which only leaves 5 months combined for the United States and this Court to perform their statutory responsibilities. It appears that Appellant's counsel has not begun review of the record of trial at this late stage of the process.

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

J. PETER 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 April 2024.

J. PETER 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 40455**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 15 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 18th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **25 May 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Special Panel
Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant*.	)	No. ACM 40455
	)	14 May 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant John D. Kershaw, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits XXV and XXX as well as transcript pages 256–285 and 289–294 in Appellant's record of trial.

Facts

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel also acquitted Appellant of one specification of sexual assault of a child. *Id.* In the course of the proceedings, trial defense counsel filed a motion to admit evidence pursuant to Mil. R. Evid. 412, and the trial counsel subsequently filed a response. App. Ex. XXV, XXX; ROT Vol. 2, Exhibit Index. The military judge heard arguments and addressed this motion during

two closed Article 39(a), UCMJ, sessions. R. at 255, 288. The military judge ordered that the filings related to this motion, which consist of Appellate Exhibits XXV and XXX, and the transcript pages from the two closed Article 39(a), UCMJ, sessions be sealed. R. at 256–85, 287, 289–94.

Law

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

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation," perform "reasonable diligence," and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b) (11 December 2018). These requirements are consistent with those imposed by the state bar to which counsel belongs.[1]

---

[1] Counsel of record is licensed to practice law in Georgia.

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

Analysis

The sealed materials include two appellate exhibits, both of which were "presented" and "reviewed" by the parties at trial. R.C.M. 1113(b)(3)(B)(i). Similarly, the sealed portions of the transcript record proceedings in which the parties participated. It is reasonably necessary for Appellant's counsel to review these sealed materials for counsel to competently conduct a professional evaluation of Appellant's case and uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and because the materials were available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials and has shown good cause to grant this motion.

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

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 May 2024.

Respectfully submitted,

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40455**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 14 May, 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibits XXV and XXX, which were reviewed by trial and defense counsel at Appellant's court-martial, as well as transcript pages 256–285 and 289–294 in Appellant's record of trial, which are closed proceedings in which both parties participated.

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* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the sealed materials.

Accordingly, it is by the court on this 17th day of May, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XXV and XXX** as well as transcript **pages 256–285 and 289–294** in Appellant's record of trial subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the 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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)** Before Special Panel No. ACM 40455 15 May 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 eleventh 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 June 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has reviewed approximately thirty percent of the record of trial in this case, not including sealed materials.[1]

Counsel is currently representing 28 clients; 18 clients are pending initial AOEs before this Court.[2] This case is undersigned counsel's highest priority among cases pending initial AOEs before this court, but one additional matter has priority over it:

1) *United States v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF – The record of trial is two volumes consisting of three prosecution exhibits, one defense exhibit, and nine appellate exhibits; the transcript is 142 pages. Undersigned counsel has petitioned the CAAF for a grant of review in this case and is drafting the supplement to the petition.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

---

[1] A consent motion to examine sealed materials is pending before this Court.

[2] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately thirty percent of the eight-volume record of trial in this case; completed his review of the four-volume record of trial and prepared and filed a 25-page AOE *in U.S. v. Zhong*, ACM 40441; prepared and filed a 30-page AOE in *U.S. v. Patterson*, ACM 40426; prepared and filed a petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) and began drafting the supplement to the petition in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; and participated in practice oral argument sessions for one additional case.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested eleventh enlargement of time for good cause shown.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 May 2024.

Respectfully submitted,

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

16 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over one year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Special Panel
Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant.*	)	No. ACM 40455
	)	17 June 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 a twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of eight days, which will end on **2 July 2024**. The record of trial was docketed with this Court on 1 May 2023. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 428 days will have elapsed.

On 25 April and 12–16 December 2022, Appellant was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 2 February 2023 (EOJ). Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. R. at 634; EOJ. The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. R. at 703; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant John D. Kershaw*, dated 24 January 2023.

The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Appellant is currently confined. Undersigned counsel has reviewed approximately ninety five percent of the record of trial, including sealed materials, and begun drafting the AOE in this case.

Counsel is currently representing 27 clients; 16 clients are pending initial AOEs before this Court.[1] This case is undersigned counsel's highest priority among cases pending initial AOEs before this court. However, undersigned counsel was recently detailed to *United States v. Doroteo*, ACM 40363, and is preparing to support presentation of oral argument before this Court on 18 June 2024 and assisting with drafting a supplemental filing based on new post-trial disclosures.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested twelfth enlargement of time for good cause shown.

---

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately sixty five percent of the eight-volume record of trial and began drafting the AOE in this case; prepared and filed a 13-page reply to the Government's answer in *U.S. v. Patterson*, ACM 40426; prepared and filed the supplement to the petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; was detailed to and prepared for both oral argument and a supplemental filing based on new post-trial disclosures in *U.S. v. Doroteo*, ACM 40363; reviewed 382 pages of a verbatim transcript requiring certification; and participated in practice oral argument sessions for one additional case.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

21 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN D. KERSHAW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40455 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 428 days in length. Appellant's over one year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

J. PETER 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 21 June 2024.

J. PETER 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*, v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40455 2 July 2024

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

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Division, AF/JAJA
U.S.C.A.A.F. Bar No. 37865
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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Assignments of Error

I.

WHETHER THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT WHERE TESTIMONY FROM MULTIPLE WITNESSES PLACED THE OFFENSE SIGNIFICANTLY OUTSIDE THE CHARGED TIMEFRAME AND RAMPANT INCONSISTENCIES AROSE BETWEEN WITNESSES.

II.

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO ASK A QUESTION FROM A COURT MEMBER ON THE BASIS THAT THE ANSWER WAS INADMISSIBLE HEARSAY WHEN AN ANSWER TO A QUESTION FROM A COURT MEMBER DOES NOT MEET THE DEFINITION OF HEARSAY.

III.

WHETHER THE MILITARY JUDGE ERRED BY APPOINTING AN ARTICLE 6B, UNIFORM CODE OF MILITARY JUSTICE, REPRESENTATIVE FOR F.A. WHEN F.A. DID NOT REQUEST SUCH A REPRESENTATIVE AND BOTH PARTIES AGREED THE APPOINTMENT WAS NOT NECESSARY.

IV.

WHETHER STAFF SERGEANT KERSHAW'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE IT IS MISSING THE AUDIO RECORDING OF THE ARRAIGNMENT AND MOTIONS HEARING, ONE OF THE ORIGINAL CHARGE SHEETS, AND DOCUMENTATION SHOWING THE CONVENING AUTHORITY'S SELECTION OF COURT MEMBERS.

V.

WHETHER THE CONVENING AUTHORITY IMPERMISSIBLY CONSIDERED THE RACE AND GENDER OF POTENTIAL COURT MEMBERS WHEN DETAILING MEMBERS TO THIS COURT-MARTIAL.

VI.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO STAFF SERGENAT KERSHAW BY

"DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" [1] WHEN STAFF SERGEANT KERSHAW WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.

Statement of the Case

On 25 April and 12–16 December 2022, Staff Sergeant (SSgt) John D. Kershaw, Appellant, was tried by a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Contrary to his pleas, a panel of officer and enlisted members found him guilty of one charge with one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), [2] 10 U.S.C. § 920b. R. at 634. The panel acquitted him of one specification of sexual assault of a child. *Id.* The military judge sentenced SSgt Kershaw to a reprimand, reduction to the grade of E-1, two years of confinement, and a dishonorable discharge. R. at 703. The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action, 24 January 2023.

Statement of Facts

SSgt Kershaw was stationed in San Antonio, Texas, from about August 2011 until the first day of May 2016. Pros. Ex. 4. During this time, he and his wife, S.K., purchased a house in the area. R. at 481. While they lived in that house with their son, many extended family members came to live with them. R. at 482–83. This included S.K.'s sister, K.S., and her four young children, S.K.'s mother, J.S., and several other adults and children. *Id.* At one point, there were as many as 14 people living in this single house, including six young children. R. at 446–48. With

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).
[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*).

so many kids in one house, it was often difficult for the children to get individual attention from their respective parents. R. at 355–56.

Unfortunately, a significant amount of tragic misconduct reportedly occurred between the many residents of this house. Two teenage boys, the sons of S.K.'s and K.S.'s brother, were both accused of molesting younger children in the house, including two of K.S.'s daughters. R. at 411–12. When she learned about this, K.S. immediately reported it to authorities, and at least one of the boys was quickly arrested. *Id.* J.S. also learned that her husband was sexually abusing their grandson, K.S.'s son, and that he had also inappropriately touched their son in the past. R. at 453. Upon learning of this, K.S. reported her father and kicked him out of the house, although it seems he left the area before being arrested. R. at 412, 453.

J.S. also brought a surprising business into this home. Her business was called Triple J Enterprises, and it operated by selling explicit materials to incarcerated persons. R. at 456–58. Essentially, J.S. found pornography and explicit stories on the internet and then advertised them to prisoners using a catalog. *Id.* The prisoners placed orders for the images and stories they wanted, and J.S. would then print these and mail them to the prisoners. *Id.* Others in the house, including S.K. and K.S., helped with this business from time to time, and that help sometimes involved them using an application "to color the naughty bits" on pornographic images. R. at 463. J.S. insisted there was no possibility the children ever saw any of these explicit materials. R. at 461. However, K.S.'s oldest daughter, F.A., testified she has read "old people books" in her grandmother's computer and that she had access to her mother's phone. R. at 310.

F.A. made the allegations that ultimately led to SSgt Kershaw's court-martial. According to her, she went upstairs to retrieve something for her mother, and SSgt Kershaw followed her upstairs and into a bedroom. R. at 314. Once in the bedroom, she stated he closed and locked the

door and, after about a minute, pulled down his pants and underwear, exposing his penis. R. at 314–16. She also reported he told her she would get ice cream if she touched and licked his penis, although she maintained that she did not do so before changing her story years later to say that she had.[3] R. at 315, 319, 343. She remembered standing throughout this incident. R. at 337.

F.A. went on to testify that her mom came upstairs after a few minutes because she knew something was not right and banged on the door. R. at 317. Once her mom banged on the door, F.A. stated SSgt Kershaw pulled his pants up and moved out of the way so she could leave. *Id.* F.A. recalled then going into another room with her mom and telling her what happened. R. at 317–18. Finally, F.A. remembered seeing a fight between her mom, her uncle, her grandfather, and SSgt Kershaw that took place downstairs shortly after she spoke with her mom. R. at 339, 359. F.A. indicated her mom had to be held back from hurting SSgt Kershaw. *Id.*

F.A.'s mother, K.S., also testified about this event. K.S. recalled that, while she was cooking dinner, she asked F.A. to go upstairs to get some clean underwear for another child who had an accident. R. at 380. She said she saw F.A. go upstairs, and about thirty seconds to a minute later, she saw SSgt Kershaw go upstairs. R. at 381, 408. K.S. stated she did not like that SSgt Kershaw went up behind F.A., so she went upstairs herself about a minute later. R. at 382. When she got upstairs, she saw the door to the room where she expected F.A. to be was closed. R. at 387. She recalled this door did not have a lock, so she "pounded" on the door once and opened it. R. at 390–91, 407. Once in the room, K.S. said she saw SSgt Kershaw standing and facing the window and F.A. sitting on the bed. R. at 390–91. SSgt Kershaw was fully clothed. R. at 407. K.S. testified SSgt Kershaw then "darted" past her. R. at 391. F.A. remained sitting on the bed,

[3] SSgt Kershaw was acquitted of the specification alleging he caused penetration of F.A.'s mouth with his penis. R. at 634.

and K.S. spoke with her in that room. R. at 391–92. According to K.S., F.A. told her SSgt Kershaw had exposed himself to F.A., and K.S. called her mother, J.S., and recounted what F.A. just said. R. at 392. K.S. testified that she did not confront SSgt Kershaw, and neither did her brother. R. at 409.

Despite reportedly learning of this incident immediately after it occurred, K.S. did not report the incident to any authorities. R. at 410, 412. J.S. recalled K.S. telling her about F.A.'s accusation later when J.S. returned to the house, but J.S. did not report it, either. R. at 439. There would be no report of this incident for years, including after F.A. changed her story and made the accusation worse by claiming she did touch SSgt Kershaw's penis. R. at 345, 423. Eventually, F.A. spoke to a counselor following her siblings' reports of sexual abuse by family members other than SSgt Kershaw, and this allegation came to light. R. at 423. F.A. subsequently participated in a series of interviews, including one with the Air Force Office of Special Investigations (OSI) in which her mother, K.S., sat with her and answered questions for her throughout the interview, and another one in which F.A., when interviewed alone, indicated she could not remember many details from this incident. R. at 348, 351–52. SSgt Kershaw was ultimately convicted of committing a lewd act by exposing his genitalia to F.A. R. at 634.

Additional facts are included *infra* as necessary.

Argument

I.

THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT BECAUSE TESTIMONY FROM MULTIPLE WITNESSES PLACED THE OFFENSE SIGNIFICANTLY OUTSIDE THE CHARGED TIMEFRAME AND RAMPANT INCONSISTENCIES AROSE BETWEEN WITNESSES.

Additional Facts

The specification of which SSgt Kershaw was convicted alleged he committed the charged offense "between on or about 1 April 2016 and on or about 30 April 2016." DD Form 458, *Charge Sheet*. SSgt Kershaw moved to the Netherlands with his wife and son pursuant to a permanent change of station (PCS) at the beginning of May 2016, checking into temporary lodging at Joint Base San Antonio – Lackland on 26 April 2016 and departing the country on 1 May 2016. Pros. Ex. 4; Def. Ex. C.

When testifying about the alleged incident, none of the Government's witnesses could recall a specific date or date range. *E.g.*, R. at 306 (F.A. does not remember when she lived with SSgt Kershaw), R. at 394 (K.S. cannot remember the date when the incident occurred). However, all of them remembered some events following the alleged incident. F.A. testified that after the incident, she stayed mostly in her mom's room for about two weeks and then moved with her mom and siblings to   , which is near Houston, Texas, where they stayed for close to a year. R. at 340–42, 370. She also stated they returned to SSgt Kershaw's house when he and his family left to go to the Netherlands. R. at 342. Similarly, K.S. testified they left for   within a week of the incident and stayed there for six months to a year with her youngest daughter's grandmother before returning around the time SSgt Kershaw and his family left for the Netherlands. R. at 370, 393–94. J.S. also testified that F.A., K.S., and K.S.'s other children went to K.S.'s youngest daughter's grandmother's house shortly after the incident and returned shortly

before SSgt Kershaw and his family left for the Netherlands. R. at 444. F.A. also testified she was six or seven years old at the time of the incident. R. at 311. She was born in 2008[4]. R. at 328

Standard of Review

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

Law and Analysis

This Court "may affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(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 members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). "In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (internal quotation marks removed) (quoting *Washington*, 57 M.J. at 399).

1. The findings of guilty are factually insufficient because the evidence fails to prove the charged misconduct occurred reasonably near the dates in the specification.

The Government is required to prove the facts it chooses to allege on the charge sheet, including the charged timeframe. *See United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019).

[4] F.A. gave her exact date of birth when testifying, R. at 328, but it is limited to only the year in this brief to comply with Rule 17.2(c)(1)(H) of this Court's Rules of Practice and Procedure.

The evidence here does not prove the offense of which SSgt Kershaw was convicted occurred between 1 April 2016 and 30 April 2016. On the contrary, it clearly points to an occasion outside the charged timeframe. Uncertainty as to the date of the charged offense seems to have permeated the court-martial, with the military judge finding "this allegation occurred sometime between October 2014 and approximately the end of March 2016" when ruling on a pretrial motion. App. Ex. XIII at 2. With no witness able to recall even an approximate date for the alleged incident, the only option is to use context clues from the evidence to try and discern a timeframe. *E.g.,* R. at 306, 394. F.A.'s age does little to help clear this up. She testified she was six or seven years old at the time of the offense, creating a range that extends between 2014 and 2016. *See* R. at 311, 328.

The clearest known date referred to by multiple witnesses is when SSgt Kershaw and his family moved to the Netherlands. From military records, it is clear they moved at the very beginning of May 2016. Pros. Ex. 4; Def. Ex. C. This means the charged timeframe of April 2016 is essentially the month immediately before this move. However, F.A., her mother, and her grandmother all recall events that make it impossible for the incident to have occurred within the month before SSgt Kershaw's PCS.

F.A. testified she and her family moved to about two weeks after the incident and stayed for almost a year, returning when SSgt Kershaw left for the Netherlands. R. at 340–42. Based on this timeline, the incident would have had to occur close to a year before SSgt Kershaw's PCS, placing it around May 2015 and around eleven months before the timeframe charged by the prosecution.

K.S. similarly testified they left within a week of the incident and returned six months to a year later, around the time SSgt Kershaw and his family moved. R. at 393–94. This would again

place the incident as much as a year before this PCS, not in the month immediately preceding it. As with F.A.'s account, K.S.'s recollection therefore places the charged conduct between six and eleven months before the charged timeframe.

J.S. did not offer a particular timeline for the move to , but she did confirm F.A., K.S., and K.S.'s other children went to live with another family member shortly after the incident and returned shortly before SSgt Kershaw left for the Netherlands. R. at 444. These generally consistent accounts of moving out and returning around the time of SSgt Kershaw's PCS, a known date, make it impossible that the charged misconduct occurred in, or even close to, the charged timeframe.

The use of the phrase "on or about" in the charged timeframe does not help the Government meet its burden because the possible timeframe indicated by the evidence is too large to be considered "on or about" the charged dates. The Court of Appeals for the Armed Forces (CAAF) has previously indicated this pleading language includes dates which are "reasonably near" the charged dates and "connotes a range of days to weeks." *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022) (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)). Thus, the court has found this language encompasses differences of two or three days, seven days, and three weeks. *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001); *United States v. Brown*, 34 M.J. 105, 106, 110 (C.M.A. 1992), *overruled in part on other grounds*, *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017); *Hunt*, 34 M.J. at 347. In contrast, the court in *Simmons* applied precedents from the factual sufficiency context to find a difference of 279 days—or a little over nine months—"far exceeds any permissible variance" in previous case law and was not "'reasonably near' to the original charged dates." 82 M.J. at 138, 140.

Here, multiple witnesses recounted the named victim and her family leaving shortly after

the alleged incident, being gone for as much as a year, and returning around the time of SSgt Kershaw's PCS to the Netherlands. R. at 340–42, 393–94, 444. Since the charged timeframe immediately preceded this move, this testimony also indicates this offense occurred well before the charged timeframe, by as much as a year. A year is not "reasonably near" the charged dates and falls well outside the "days to weeks" connoted by the phrase "on or about." *See Simmons*, 82 M.J. at 139. Indeed, a difference of a year exceeds the 279-day difference the CAAF rejected in *Simmons* because it was not "'reasonably near' to the original charged dates." *Id.* at 140. Even using the low end of K.S.'s broader estimate for the amount of time they stayed in , the charged offense would have had to occur at least six months before the charged timeframe. *See* R. at 393–94. This is still much longer than the differences of days or weeks which have previously been found to be encompassed by the phrase "on or about." *See Simmons*, 82 M.J. at 140; *Barner*, 56 M.J. 137; *Brown*, 34 M.J. at 106, 110; *Hunt*, 34 M.J. at 347. Even considering the "on or about" language in the specification, this Court should not be convinced beyond a reasonable doubt that the charged misconduct occurred reasonably near the charged timeframe.

The Army Court of Criminal Appeals found factual insufficiency under similar circumstances in *United States v. Gilliam*, No. ARMY 20180209, 2020 CCA LEXIS 236 (A. Ct. Crim. App. July 15, 2020). That case involved three convictions for sexual offenses against the appellant's stepdaughter, all of which were alleged to have occurred "between on or about" date ranges that spanned more than a year. *Id.* at *2–4. The court found the victim's testimony about both digital penetration and exposure credible, but it held all three convictions were factually insufficient because of ambiguous evidence regarding the timing of the offenses. *Id.* at *8–11. Based on the victim's testimony, the last incident of digital penetration "could have occurred almost eleven months after the last date charged by the government," leading the court to conclude

there was a reasonable possibility the other instances also occurred almost eleven months after the end of the charged timeframe. *Id.* at *9–10. Thus, the court was "not convinced beyond a reasonable doubt that [the offenses] occurred within or even reasonably near to the timeframes charged by the government." *Id.* at *10. The court similarly found the possible timing of the exposure offenses extended well beyond the charged timeframe. *Id.* at *11. Consequently, the court set aside the findings of guilty and the sentence and dismissed the charges and specifications. *Id.*

Gilliam demonstrates that uncertainty and ambiguity as to the timing of an alleged offense is enough for a finding of factual insufficiency. As in *Gilliam*, the evidence regarding the timing of the offense in this case is ambiguous even in the most charitable light. *Id.* at *9. The best determination based on the evidence is that the charged incident occurred before the charged timeframe and that the gap between the two was as much as eleven months to a year. This difference is very similar to, and possibly even longer than, the eleven-month difference that precipitated a factual insufficiency finding in *Gilliam*. *Id.* at *9–10. Further, the difference here is more certain than a reasonable possibility, which was enough for the court in *Gilliam* to find factual insufficiency. *Id.* Based on the Government's own witnesses who consistently recalled a move to another city between the charged incident and SSgt Kershaw's PCS, this incident had to have occurred well before the charged timeframe. *See* R. at 340–42, 393–94, 444. As a result, this Court should reach the same conclusion as the court in *Gilliam*: that "the evidence adduced at trial does not establish appellant's guilt beyond a reasonable doubt." *Id.* at *10.

2. The testimony of multiple witnesses leaves additional doubt as to SSgt Kershaw's guilt because of contradictions, apparent influence, and questionable responses by adults.

A fresh, impartial look at the evidence also show numerous inconsistencies between key witnesses. For instance, F.A. stated SSgt Kershaw locked the door to the room, but K.S. stated the

door to that room did not have a lock. R. at 314, 407. The timeline is also suspect. F.A. said SSgt Kershaw stood in front of the door for a minute and that it was several minutes before her mom came upstairs, but K.S. asserted F.A. and SSgt Kershaw could have only been alone together for about one minute. R. at 314–15, 317, 408. F.A. also stated SSgt Kershaw pulled his pants up after her mom knocked on the door, but K.S. recalled knocking once and immediately opening the door, finding SSgt Kershaw fully clothed. R. at 317, 390–91. If SSgt Kershaw had only pulled up his pants when K.S. knocked, he would not have had time to get them on fully before she entered, and she would have seen him pulling up his pants. Despite reportedly entering the room immediately after knocking, K.S. did not see this. K.S. did recall seeing F.A. sitting on the bed when she entered the room, but F.A. testified that she was standing throughout the incident. R. at 337, 390–91.

The contradictions continue, with F.A. saying SSgt Kershaw moved out of the way so she could leave, while K.S. recalled SSgt Kershaw darting past her and leaving when she entered the room. R. at 317, 391. F.A. and K.S. also disagreed about the room in which they spoke, with F.A. saying they went to a different room and K.S. saying they stayed in the same room. R. at 317–18, 391–92. Most glaringly, F.A. vividly recalled a dramatic confrontation that K.S. indicated did not happen. F.A. testified that she watched from the top of the stairs as her mother tried to fight SSgt Kershaw and had to be restrained by her uncle. R. at 339, 359. In contrast, K.S. stated she did not confront SSgt Kershaw, and neither did her brother. R. at 409.

Taken together, these inconsistencies and outright contradictions undermine the testimony of these witnesses. F.A. was the only witness who could recount the charged misconduct, and K.S. was the only other witness who could recall pieces of the context immediately around the allegations. Yet where their stories intersect, they contradict each other on detail after detail. With so many discrepancies between them, this Court cannot be confident in either of their accounts.

This should leave the Court with reasonable doubt as to SSgt Kershaw's guilt.

There is also additional evidence that calls F.A.'s credibility into question. It is clear from her testimony that she had discussed this incident in detail with her mother because she testified to knowledge that she could only have learned from her mother. Specifically, she testified her mother came upstairs because she knew something was not right. R. at 317. F.A. could not know this simply from her own memory; her mother had to tell her about this. The fact that this became so ingrained in F.A.'s recollection that she included it in her testimony shows how susceptible she was to the influence of the adults in her life. This influence continued when OSI interviewed F.A., with her mother sitting with her throughout the interview and even answering questions for her. R. at 348. In stark contrast, when F.A. was interviewed by herself, she mostly indicated she could not remember a wide variety of details from this incident. R. at 351–52. The clear influence of F.A.'s mother on her recollection of and testimony about this incident adds additional reasonable doubt to the already substantial list.

Finally, the actions of the adults in this situation give even more reason to doubt SSgt Kershaw's guilt. Despite purportedly learning of this incident soon after it happened, neither K.S. nor J.S. reported the incident to authorities. R. at 410, 412, 439. This reaction suggests they did not take F.A.'s accusation seriously, especially since it is opposite to how they reacted to several other accusations of child molestation in their house, which they indicated they reported quickly. R. at 411–12, 453. K.S.'s explanation that she did not report the incident because she and her family had nowhere else to go is undermined by her own account of moving out shortly after the incident. R. at 393–94, 422. K.S. and J.S. also expressed concern over F.A.'s seemingly age-inappropriate knowledge, but the presence of J.S.'s pornography business in the home provided a ready source for F.A. to be exposed to age-inappropriate material. R. at 397, 456–58. F.A. even

testified she had read some of her grandmother's old people books in her computer, suggesting she may have accessed some explicit material, and that she had access to her mom's phone, which could reasonably have had explicit materials from when K.S. helped J.S. with her business. R. at 310. Considering the chaos of a house with as many as 14 people living in it, including multiple small children, J.S.'s unequivocal assertion that F.A. could not possibly have seen any explicit materials from her business is simply unreasonable. R. at 461. These factors add even more reasons to doubt the veracity of the account of SSgt Kershaw's misconduct, and this Court should not be convinced of his guilt beyond a reasonable doubt.

WHEREFORE, SSgt Kershaw respectfully requests this Honorable Court set aside the findings of guilty and the sentence and dismiss the Specification and Charge.

II.

THE MILITARY JUDGE ERRED IN REFUSING TO ASK A QUESTION FROM A COURT MEMBER ON THE BASIS THAT THE ANSWER WAS INADMISSIBLE HEARSAY BECAUSE AN ANSWER TO A QUESTION FROM A COURT MEMBER DOES NOT MEET THE DEFINITION OF HEARSAY.

Additional Facts

SSgt Kershaw's wife, S.K., testified during the findings phase of the court-martial. R. at 479. Before she testified, K.S. testified that her sister, meaning S.K., knew about the allegations at issue around the time in question. R. at 431. After the parties conducted their examinations of S.K., a court member submitted a question for S.K., asking, "Did you speak with [SSgt Kershaw] about the incident once you found out?" App. Ex. L; R. at 504–05. The Defense did not object to this question, but trial counsel objected on the basis of hearsay. R. at 505. Before asking the question, the military judge held an Article 39(a), UCMJ, session outside the presence of the members. The military judge first posed the question to S.K., who answered, "Yes,"

indicating she did speak with SSgt Kershaw about the incident. R. at 506. The military judge then asked, "What did he say?" The witness responded, "He denied it." *Id.*

Discussion about the Government's hearsay objection immediately focused on Mil. R. Evid. 801(d)(2) and whether SSgt Kershaw's statement to S.K. when she spoke with him would be admissible as an opposing party's statement. R. at 507. Trial counsel contended it would not because the court is not an opposing party and only the Government could ask what SSgt Kershaw said. *Id.* The Defense asserted the opposing view that the rule only prevents the Defense from offering the statement, which the Court should be allowed to ask as part of its "true [sic] finding function." *Id.* The Defense went on to argue that the actual question from the member—did S.K. speak with SSgt Kershaw—is permissible because it does not call for the statement. R. at 508. After further discussion, the military judge concluded testimony that S.K. spoke to SSgt Kershaw was permissible and its probative value of illuminating what the witness did after learning about the allegations was not outweighed by a danger of unfair prejudice. R. at 508–10. When the members returned, the military judge asked S.K. that question, and she answered, "Yes," indicating, as expected, that she spoke with SSgt Kershaw about the incident. R. at 513. The members did not ask any further questions on this topic at that time. R. at 513–15.

After the court had closed for deliberations, a member submitted a couple of additional questions. R. at 619. To answer a question about whether SSgt Kershaw sold his house when he moved to the Netherlands, the court re-opened and recalled S.K. to testify telephonically. R. at 629. After she answered that question, another member submitted an additional question, which read, "Asked yesterday, did you confront SSgt Kershaw about incident, you responded yes. Did SSgt Kershaw deny or confirm he had been in room with [F.A.]?" App. Ex. LXVII; R. at 630, 632. Trial counsel objected to this question without indicating a reason for the objection, and the

Defense did not object to the question. App. Ex. LXVII. The military judge did not ask the question, telling the member, "This is not something that is admissible under the Military Rules of Evidence." R. at 631.

After the court closed and the members returned to their deliberations, the military judge conducted an Article 39(a), UCMJ, session in which he elaborated on his decision. R. at 632. He indicated he interpreted trial counsel's objection as a hearsay objection and found "it's inadmissible hearsay" for the same reasons discussed earlier when considering the possibility of such a question. *Id.*

Standard of Review

"Issues about the meaning of evidentiary rules . . . are questions of law that this Court must decide de novo." *United States v. Mellette*, 82 M.J. 374, 383 (C.A.A.F. 2022) (citing *United States v. Matthews*, 68 M.J. 29, 35–36 (C.A.A.F. 2009)). "[The court] review[s] a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citing *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015)). When reviewing a decision for an abuse of discretion, "[f]indings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *Id.* (quoting *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011)). "If the court finds the military judge abused his discretion, it then reviews the prejudicial effect of the ruling de novo." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citing *United States v. Roberson*, 65 M.J. 43, 47 (C.A.A.F. 2007)); *see also Mellette*, 82 M.J. at 383.

Law and Analysis

1. A statement elicited by a court member's question does not meet the definition of hearsay because a party is not offering it to prove the truth of the matter asserted in the statement.

"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) *a party offers* in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c) (emphasis added). The plain language of this definition from the Military Rules of Evidence governs. *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007). That plain language states that, to be hearsay, a party must offer the out of court statement. Court members are not a party, so a member's question does not constitute a party offering evidence. *See* Mil. R. Evid. 614(b) (distinguishing between members and parties); *see also United States v. Palacios Cueto*, No. ACM 39815, 2021 CCA LEXIS 239, at *24 (A.F. Ct. Crim. App. May 18, 2021), *aff'd*, 82 M.J. 323 (C.A.A.F. 2022) ("The Government argued the members are not a party , so Mil. R. Evid. 801, which states out-of-court statements by a party opponent are not hearsay, was not applicable"). If a party does not offer a statement in evidence, then the statement does not meet the definition of hearsay and is therefore not hearsay under the Military Rules of Evidence. *See* Mil. R. Evid. 801(c). Thus, testimony elicited by a member's question is not hearsay, and the rule against hearsay does not prohibit its admission. *See* Mil. R. Evid. 802.

A comparison of the current text of Mil. R. Evid. 801(c) with previous iterations shows that the words "a party offers" are a relatively recent addition to this rule. Mil. R. Evid. 801(c) previously read, "'Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), Part III, Mil. R. Evid. 801(c). The words "a party offers" first appeared in this rule in through a 2013 Executive Order. Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,599 (May 15, 2013). This adopted a 2011 amendment to the

corresponding Federal Rule of Evidence. *See* Mil. R. Evid. 1102 (incorporating Fed. R. Evid. Amendments to the Mil. R. Evid. after 18 months). This change simplified existing law. Fed. R. Evid. 801(c)(2) advisory committee's note (Noting the 2011 amendment was "part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.") A plain reading of the rule shows exactly what these words mean and have always meant: a party must offer a statement for it to be considered hearsay under the rule. Consequently, a statement elicited by a court member's question falls outside the Military Rules of Evidence's definition of hearsay.

Consideration of the rest of Mil. R. Evid. 801(c)(2) confirms that the definition of hearsay could not apply to testimony elicited by a member's question. The rule states a party must offer the statement "to prove the truth of the matter asserted." Mil. R. Evid. 801(c)(2). As the military judge instructed the members in this case, members cannot attempt to help either the government or the defense through the questions they ask. R. at 75. To comply with this instruction, a member could not ask a question "to prove the truth of the matter asserted" or to prove anything else because seeking to prove something would inevitably be helping one of the parties. Moreover, trying to determine a member's purpose for asking a question would risk improperly probing deliberations, especially when, as here, the member's question came after the members had deliberated for some time. R.C.M. 921(a) ("[T]he members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting."); R.C.M. 922(e) ("[M]embers may not be questioned about their deliberations."); R. at 637 (instructing members not to discuss anything about deliberations, including what they thought, what other people thought, and how anybody voted); R. at 619 (indicating questions came from the members after

they began deliberating). The requirement that a statement be offered "to prove the truth of the matter asserted" is an essential part of the hearsay definition because having a different purpose makes the statement non-hearsay. *See, e.g., United States v. Leach*, No. ACM 39805 (f rev), 2022 CCA LEXIS 76, at *15-16 (A.F. Ct. Crim. App. Feb. 3, 2022) (citing *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) (interpreting Fed. R. Evid. 801(c)(2), a provision which is identical to Mil. R. Evid. 801(c)(2))) (stating out of court statements offered for other reasons, like effect on the listener, may be admitted as non-hearsay). Since a court member could not properly have a purpose to prove anything, and the military judge and parties could not properly inquire into the reason for a member's question, this essential part of the hearsay definition cannot be met for a statement elicited by a member's question. This Court should hold that statements elicited by a court-member's question are not hearsay under the Military Rules of Evidence.

2. The military judge abused his discretion by failing to consider whether the statement at issue met the definition of hearsay under Mil. R. Evid. 801(c), and this error prejudiced SSgt Kershaw by preventing the members from hearing beneficial testimony.

"A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Erikson*, 76 M.J. at 234 (quoting *Olson*, 74 M.J. at 134). Here, the military judge reached an incorrect conclusion of law—that the answer to the member's question would be hearsay—by failing to even consider the definition of hearsay in the Military Rules of Evidence. The discussion of this issue in the record does not include a single reference to Mil. R. Evid. 801(c). R. at 506–10, 632. Rather, the military judge skipped considering whether the statement meets the definition of hearsay, apparently presuming it does without further explanation, and went right to the question of whether it would be a statement of a party opponent under Mil. R. Evid. 801(d)(2). R. at 507. Presuming this statement is hearsay without actually applying the definition was arbitrary, and the analysis of Mil. R. Evid. 801(c) *supra* shows that the

military judge's conclusion was clearly erroneous. *See Erikson*, 76 M.J. at 234 (stating an abuse of discretion "must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.") By excluding a question from a member without analyzing the controlling definition in the Military Rules of Evidence, which would have led to a different result under its plain language, the military judge abused his discretion.

Despite extensive searching, undersigned counsel has not located a case in which a court directly applied the language "a party offers in evidence to prove the truth of the matter asserted in the statement" when analyzing a judge's decision to admit or exclude a court member's, or a civilian juror's, question. This Court has considered a factually similar matter, but that case does not directly address the issue presented in this argument. In *Palacios Cueto*, the Court considered whether a military judge abused his discretion by denying court members' request for statements the accused made to law enforcement agents. 2021 CCA LEXIS 239, at *22. This Court concluded it was not error, noting, without further discussion, that the statements were hearsay and then finding that the members were not a party opponent of the accused. *Id.* at *26. The problem is that the Court did not apply the precise language of Mil. R. Evid. 801(c). Rather, it stated, "Hearsay is an out-of-court statement offered for the truth of the matter asserted." *Id.* This definition omits the words "a party offers" and is therefore not an accurate reflection of the definition found in Mil. R. Evid. 801(c).[5] As a result of the Court not applying the true definition of hearsay from Mil. R. Evid. 801(c), *Palacios Cueto* was wrongly decided, and its non-binding

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[5] When giving this definition, the Court cited *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020). Despite citing Mil. R. Evid. 801(c), the court in *Finch* also imprecisely described the language of the rule, omitting the words "a party offers." *Id.* Moreover, that court did not consider the issue in this appeal because the evidence at issue in *Finch* was offered by the government, a party, and not sought through a court member's question. *Id.* Since the court did not have the opportunity to consider the question at issue here, and clearly did not consider it based on the imprecise characterization of Mil. R. Evid. 801, *Finch* does not control.

holding should not be followed. On the contrary, this Court should hold the military judge abused his discretion by failing to even consider the definition of hearsay in Mil. R. Evid. 801(c), which would have shown that a statement elicited by a member's question is not hearsay.

Finally, this abuse of discretion prejudiced SSgt Kershaw. The Court evaluates prejudice by weighing four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). From the record, it is clear what S.K.'s answer would have been if asked the court member's question: when she spoke to SSgt Kershaw about the incident, he denied it. R. at 506. The members already knew S.K. confronted him. R. at 513. Although the military judge said SSgt Kershaw's response was not admissible under the military rules of evidence, not asking the question left open the possibility that he said nothing or even that he could have admitted it. R. at 631. Hearing S.K.'s answer would have foreclosed these possibilities as well as informed the members that SSgt Kershaw denied the charged accusations when confronted by his wife. Moreover, it is clear this was important to the members because two different members asked about this interaction. App. Ex. L, LXVII; R. at 630. This eyewitness account of SSgt Kershaw's denial was strong, material evidence that would have bolstered his defense, and the military judge's decision to not allow this question prejudiced him.

An assessment of the relative strength of the cases confirms the prejudice from refusing to ask the member's question. As discussed in Assignment of Error I *supra*, the Government did not present a particularly strong case. Only one witness, F.A., testified that SSgt Kershaw committed the charged misconduct, and her account both changed over time and was contradicted in significant details by other witnesses. *See* R. at 564–67 (trial defense counsel summarizing

inconsistencies). In contrast, the Defense presented a strong case, not only highlighting the weaknesses in the Government's case, but also emphasizing key points like a plausible alternative source for F.A.'s age-inappropriate knowledge. *See* R. at 456–58. This is best demonstrated by the split verdict returned by the members, which is only possible if they found the complaining witness credible on some matters but not all. R. at 634. In a case that was that close of a call, hearing that SSgt Kershaw denied the allegations would have been persuasive evidence, especially since the members were clearly interested in learning that information. Yet, the military judge excluded this evidence as inadmissible hearsay without considering the true definition of hearsay in Mil. R. Evid. 801(c). That was an abuse of discretion, and weighing the factors shows that excluding this persuasive evidence prejudiced SSgt Kershaw.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY APPOINTING A REPRESENTATIVE FOR F.A. UNDER ARTICLE 6B, UNIFORM CODE OF MILITARY JUSTICE, EVEN THOUGH F.A. HAD PREVIOUSLY INDICATED NO INTEREST IN HAVING A REPRESENTATIVE AND BOTH PARTIES AGREED THE APPOINTMENT WAS NOT NECESSARY.

Additional Facts

F.A. was 14 years old at the time of trial, and she declined to be represented by victim's counsel. R. at 55. Counsel for both sides had explained to F.A. and her mother the possibility of appointing a representative for F.A. under Article 6b, UCMJ, but they had no desire to seek such an appointment. *Id.* Despite this, the military judge conducted a hearing after impanelment to determine whether he should appoint a representative for F.A. R. at 219, 223. At the outset of

this hearing, trial counsel indicated the appointment of a representative was not appropriate, and defense counsel concurred with this position. R. at 223. However, both parties also expressed a preference for F.A.'s grandmother, J.S., to be the representative if the military judge decided to appoint one. R. at 220, 223. This was largely because the other obvious candidate, F.A.'s mother, K.S., was a government witness, and F.A. had previously indicated she could not tell the truth around her mother. R. at 219–20. J.S. was also listed as a government witness, but the military judge expressed a view that representatives are often also witnesses. App. Ex. XXI at Attachment 1; R. at 219.

During the hearing, the military judge asked F.A. whether she wanted a representative, and she answered that she believed one was already coming. R. at 225. The person to whom F.A. was referring was a family friend, D.H., and F.A. later agreed with the judge that she wanted a representative and wanted it to be D.H. R. at 227. However, subsequent inquiry showed that D.H. was not a good option because her attendance at the court-martial was uncertain. R. at 228, 230. The military judge then recalled F.A. and asked her how she would feel about her grandmother serving as her representative. R. at 230. F.A. indicated she would be very comfortable with that. *Id.*

After this hearing, the military judge stated he was inclined to appoint a representative for F.A. R. at 233. The military judge provided no further explanation for this decision, although he had previously suggested he thought the need for one arose because of "victim specific issues" in a Mil. R. Evid. 412 motion. R. at 221, 233. The military judge then appointed J.S. to be F.A.'s representative pursuant to Article 6b, UCMJ. App. Ex. XXIX; R. at 233. Following this appointment, both J.S. and F.A. declined to be present at the closed session in which the court considered the Mil. R. Evid. 412 motion. R. at 255. J.S. did, however, attend later court sessions

in which other witnesses, including F.A., testified before she was herself called as a witness for the Government. R. at 436, 449. Trial defense counsel later indicated F.A. looked over at J.S. after a particular question about whether F.A. ever had access to J.S.'s computer, although J.S. claimed she could not tell where F.A. was looking. R. at 449, 579. A court member also asked why J.S. was allowed to be in the court room while F.A. testified, and the military judge answered that J.S. could exercise F.A.'s right to be present during all proceedings because he had appointed her to be F.A.'s representative. R. at 628. A court member followed-up by asking if there was a reason the military judge picked J.S. instead of K.S., and the military judge responded there was, "but the reasons and going into that isn't like a legally admissible kind of thing." *Id.*

Standard of Review

The decision to designate a person to assume the victim's rights is within the discretion of the military judge, and this Court should review that decision for an abuse of discretion, where here both parties opposed the decision to appointment such a representative. R.C.M. 801(a)(6).

Law and Analysis

Article 6b(c), UCMJ, allows for the designation of another person to assume the rights of the victim in a number of circumstances, including when the victim is under 18 years old. 10 U.S.C. § 806b(c). A person so designated is commonly referred to as an "Article 6b representative." *See, e.g.,* R. at 223. R.C.M. 801(a)(6) provides further details about these designations and specifies that the decision to designate a representative within the discretion of a military judge. Neither Article 6b(c), UCMJ, nor R.C.M. 801(a)(6) requires the designation of a representative for a person under the age of 18 or under any other circumstances. R.C.M. 801(a)(6) previously required the military judge to designate someone to assume the victim's rights under specified circumstances, but the requirement became a discretionary option when changes to

R.C.M. 801 took effect at the beginning of 2019. *Compare* 2016 *MCM*, Part II, R.C.M. 801(a)(6) *with* 2019 *MCM*, Part II, R.C.M. 801(a)(6); *see also* Heather Houseal, *Article 6b Representative: Who Is It and Why Do I Care?*, THE JAG REPORTER, May 27, 2021, https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2629134/article-6b-representative/ (describing change from a mandate to a permissive appointment). Such a representative is also distinct from a victim's counsel. *Id.*

In general, "[a] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Erikson*, 76 M.J. at 234 (quoting *Olson*, 74 M.J. at 134). When deciding to designate an Article 6b representative for F.A., and who to designate, the military judge did not make any findings of fact on the record or explain his conclusion that such a designation was necessary. *See* R. at 233; App. Ex. XXIX. Assessing this decision is further complicated by a dearth of guidance as to what a military judge should consider when deciding whether to designate a representative. Although two authoritative sources refer to the designation of a person to assume the rights of a victim, neither states what a military judge should consider when making this decision.[6] *See* Article 6b, UCMJ, 10 U.S.C. § 806b; R.C.M. 801(a)(6). The one reason the military judge noted for raising this issue when neither F.A. nor anyone else requested the appointment of a representative was the emergence of "victim specific issues" in a Mil. R. Evid. 412 motion. R. at 221. However, F.A. and her representative did not

[6] The discussion accompanying R.C.M. 801(a)(6) previously included factors for a military judge to consider, but these were removed when the rule was updated. *Compare* 2016 *MCM*, Part II, R.C.M. 801(a)(6)(A), Discussion *with* 2019 *MCM*, Part II, R.C.M. 801(a)(6); *see also* Heather Houseal, *Article 6b Representative: Who Is It and Why Do I Care?*, THE JAG REPORTER, May 27, 2021, https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2629134/article-6b-representative/ (noting the previous factors). Even when the discussion in the R.C.M. included these factors, they were focused on identifying who to designate instead of whether to designate someone, presumably because the version of the rule which the factors accompanied required the designation. *See* 2016 M.C.M., Part II, R.C.M. 801(a)(6).

seem to share this concern. Immediately after being designated as F.A.'s representative, J.S. declined to attend the closed session held to discuss the Mil. R. Evid. 412 motion. R. at 255. Contrary to the military judge's view, there is no indication that issues in that motion necessitated the designation of an Article 6b representative.

While the military judge said little on the record about the reasons for designating a representative, there were multiple indications that such a designation was not necessary. F.A. had shown no desire for representation, declined victim's counsel and expressing no interest in an Article 6b representative after having that option presented to her. R. at 55. Although her answers to the military judge's questions indicated some interest in having a representative, these answers are better characterized as agreeing with leading questions than conveying an actual desire for representation. R. at 227. The parties also indicated that there was no need for an Article 6b representative, as trial and defense counsel both agreed it was not necessary to designate one, with trial counsel going so far as to say that "it's not appropriate." R. at 223. Both parties' support for J.S. to be designated was only a recognition that she was the better of the available candidates if the military judge decided to designate a representative; neither party thought a representative needed to be designated. *Id.* Against the weight of all the indications that a representative was not needed, the military judge should have at least explained his decision to appoint one anyway, but no such explanation appears in the record. Because this decision was contrary to the majority of the available information and made without articulating any findings or conclusions, this Court should find the decision to designate an Article 6b representative was an abuse of the military judge's discretion.

The decision to appoint an Article 6b representative also prejudiced SSgt Kershaw. By the time the military judge raised this issue after impaneling the members, there were only really two

viable options for the representative, both of whom were on the Government's witness list. R. at 219–20; App. Ex. XXI at Attachment 1. Witnesses are typically excluded from court proceedings when they are not testifying. *See* Mil. R. Evid. 615. However, victims have a right to not be excluded from public proceedings under most circumstances. Article 6b(a)(3), UCMJ, 10 U.S.C. § 806b(a)(3); *see also* Mil. R. Evid. 615(d). Since an Article 6b representative assumes the rights of the victim, the representative also cannot be excluded from public proceedings under most circumstances. Article 6b(c), UCMJ, 10 U.S.C. § 806b(c); R.C.M. 801(a)(6). Contrary to the military judge's view that Article 6b representatives are often also witnesses, it is generally best to avoid this so that the witness does not have the opportunity to sit through testimony from all of the other witnesses. R. at 219; Heather Houseal, *Article 6b Representative: Who Is It and Why Do I Care?*, THE JAG REPORTER, May 27, 2021, https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2629134/article-6b-representative/ (describing issues that can arise when an Article 6b representative is also a witness). Yet that is exactly what happened here.

J.S. sat through the testimony of other witnesses, including F.A., before she testified herself, giving her the opportunity to adjust her testimony based on what she heard and saw. R. at 436, 449. Moreover, her presence during F.A.'s testimony seemingly influenced F.A. Based on her varying statements in the past, F.A. was known to be susceptible to influence by the adults in her life. R. at 219–20, 348, 351–52. During F.A.'s testimony, the trial defense counsel noticed F.A. look over at J.S. right after denying that she ever had access to J.S.'s computer, suggesting that she was seeking approval for the answer she just gave. R. at 449, 579. Court members also shared concerns about J.S.'s presence during F.A.'s testimony, as evidenced by one of them asking the court why she was allowed to be there. R. at 628. While J.S.'s presence was likely less harmful than K.S.'s would have been, it still gave her the opportunity to both influence F.A. and adjust her

own testimony after hearing other testimony and evidence. Thus, the military judge's decision to appoint an Article 6b representative tainted the testimony of at least two witnesses, including the named victim, causing prejudice which warrants relief.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

IV.

THE RECORD IS SUBSTANTIALLY INCOMPLETE BECAUSE IT IS MISSING THE AUDIO RECORDING OF THE ARRAIGNMENT AND MOTIONS HEARING, ONE OF THE ORIGINAL CHARGE SHEETS, AND DOCUMENTS SHOWING THE CONVENING AUTHORITY'S SELECTION OF COURT MEMBERS.

Additional Facts

The record of trial (ROT) includes two disks containing audio recordings of the proceedings in this court-martial. Disk labeled "US v. SSgt Kershaw, John D. GCM – Spangdahlem AB Open Sessions Audio 12-16 Dec 22 Disc 1 of 1;" Disk labeled "US v. SSgt Kershaw, John D. GCM – Spangdahlem AB Open Session – Child Testimony Disc 1 of 1." One of the disks contains audio recordings off all of the open session from 12 to 16 December 2022, while the second disk has copies of the audio files from 13 December 2022. *Id.* Neither disk includes the audio from the arraignment and motions hearing on 25 April 2022. *Id.*; *see also* R. at 1–42 (written transcript from the arraignment and motions hearing on 25 April 2022).

SSgt Kershaw was arraigned on another charge with two specifications that were withdrawn and dismissed before trial. R. at 13, 44–45. The charge and specifications are reflected on the Entry of Judgment and the Statement of Trial Results. Entry of Judgment, 2 February 2023; Statement of Trial Results, 3 January 2023. However, the charge sheet showing this charge and

its specifications, and their withdrawal and dismissal, is not included in the ROT. *See* DD Form 458, *Charge Sheet*. A copy of that charge sheet can be seen as an attachment to an appellate exhibit, but that copy does not show the withdrawal and dismissal. App. Ex. II, Attachment 2.

Finally, the ROT includes four convening orders. Special Order A-06, 22 October 2021; Special Order A-29, 10 May 2022; Special Order A-33, 2 June 2022; Special Order A-07, 6 December 2022. There is only one document showing the convening authority's selection of members associated with one of these convening orders. 1st Ind to 3 AF/JA, Oct 22 2021, Pretrial Advice. For the other convening orders, there is no documentation showing the convening authority's selection of members.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge. 10 U.S.C. § 854. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). A record that is missing exhibits may be substantially incomplete. *See Stoffer*, 53 M.J. at 27 (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). "Insubstantial" omissions from a record of trial do not render the record incomplete. *See Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). The threshold question is whether the missing exhibits are substantial, either

qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (citing *United States v. Nelson*, 3 C.M.A. 482 (C.M.A. 1953)). This Court individually analyzes whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). However, the Court has also recently noted "a systemic problem indicating institutional neglect" across the Air Force based on post-trial processing errors like those noted here. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024).

The record of trial for a general court martial shall include "[a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." R.C.M. 1112(b)(1). A record of trial that does not include a substantially verbatim recording of the court-martial proceedings is incomplete and should be remanded for correction. *United States v. Valentin-Andino*, 83 M.J. 537, 540–41 (A.F. Ct. Crim. App. 2023). SSgt Kershaw's record of trial is incomplete because it does not include a substantially verbatim recording of the arraignment and motions hearing. This Court has previously found the omission of an arraignment hearing is quantitatively substantial. *United States v. Matthew*, No. ACM 39796 (f rev), 2022 CCA LEXIS 425, at *11-12 (A.F. Ct. Crim. App. July 21, 2022) (citing *United States v. Tate*, 82 M.J. 291, 294–95 (C.A.A.F. 2022)). The same is true here. The omission of the arraignment and motions hearing audio is substantial because it deprives the record of a required recording and prevents a complete assessment of this session, including the opportunity to verify the accuracy of the written transcript using the source audio. R.C.M. 1112(b)(1).

A record of trial for a general court-martial must also contain "[t]he original charge sheet

or a duplicate." R.C.M. 1112(b)(2). While the ROT here contains one of the charge sheets involved in SSgt Kershaw's case, it is missing a second one. Based on the Entry of Judgment, the Statement of Trial results, and statements made on the record, this additional charge sheet would show the withdrawal and dismissal of the arraigned charge and specifications listed on it. R. at 44–45. This omission is substantial in that it deprives the record of a required foundational document from the court-martial and omits documentation of the actual withdrawal and dismissal of a charge and specifications on which SSgt Kershaw was arraigned. R.C.M. 1112(b)(2); R. at 13, 44–45.

Lastly, a record of trial must include pretrial court member replacement requests and excusals. AF/JAJM, *Article 65/66 Review ROT and Attachments Assembly Checklist*, February 2024.[7] When acted upon by the convening authority, these documents show the convening authority's selection of court members. While the convening orders themselves list the selected members, they do not document the convening authority's selection process. SSgt Kershaw's ROT only includes a document showing the court member selection, for one of the four convening orders. *See* 1st Ind to 3 AF/JA, Oct 22 2021, Pretrial Advice. The omission of such documentation is substantial because it prevents an assessment of the convening authority's selection of court members which, in turn, can affect whether the court-martial was properly convened. *See United States v. King*, 83 M.J. 115, 121-23 (C.A.A.F. 2023) (assessing documentation about the propriety of a panel's constitution); *United States v. Jeter*, 84 M.J. 68, 73 (C.A.A.F. 2023) (discussing questionnaires considered by the convening authority and the original convening order in assessing the consideration of race in selecting members); *see also* Assignment of Error V *infra*.

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[7] Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, 21 April 2021, at paras. 1.3.3.1. and 2.1.1. mandates the use of this checklist when preparing ROTs.

The appropriate relief for the omitted audio recordings, charge sheet, and member selection documents from the convening authority is remand for correction or, if the issue cannot be corrected on remand, sentence reassessment. An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2); *e.g., United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2-3 (A.F. Ct. Crim. App. Oct. 26, 2022) (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction after finding the absence of eight attachments to the stipulation of fact substantial); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *9-10 (A.F. Ct. Crim. App. Jan. 6, 2022). R.C.M. 1112(d)(2) states, "A superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

In contrast, attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *Welsh*, 2022 CCA LEXIS 631, at *2 ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *Mardis*, 2022 CCA LEXIS 10, at *7 ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, . . . ; we did not consider the exhibits as a means to complete the record.").

Where a substantial omission exists and the record cannot be completed, a rebuttable

presumption of prejudice is raised, and where unrebutted, courts have previously set aside a punitive discharge. *See Stoffer*, 53 M.J. at 27. Thus, if correction on remand is not possible, the dishonorable discharge should be set aside. *See* R.C.M. 1112(d)(3)(c). Especially if the audio recording of the arraignment and motions hearing cannot be found, this Court could also set aside the findings and sentence, as it has done previously when the audio recording of an arraignment hearing could not be located. *Matthew*, 2022 CCA LEXIS 425, at *16.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be completed, disapprove the dishonorable discharge or set aside the findings of guilty and the sentence.

V.

THE CONVENING AUTHORITY RECEIVED COURT-MEMBER DATA SHEETS INDICATING THE RACES AND GENDERS OF POTENTIAL COURT MEMBERS. THIS CREATES A PRIMA FACIE SHOWING THAT RACE AND GENDER WERE IMPERMISSIBLY CONSIDERED WHEN SELECTING MEMBERS, GIVING RISE TO A PRESUMPTION THAT THE PANEL WAS NOT PROPERLY CONSTITUTED.

Additional Facts

The convening authority detailed members to this court-martial in a series of four convening orders. Special Order A-06, 22 October 2021; Special Order A-29, 10 May 2022; Special Order A-33, 2 June 2022; Special Order A-07, 6 December 2022. Before selecting the members to be detailed in each order, the convening authority received a memorandum with lists of proposed nominees and court member data sheets for each nominee attached. *E.g.*, Forwarding of Court-Martial Charges, 19 October 2021. The court member data sheets listed biographical information about each nominee, including notations of the nominee's race and gender. *See* Court

Member Data Sheets.[8] After receiving the lists of nominees and accompanying information, the convening authorities selected members by initialing next to their names on indorsements to the requests. *See* 1st Ind to 3 AF/JA, Oct 22 2021, Pretrial Advice.

Standard of Review

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

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *Jeter*, 84 M.J. at 70. The Government may then seek to rebut that presumption. *Id*. Should the Government be unable to rebut the presumption, automatic reversal is warranted. *Id*. at 74; s*ee also Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the

[8] The court member data sheets included with the accompanying Motion to Attach are not all of the data sheets from this court-martial. These data sheets are representative of the data sheets sent to the convening authority throughout the pretrial process and are sufficient to make a prima facie showing. However, if the Court believes this issue necessitates review of all of the data sheets that were available to the convening authority, post-trial discovery, such as an order compelling production or a *DuBay* hearing, would be appropriate.

selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

"The Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where the convening authority might arbitrarily select members based on race to create a more diverse panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the CAAF unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id*. at 74.

However, at the time of SSgt Kershaw's court-martial, *United States v. Crawford* provided that convening authorities *could* use race to select a panel when it was "in favor of, not against, an accused." 35 C.M.R. 3, 13 (C.M.A. 1964). Military appellate courts did "not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). Taking note of race during panel selection became further extended in *United States v. Smith*, a case about gender, providing:

> As we interpret Article 25 in light of *Crawford*, Congress has not required that court-martial panels be unrepresentative of the military population. Instead,

> Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, *a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels*.

27 M.J. 242, 249 (C.M.A. 1988) (emphasis added). Not only could race be used to make a panel more representative of the accused's race, but also race could be considered to make a more diverse panel, representative of the military community. Then, based on this extension of *Crawford*, the CAAF noted, "In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id*. As such, at the time of SSgt Kershaw's trial, both race and gender could be considered to create a panel.

Last year, though, *Jeter* explicitly held *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race is simply unrelated to his fitness as a juror." *Jeter*, 84 M.J. at 73 (quoting *Batson*, 476 U.S. at 87). *Jeter* did not consider the question of using gender as a basis for juror fitness. However, it is clear through the abrogation of *Crawford* by *Batson*, *Smith* is similarly abrogated by *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). *J.E.B.* followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* As with race, "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. at 130. The Supreme Court also wrote:

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

Id. at 145. It is clear, then, gender, like race, cannot be considered for court member selection, whether members of certain genders or races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id*. at 142 n.13. *Jeter* unequivocally states that "race shall not be a criterion in the selection of court-martial members," and its reasoning indicates the same must be true of gender. 84 M.J. at 73.

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

Equivalent identifiers are present here, as the court member data sheets sent to the convening authorities with each request for members included racial and gender identifiers for the members, either on the data sheet itself or on an attached SURF. *See* Court Member Data Sheets. Although the data sheets accompanying the motion to attach are not all of the data sheets from this case,[9] they clearly show provision of these identifiers to the convening authorities when selecting members, establishing a prima facie showing.

The inclusion of these identifiers on court member data sheets indicates the convening authorities solicited the race and the gender of prospective court members. *See Jeter*, 84 M.J. at

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

73. The *Jeter* court also noted the understandable belief that *Crawford* was still good law at the time contributed to the prima facie showing, and the same is true here because SSgt Kershaw's court-martial also took place before the court's holding in *Jeter*. *Id.* at 74. Based on these factors, SSgt Kershaw has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.[10]

Once a prima facie showing has given rise to the presumption that the panel was not properly constituted, "[t]he government may then seek to rebut that presumption." *Id.* at 70. Here, the documentation regarding the selection of court members fails to rebut this presumption because none of it indicates the convening authorities did not consider the racial and gender identifiers available to them in the court member data sheets. *See* Court Member Selection Documents. On the contrary, the results of at least one selection process indicate a probable use of the gender identifiers. Without rebuttal, the presumption that these impermissible identifiers were used when selecting court members stands, constituting clear and obvious error since it is plain at the time of appellate review that these factors may not be considered at all. Although the plain error standard normally calls for an assessment of prejudice, that is not necessary here because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466. This Court should therefore grant the same remedy the court granted in *Jeter* by setting aside the findings of guilty and the sentence. 84 M.J. at 75.

WHEREFORE, SSgt Kershaw respectfully requests this Honorable Court set aside the

[10] A complete analysis of the court-member selection is precluded by the absence of the convening authority's 1st indorsement to pretrial advice or similar documentation associated with all but one of the convening orders, as described in Assignment of Error IV, *supra*. These documents would show the convening authority's selection of members and allow a full assessment of that selection.

findings of guilty and the sentence.

VI.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" BECAUSE STAFF SERGEANT KERSHAW WAS CONVICTED OF A NON-VIOLENT OFFENSE, AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022).

Additional Facts

The first indorsements to both the Entry of Judgment and Statement of Trial Results state that SSgt Kershaw is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, 2 February 2023; Statement of Trial Results, 3 January 2023.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. *Section 922 is unconstitutional as applied to SSgt Kershaw.*

The test for applying the Second Amendment is as follows:

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

Bruen, 597 U.S. at 24 (citation omitted).

Although the annotation that Section 922 applies to the case is vague, the Government presumably intended to apply Section 922(g)(1), which bars the possession of firearms for those

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

The historical tradition took a narrow view of firearms regulation for criminal acts than that reflected in Section 922:

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id*. at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). The offense of which SSgt Kershaw was convicted falls short of these. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' imprisonment. *Range v. AG United States*, 69 F.4th 96, 98 (3d Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (Jun. 21, 2024)). Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The real question, then, is whether SSgt Kershaw's conviction meets the historical tradition of regulating firearms based on a limited framing of "violent."

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

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

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal 'felon' disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [64] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a

ban is consistent with this country's history and tradition.

All the arguments above demonstrate that a lewd act by exposure, even to a child, does not qualify for a lifetime ban on firearms. The recent case of *United States v. Rahimi* does not change the analysis. 602 U.S. ___, 2024 U.S. LEXIS 2714. In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. *Id.* at *26. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at *25.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at *26. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case never involved a threat, with a weapon or otherwise, and the firearms ban will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding. As the Supreme Court stated, "we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 30. Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court may order correction of the Entry of Judgment.

In *United States v. Lepore*, citing the R.C.M. in the 2016 *MCM*, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to

bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. Recently, this Court further concluded that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review." *United States v. Vanzant*, __ M.J. __, No. 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. May 28, 2024).

However, in *Lemire*, 82 M.J. at n*, the CAAF "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." The CAAF's direction to fix the promulgating order is at odds with this Court's holdings in *Lepore* and *Vanzant*, and it reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[11] Second, the CAAF believes that CCAs have the power to address collateral consequences under Article 66 as well since it "directed" a CCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the R.C.M.—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81

[11] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." 2019 *MCM*, App. 15 at A15-22.

M.J. at 760 n.1. In the 2019 *MCM*, both the Statement of Trial Results and Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, 14 April 2022, ¶ 29.32, the Statement of Trial Results and Entry of Judgment must include whether the offenses trigger a prohibition under Section 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now require—by incorporation—a determination of whether the firearm prohibition is triggered.[12] Thus, this Court can rule in SSgt Kershaw's favor without taking the case en banc.[13] If this Court disagrees, SSgt Kershaw offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, SSgt Kershaw respectfully requests this Court hold Subsection 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the Entry of Judgment and Statement of Trial Results to indicate that no firearm prohibition applies in his case.

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

[13] SSgt Kershaw recognizes this Court has repeatedly ruled against this argument. *See, e.g.*, *United States v. Vanzant*, 2024 CCA LEXIS 215, at *23–26. However, this Court has not yet addressed the question of whether the Rules change provides a basis for this Court to reach a different result.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 July 2024.

Respectfully submitted,

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Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant*.	**MOTION TO ATTACH** Before Special Panel No. ACM 40455 2 July 2024

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) John Kershaw, by and through counsel, hereby moves to attach the Appendix to this motion to SSgt Kershaw's Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals 17 pages in length and consists of the following:

Court Member Data Sheets: Data sheets presenting biographical data for prospective court members.[1] These data sheets are relevant and necessary to resolve Appellant's fifth assignment of error and determine whether the court-martial panel was properly constituted. *See United States v.*

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

Jeter, 84 M.J. 68 (C.A.A.F. 2023). The convening authority received court member data sheets, of which these are exemplars, to review before detailing members to the court-martial, so the data sheets represent the information about each potential member available to the convening authority at the time of detailing. Since they show the information provided to the convening authority when detailing members to the court-martial, these data sheets are necessary to resolve an issue raised by the record and may be considered by this Court. *Jessie*, 79 M.J. at 444.

Article 65/66 Review ROT and Attachments Assembly Checklist: A copy of the checklist used when assembling records of trial (ROT) for general and special courts-martial. Department of the Air Force Manual 51-230, Records of Trial, 21 April 2021, mandates the use of this checklist at paras. 1.3.3.1. and 2.1.1. The checklist details all of the documents required to be included in the ROT, including documents which show the convening authority's selection of court members. Appellant alleges some of these required documents are missing from his ROT in his fourth assignment of error. The checklist is necessary to establish what is required to be in a ROT. Since it details exactly what constitutes a complete ROT, this checklist is necessary to resolve an issue raised by the record and may be considered by this Court. *Jessie*, 79 M.J. at 444.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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Appendix

1. Court member Data Sheets, various dates, 12 pages.
2. Article 65/66 Review ROT and Attachments Assembly Checklist, February 2024, 5 pages

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 July 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO MOTION TO ATTACH Before Special Panel No. ACM 40455 9 July 2024

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny, in part, Appellant's Motion to Attach, dated 2 July 2024. The United States opposes Appellant's Motion to Attach Appendix item one, court member data sheets, but does not oppose Appendix item two, Article 65/66 Review ROT and Attachments Assembly Checklist.

Opposition to Motion to Attach

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

This Court is reviewing this case pursuant to Article 66(d)[1], UCMJ. When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA

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

cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

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

Here, Appellant asks this Court to attach court member data sheets printouts to the record on the grounds that they are "necessary to resolve [Appellant's] fifth assignment of error and determine whether the court-martial panel was properly constituted." (App. Mot. at 1.) In the assignment of error, Appellant asserts that the presence of racial and gender identifiers therein—along with the fact that his court-martial preceded the decision in United States v. Jeter, 84 M.J. 68 (C.A.A.F. 2023)[2]—"gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process." (App. Br. at 38.)

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

The problem for Appellant, however, is that the issue he alleges—impermissible use of race and gender in court member selection—can only be raised using matters currently outside the record. (*See generally* App. Mot. at 1-2; App. Br. at 33-38.) Appellant has not articulated how the issue of improper member selection is raised by any materials *currently* in the record, such that the attachment of court member data sheets would be necessary to resolve it. Jessie, 79 M.J. at 442. There were no motions about improper panel constitution, nor were there any related objections at trial. (*See generally* R. at 15-222; *see also Exhibit Index*, ROT, Vol. 2.) Nowhere in the unsealed portions of the transcript does the word "race" appear.[3] (*See generally* R. 1-705.) Appellant cannot—and has not—pointed to anything in the transcript, exhibits, or allied papers that even *hints* at improper panel constitution.

Appellant, for his part, suggests that the attachment of the court member data sheets to documents provided to the convening authority is sufficient to raise the issue of which he complains.[4] (App. Mot. at 2.) But just as the mere fact of an appellant's sentence to confinement did not "raise[] an issue regarding [the confinement facility's] policies," Jessie, 79 M.J. at 444, the fact that member data was referred to on other pretrial papers within the record does not—without more—raise the issue of improper panel constitution based on race. *Cf.* Jeter, 84 M.J. at 71 (where the trial defense litigated the issue of "systematic exclusion of members based on race and gender" at the trial level); *see also* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("We will not presume improper motives from inclusion of racial…identifiers on lists of nominees for court-martial duty."). The issue of improper panel selection was not

[3] The sealed portions of the transcript relate to Mil. R. Evid. 412 matters.
[4] Though the member data sheets were attached to the pretrial advice they were omitted from the Record of Trial in accordance with DAFMAN 51-203, *Records of Trial*.

"raised by materials in the record," so outside materials are not necessary, and therefore not authorized, to resolve it. Jessie, 79 M.J. at 444-45.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 July 2024.

ADAM M. LOVE, Maj, USAF
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United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40455**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John D. KERSHAW	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 2 July 2024, Appellant submitted a motion to attach the following documents to the record: (1) court member data sheets, that present redacted biographical data for the prospective court members during Appellant's court-martial; and (2) a copy of the Air Force checklist used when assembling records of trial (ROT) for general and special courts-martial.

The Government opposes the motion in part. Specifically, the Government objects to the attachment of the court member data sheets on the grounds that they are matters outside the record and are not "necessary to resolve an issue raised by the record" pursuant *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). The Government did not oppose the motion to attach the ROT assembly checklist.

The court has considered Appellant's motion, the Government's opposition, and the applicable law. The court grants Appellant's 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 documents until it completes its Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 10th day of July, 2024,

ORDERED:

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

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES' ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel Panel
Staff Sergeant (E-5)	)	
JOHN D. KERSHAW,	)	
United States Air Force,	)	No. ACM 40455
Appellant.	)	
	)	1 August 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant*	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR Before Special Panel No. ACM 40455 1 August 2024

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT WHERE TESTIMONY FROM MULTIPLE WITNESSES PLACED THE OFFENSE SIGNIFICANTLY OUTSIDE THE CHARGED TIMEFRAME AND RAMPANT INCONSISTENCIES AROSE BETWEEN WITNESSES.

II.

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO ASK A QUESTION FROM A COURT MEMBER ON THE BASIS THAT THE ANSWER WAS INADMISSIBLE HEARSAY WHEN AN ANSWER TO A QUESTION FROM A COURT MEMBER DOES NOT MEET THE DEFINITION OF HEARSAY.

III.

WHETHER THE MILITARY JUDGE ERRED BY APPOINTING AN ARTICLE 6B, UNIFORM CODE OF MILITARY JUSTICE, REPRESENTATIVE FOR F.A. WHEN F.A. DID NOT REQUEST SUCH A REPRESENTATIVE AND BOTH PARTIES AGREED THE APPOINTMENT WAS NOT NECESSARY.

IV.

WHETHER STAFF SERGEANT KERSAW'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE IT IS MISSING THE AUDIO RECORDING OF THE ARRAIGNMENT AND MOTIONS HEARING, ONCE OF THE ORIGINAL CHARGE SHEETS, AND DOCUMENTATION SHOWING THE CONVENING AUTHORITY'S SELECTION OF COURT MEMBERS.

V.

WHETHER THE COVENING AUTHORITY IMPERMISSIBLY CONSIDERED THE RACE AND GENDER OF POTENTIAL COURT MEMBERS WHEN DETAILING MEMBERS TO THIS COURT MARTIAL.

VI.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO STAFF SERGEANT KERSHAW BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION FO FIREARM REGULATION"[1] WHEN STAFF SERGEANT WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant, Staff Sergeant John D. Kershaw, lived with his extended family in his home in San Antonio, Texas. (R. at 304.) In total, there were upwards of fourteen people living in the home, which included his wife's sister, K.S., and her children. (R. at 306, 448, 461.) One day,

[1] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

in or around April 2016, F.A., K.S.'s seven-year-old daughter, was downstairs and K.S. asked her to go upstairs to get something out of her room. (R. at 312, 358, 380–81, 440.) F.A. obliged and walked upstairs. (R. at 314.) At that moment, Appellant followed his niece up the stairs and into a second-floor bedroom of the home, closing the door behind him. (R. at 314.) Appellant then dropped his pants and underwear to his ankles, exposed his erect penis and told F.A. that he would get her ice cream if she touched and licked his penis. (R. at 305, 314–17.)

Shortly thereafter, F.A.'s mother, K.S., felt something was not right and went upstairs. (R. at 382.) As K.S. approached the second floor, she noticed that there was a door closed. (R. at 317.) She proceeded to pound on the bedroom door causing SSgt Kershaw to pull up his pants and move out of the way so F.A. could leave the bedroom. (R. at 317.) K.S. entered the room, saw SSgt Kershaw clothed and facing the window, and F.A. sitting on the bed. (R. at 390-391, 407.) SSgt Kershaw immediately left the room, and F.A. then told her mother SSgt Kershaw showed her his penis. (R. at 317, 319, 408.)

After the incident occurred, K.S. proceeded to barricade her children in the room for some time, ensuring that they were away from Appellant and having the family bring food up to the room. (R. at 340.) Sometime later, on 2 May 2016, SSgt Kershaw permanently changed stations (PCS) to Netherlands, and moved out of the home in San Antonio. (*See* Pros. Ex. IV, ROT, Vol. 2; R. 319-20.)

Later, after being reminded of the incident, F.A. told her mother that Appellant not only exposed himself but asked her to suck and lick his penis. (R. at 395, 422, 425.) She then admitted to her mother that she did. (R. at 413.) K.S. did not report the incident to law enforcement until F.A. was in middle school and the incident was starting to affect her, and she

wanted to speak with a counselor. (R. at 423.) The counselor eventually made a notification to law enforcement. (R. at 396.)

Facts relevant to each assignment of error are set out in their sections below.

ARGUMENT

I.

ANY POTENTIAL VARIANCE WAS IMMATERIAL AND NONPREJUDICIAL, AND SUFFICIENT EVIDENCE OF THE OFFENSE OCCURING WITHIN THE CHARGED TIMEFRAME EXISTED SUCH THAT THIS COURT SHOULD BE CONVINCED OF APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

Additional Facts

At the close of evidence, defense counsel moved for a finding of not guilty under Rule for Courts-Marital (R.C.M.) 917. (R. at 472.) Specifically, the defense argued that their claim was not whether there was sufficient facts supporting the elements of the charge, rather, the motion was "strictly based on the charging timeframe that the government decided to charge [the] case with." Id.; (*see also* App. Ex. LVIII.) In their written response, the Government argued that there was sufficient evidence regarding the charged timeframe such that the motion should be denied. (App. Ex. LIX, at 3.) The court denied the motion, concluding that there was sufficient evidence within the charged timeframe. (*See* App. Ex. LXX.)

Additionally, in discussing proposed closing instructions, the court asked the parties their position on a variance instruction. (R. at 525.) The Government requested a time variance instruction and the defense agreed. (R. at 526.) However, the defense requested a specific instruction which included language to the effect of "on or about" is "days or weeks and not

months or years." (R. at 524.) The Government opposed the modified language. (R. at 526.) The court, recognizing the issue collided with the R.C.M. 917 motion, allowed the parties to come to a compromise. (R. at 525–26.) The court ultimately gave the following variance instruction without objection:

> Variance. If you have doubt about the timeframe the alleged offenses occurred, but you are satisfied beyond a reasonable doubt that the offenses were committed at a time that differs slightly from the exact time in the specifications, you may make minor modifications in reaching your findings by changing the time described in the specification, provided that you do not change the nature or identify of the offense.

(R. at 539–40.)

The panel found Appellant guilty of Charge I, Specification II, with no modifications. (*See* App. Ex. LIV, ROT, Vol. 4.; R. at 634.)

Standard of Review

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

Law and Analysis

There is sufficient evidence to support the essential elements of the crime beyond a reasonable doubt. This Court "may affirm only such findings of guilty as the Court finds correct in law, and in fact[.]" Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A). To conduct its review, this Court "may weigh the evidence and determine controverted questions of fact subject to appropriate deference" to the trial court's personal observations of the witnesses and evidence, and the findings of fact by the military judge. *See* Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B). "After viewing the evidence in the record of trial and making allowances for not

having personally observed the witnesses, [this Court] [must be] convinced of the accused's guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.A.A.F. 1987). Here, the evidence presented at trial supports a finding of Appellant's guilt beyond a reasonable doubt. *See* id.

A. Appellant's assignment of error is more properly reviewed as a variance claim, but it still fails because Appellant cannot prove he was prejudiced by any potential variance.

Appellant's first claim concerns *when* the offense occurred, not whether it occurred. (*See* App. Br. at 7–8) (arguing evidence did not align with charged timeframe, instead, "it clearly [pointed] to an occasion outside the charged timeframe."). As a result, his claim is one of variance, not factual sufficiency. *See* United States v. Rath, 27 M.J. 600, 604 (A.C.M.R. 1988) ("[A]ppellant misunderstands the legal significance of the conflict which exists between the pleading and the proof: such a conflict raises the legal issue of variance rather than one of the sufficiency of the evidence."); *see also* United States v. Burkhead, 2016 CCA LEXIS 73, *7 (A.F. Ct. Crim. App. 9 Feb. 2016) (upub. op.) (reciting variance instruction as satisfaction that an offense was committed "as a time, at a place, or in a particular manner that differs slightly from the exact time, place, or manner in the specification"); United States v. Williams, 2017 CCA LEXIS 178, at *3-4 (A. Ct. Crim. App. Mar. 21, 2017) (difference in location between pleading and proof was an issue of variance, not legal and factual sufficiency).[2] "A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal

[2] The Army Court of Criminal Appeals appears to have disregarded this principle in United States v. Gilliam, 2020 CCA LEXIS 236 (A. Ct. Crim. App. 15 July 2020), treating a discrepancy in the date of the offense as an issue of factual sufficiency. But Gilliam is an unpublished case and does not explain its rationale for departing from cases like Rath and Williams.

offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999). A variance is fatal only when (1) the variance was material and (2) it substantially prejudiced appellant. United States v. Hunt, 37 M.J. 344, 347 (C.M.A. 1993). Here, any potential variance was not material or prejudicial, and thus Appellant's claim fails.

The specific date of an offense need not be alleged unless time is an essential element of the offense. United States v. Williams, 40 M.J. 379, 382 (C.A.A 1994) (citing Ledbetter v. United States, 170 U.S. 606, 612 (1898)); *see also* United States v. Jones, 15 C.M.R. 664, 670 (U.S. A.F.B.R. 1954) ("[D]efects in allegations of time are merely formal except where time is an element of the offense.") (citing Weatherby v. United States, 150 F.2d 465, 466–67 (10th Cir. 1945)). When an offense is alleged to occur "on or about," "the government is required to establish that the crime occurred at a date within the timeframe charged or reasonably near the charged timeframe in order to avoid a material variance." Allen, 50 M.J. at 86. A variance is material if it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." United States v. Finch, 64 M.J. 118, 121 (C.A.A.F. 2006). Here, none of these conditions are met.

A potential variance that alters the charged timeframe, without more, does not change the nature of the offense. "Minor variances, such as the location of the offense or the date upon which an offense is allegedly committed, do not necessarily change the nature of the offense and in turn are not necessarily fatal." United States v. Teffeau, 58 M.J. 62, 66 (C.A.A.F. 2003); *see also* United States v. Lovett, 59 M.J. 230, 235 (C.A.A.F. 2004). Uncontradicted testimony presented at trial provided that F.A. was "six or seven years old" when the offense occurred. (R.

at 311, 358, 439, 441, 450.) Taking Appellant's claim as true—that the incident occurred around May 2015 rather than April 2016—F.A.'s reported age remains accurate; she was still "six or seven years old" in May 2015. (*See* App. Br. at 8); (*see also* R. at 398) (noting F.A.'s birthday in 2008). The remaining facts concerning the nature of the offense including where or what occurred are similarly unimpacted by any potential alleged shift in time.

Additionally, nothing about a potential change in date impacted the seriousness of the offense. *Cf*. United States v. Simmons, 82 M.J. 134, 137 (C.A.A.F. 2022) (concluding that variance altered the chronology of the offenses, thereby allowing the prosecution to allege that the accused extorted the victim while she was a minor, which made the offense "absolutely more serious"). There would be no difference in the severity of the offense or language in the specification if the timeframe charged was May 2015 rather than April 2016. F.A. remained well under twelve years old, the age cutoff of "minor" as defined in Article 120b, Uniform Code of Military Justice (UCMJ), in both 2015 and 2016.

Finally, the variance also did not change the maximum authorized punishment for Appellant's offense. *See* Manual for Courts-Martial, United States (2016 ed.) (MCM), part IV, para. 45b.e(3). Based on the above, the variance was immaterial and nonfatal, therefore the analysis should end here.

But even assuming *arguendo* that this Court finds the variance material, Appellant's claim still fails because he cannot demonstrate prejudice. United States v. Lee, 50 C.M.R. 161, 162 (C.M.A. 1975) ("[E]ven where there is a variance in fact, the critical question is one of prejudice."). To show prejudice, Appellant must show both that (1) he was misled by the language of the charge, such that he was unable adequately to prepare for trial, and (2) that the

variance puts him at risk of another prosecution for the same offense. Allen, 50 M.J. at 86 (citing Lee, 50 C.M.R. at 1); *see also* United States v. Hopf, 5 C.M.R. 12, 14 (C.M.A. 1952) (explaining a variance is not fatal "unless it operates to *substantially* prejudice the rights of the accused") (emphasis added). Appellant has not claimed that either has occurred, nor could he.

There was no possibility that Appellant was misled about which charge to prepare a defense. Direct, uncontradicted evidence from three witnesses, including F.A., provided that F.A. was "six or seven years old" at the time of the offense. (R. at 311, 358, 439, 441, 450.) Evidence presented also indicated the offense occurred at Appellant's home on Luckey Pine in San Antonio, Texas, prior to Appellant's move to the Netherlands in May 2016. (R. 307–08, 382.) As a result, the offense had to occur, based upon the occupants living in the home, between Christmas 2014, when F.A.'s family moved into the home, and May 2016, when Appellant had a PCS to the Netherlands. (R. at 401, 446, 480.) The definitive timeline of approximately fifteen months of opportunity, the certain location on Luckey Pine, and the participants in his extended family who were involved, made it abundantly clear which offense the charge addressed. There was no resulting confusion. Importantly, too, Appellant does not now, nor did he at trial, allege any confusion regarding which offense he was defending against. *Cf.* United States v. Gilliam, 2020 CCA LEXIS 236, *9 (A. Ct. Crim. App. 15 July 2020)(unpub. op.) (finding uncertainty in charged timeframe and noting Appellant requested a bill of particulars prior to trial).

For similar reasons, there is also no risk of another prosecution. "[P]rotection against double jeopardy can be predicated upon the evidence in the record of the prior prosecution," Lee, 50 C.M.R. at 162-63. The record clearly indicates an offense against F.A. in the upstairs

bedroom at   in San Antonio shortly before Appellant's PCS to the Netherlands such that Appellant has failed to show he was prejudiced. *See* Hopf, 5 C.M.R. at 14 (C.M.A. 1952) (noting "[t]he law is not so much concerned with the words used as with elemental concepts of justice"). Because Appellant is unable to demonstrate either materiality or prejudice, any potential fatal-variance claim is without merit, and Appellant is not entitled to relief.

B. The findings are supported by sufficient factual evidence within the charged timeframe.

Even if this Court were to agree with Appellant and find his claim to be one of factual sufficiency, Appellant still does not prevail because there is sufficient factual evidence to support the offense occurring during or reasonably near the charged timeframe of on or about 1–30 April 2016.

As stated previously, direct, uncontradicted evidence from three witnesses, including F.A., provided that F.A. was "six or seven years old" at the time of the offense. (R. at 311, 358, 439, 441, 450.) F.A.'s birthday was in 2008,[3] accurately making her seven years old during the charged timeframe of on or about 1–30 April 2016. (R. at 398.) Evidence presented also indicated the offense occurred at Appellant's home on Luckey Pine prior to Appellant's move to the Netherlands in May 2016. (R. 307–08, 382, 495.) As a result, based upon the occupants living in the home, the offense must have occurred between Christmas 2014 and May 2016. (R. at 401, 446, 480.)

[3] In accordance with Air Force Court of Criminal Appeals Rule of Practice and Procedure 17.2(c)(1)(H), the date of birth provided is limited to year only.

But other evidence narrowed the timeline further – to the April 2016 dates that were charged. Immediately after the incident occurred, F.A. recalled that her mother effectively locked her and her siblings in their upstairs bedroom at away from Appellant, with food being brought to their room from others in the family. (R. at 340-41, 393.) This, according to F.A. and her mother, lasted a few weeks, "until [Appellant] left for the Netherlands." (R. at 409.)

K.S. also noted that she was still living in the house when Appellant left for the Netherlands. (R. at 371.) She stated that Appellant moved to the Netherlands not "long after [the incident] happened[.]" (R. at 394.) When asked specifically whether there was anything "going on" around the time of the incident which might help determine the date it occurred, K.S. responded, "When [Appellant] left [for the Netherlands], but I don't know when [his family] left." (R. at 393–94.) As noted previously, Appellant moved to the Netherlands in May 2016, thus the incident and immediate aftermath that lasted "a few weeks" is consistent with the charged timeframe.

To be sure, there were some inconsistencies with the timeline surrounding a move by F.A.'s family to , a city in Texas a few hours from San Antonio. (R. at 341, 370.) Specifically, F.A. and her mother stated that they moved to shortly after the incident occurred and stayed there for six months to a year. (R. at 394.) But the memory of the timeline of the move was weak by both witnesses and internally inconsistent. For example, F.A. remembered that the move was for the purpose of fleeing Appellant's presence, despite them spending weeks after the incident at . (R. at 341.) K.S. and J.S., however, remember that the purpose of the move was to visit with K.S.'s youngest daughter's

grandmother. (R. at 444, 370–71.) Similarly, at one point K.S. testified that the reason they moved back to Luckey Pine was to say goodbye to Appellant and his family, but then later testified that they left because her daughter's grandmother "had a tragedy" and was unable to have children around. (R. at 371, 394.)

Additionally, K.S. confirmed that they were still living in the home when Appellant departed for the Netherlands because they did not "[have] another place to go," and F.A. remembered being at when Appellant and his family moved. (R. at 342, 394, 371, 422, 426.) This, of course, is in direct contradiction to a move upwards of a year prior to Appellant's PCS. (R. at 341, 394.) Thus, the lack of clarity on the timeline of the move, combined with the internal consistencies of the timeline are not enough to rise to reasonable doubt, especially juxtaposed with the uncontradicted definitive evidence that the offense occurred weeks before the move to the Netherlands when F.A. was seven years old. (*See, e.g.*, R. at 394.)

Appellant claims that the witnesses' inability to recall the date of the incident leaves no option but "to use context clues from the evidence to try and discern a timeframe." (App. Br. at 8.) But, these context clues, otherwise known as circumstantial evidence, are precisely what a panel and this Court should use to determine if an offense occurred beyond a reasonable doubt. (*See generally* R. at 540.) (providing panel instructions on direct and circumstantial evidence). And the circumstantial evidence supports the charging timeframe. For example, F.A.'s grandmother recounted a time "a few months" after the incident where F.A. made a comment that a sausage at the grocery store looked like a boy's "butt"—a comment F.A.'s grandmother thought particularly remarkable for a six- or seven-year-old who should not "know what a penis

looks like." (R. at 441.) She noted that the comment happened in the summertime—which aligned with a charging timeframe of April 2016. (R. at 441.)

K.S. had a similar memory regarding the conversation about a "front butt" too. (R. at 396.) She testified that it occurred "two, three weeks after [the incident] happened," which was consistent with J.S.'s testimony and the charged timeframe. (R. at 397.) Importantly, J.S. noted that she was there for both conversations, with one occurring at her mother-in-law's house "a few months" after the incident. (R.at 441.) If, as Appellant claims, K.S. and her family moved to shortly after the incident for upwards of a year, then they would not have been with J.S. on multiple occasions months later making concerning comments about sausages. (R. at 441.); (*see also* R. at 341) (noting K.S., F.A., and her siblings went to , not J.S.).

Despite this circumstantial evidence, Appellant claims that the charged conduct must have happened around April 2015 to account for a six-month-to-a-year move to before May 2016. This, Appellant claims, conflicts with precedent in Simmons, noting that an offense occurring 279 days outside of the charged timeline was too long and thus constituted a major change to the charge sheet. *See* Simmons, 82 M.J. at 139. But Simmons does not warrant reversal here. First, the Simmons court explicitly rejected defining a brightline number of days constituting a major change or variance. *See* id. at 139 (rejecting "a rigid and arbitrary time line"). Second, the fears expressed in Simmons warranting a finding that 279 days was too far outside the charged timeframe are not present here, namely misleading the accused and preparation of trial. *See* id. at 140.

To illustrate, in Simmons, the Court noted that the change in dates probably affected the investigation, the type of evidence the parties would have introduced, and the nature of the cross-

examination. Id. In fact, the change in the date impacted the chronological order of the offenses, thereby creating an entirely new motive that the government could argue. Id. Here, in contrast, those fears are absent: everyone was in agreeance that one incident took place at ,
where everyone resided at the time, with no contradiction that it occurred between Christmas 2014 and May 2016. Indeed, that was the *only* timeframe in which the offense *could* have occurred based upon who lived in the home. There was no change in circumstance, no change in who was involved, and no change to a potential motive or argument by the government. In other words, the nature of the investigation and resulting cross-examination would not have differed with a modified charging timeframe. In fact, the only change resulting from the passage of time would be F.A.'s age, but even that testimony accounted for the time between Christmas 2014 and May 2016. Every witness noted F.A. was "six or seven years old." There was no confusion about the fact that Appellant needed to defend against an accusation that occurred at the house, upstairs, shortly before he moved to the Netherlands. (R. at 401, 446, 480.) Thus, the Simmons 279-day line does not automatically translate here.

Furthermore, Appellant's reliance upon Gilliam is similarly misplaced. Gilliam, unpub. op. at *5. There, the Court found that there was sufficient evidence that the victim was digitally penetrated prior to turning twelve years old, but the ambiguity of when the penetration occurred impeded a finding that the offenses occurred reasonably near the charged timeframe of 1 October 2010 to 27 June 2012. Id. at *3. The victim alleged that she was digitally penetrated at least six times but could not remember when, where, or in what order each occurred. Id. at *5, n.4, n.5. Based upon the testimony at trial, however, the last incident of penetration—"the *only* act of digital penetration tied to any date certain" —either occurred in the Summer of 2014 or a couple

months prior to September of 2016, which was outside of the charged timeframe. Id. at *5, n.6, *10 (discussing inconsistent testimony).

Appellant's case is distinguishable for a few reasons. First, the testimony in Gilliam was far more ambiguous and vague than F.A. and K.S.'s testimony here. In Gilliam, the victim could not say when any of the acts occurred or in what order. Id. at *5–*6. The only approximate timeframe that could be established was in regard to the last incident, which, based on the testimony, was sometime between summer 2014 and September 2016. Id. at *5. This meant that the charged timeframe was anywhere from eleven months to six years incorrect. And this was based on the *only* evidence available regarding a timeline of eight alleged offenses, and was internally inconsistent by over two years. Id. This differs greatly from the uncontradicted, short finite period where the offense could have occurred here, and the clear indication by multiple witnesses that it happened prior to a move to the Netherlands in May 2016.

Further, in Gilliam the Appellant also exhibited confusion by asking for a bill of particulars to further narrow his defense. Id. Here, in contrast, Appellant made no such claim, nor could he—every witness was consistent that the offense took place shortly before Appellant moved to the Netherlands. (R. at 401, 446, 480.) And, once combined with the circumstantial evidence, it became clear that the offense occurred around April 2016. Appellant was not misled regarding what timeframe and which offense he must defend against. Accordingly, this Court should find Gilliam inapposite.

Finally, it is evident that the panel did not have difficulty determining the dates of the charged offense because they did not use the instructed-upon variance instruction, allowing them to amend the charged timeframe. (R. at 539–40; *see also* Pros. Ex. 4.) Further bolstering this is

the fact that the panel was unable to convict on the first charge—highlighting that the panel believed that something happened at the time alleged, just not the exact way described by F.A. (R. at 634.) Had the charged timeframe created reasonable doubt, the panel would have entered an acquittal for both charges, or specified modifications. That they convicted on one and not the other suggests that they were convinced beyond a reasonable doubt that the incident occurred on or about April 2016, but there was not enough evidence to support penetration.

Based upon the direct and circumstantial evidence presented at trial, this Court should be convinced beyond a reasonable doubt that the offense occurred within, or reasonably near, the charged timeframe. The strong, clear memory that the incident occurred shortly before Appellant moved to the Netherlands in May 2016 was the common denominator across three witnesses. This, combined with the evidence regarding F.A.'s age at the time of the incident, as well as the actions taken in the immediate aftermath and F.A.'s behavior months later, provide proof beyond a reasonable doubt that the incident occurred on or around 1–30 April 2016.

Thus, with due deference to the military court's direct observations, this Court should be convinced beyond a reasonable doubt that the offense occurred within the charged timeframe.

C. There is sufficient evidence for this Court to conclude that the remaining essential elements of the crime were proven beyond a reasonable doubt.

Weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should also be convinced of Appellant's guilt regarding the remaining elements beyond a reasonable doubt. *See* Turner, 25 M.J. at 325.

Appellant's conviction was supported by eyewitness testimony from the victim as well as outcry witnesses, K.S. and J.S. (*See, e.g.*, R. at 315, 395, 438.) F.A. described that when she

was six or seven years old, she went upstairs in her home to grab a change of clothes for her sibling, as requested by her mother. (R. at 312.) When she went upstairs, her uncle, Appellant, entered the room behind her, shut the door, dropped his pants and underwear, exposing his erect penis and asked her to suck and lick it. (R. at 314–15.) Shortly thereafter, F.A.'s mother sensed something "didn't feel right" and followed Appellant upstairs. (R. at 382.) Once upstairs, she saw that only one bedroom door was closed. (R. at 382–83.) After pounding on the door, she was able to open it and see Appellant standing in front of his seven-year-old niece who was on the bed and he walked away. (R. at 390.) Immediately after, F.A. explained what occurred and F.A.'s mother proceeded to tell her mother, J.S. (R. at 393.) She also barricaded her children in the room, keeping a watchful eye until Appellant was no longer living in the home. (R. at 393, 408.)

F.A.'s recollection of events, although not perfect in every aspect, was substantially corroborated by both her mother and her grandmother. (R. at 393) (discussing the three speaking the evening of the offense). They both explained being told immediately following the event, as well as the same day of the incident. (R. at 393, 438, 451-52.) They also confirm that K.S. was actively keeping F.A. and her siblings away from Appellant while he was still in the home. (R. 393, 408.) These behaviors suggest the veracity of F.A.'s claims. Indeed, based upon the record it was clear that F.A. was having a difficult time testifying about what occurred to her when she was seven years old. (R. at 313) (requesting to retrieve comfort item of a "snowflake blanket" when asked about what occurred in the room).

Circumstantial evidence also supports the conviction as well. First, Appellant had no reason to be upstairs, let alone in a room with F.A. with a closed door. (R. at 498.) Testimony

revealed that Appellant's bedroom was downstairs, and he had no business upstairs other than laundry. (R. at 498.) But he was not found in the laundry room, and was instead in a room with his niece with the door closed. (R. at 387.)

Additionally, just weeks after the incident occurred, F.A.'s mother and grandmother recall two separate moments where F.A. made comments about large phallic-shaped objects resembling a "boy's front butt." (R. at 397.) They each noted it was particularly memorable because F.A. would have no reason to recognize the similarity. (R. at 441.)

Appellant highlights the grandmother's business of printing and shipping pornographic images and stories to argue that perhaps F.A. saw some of the material and that contributed to her age-inappropriate knowledge. (App. Br. at 13.) But there was no evidence that F.A. or the children had access to the material. (R. at 442.) To the contrary, F.A. explained that she did not have access to her grandmother's computer and had only read "old people books" on her devices. (R. at 310) (describing the books as "very boring"). J.S. was also adamant that the children did not have access to the photographs or stories either. (R. at 442.) And even assuming *arguendo* F.A. had seen some material, this possibility would still not explain Appellant's presence in a closed-door room with his seven-year-old niece.

Appellant also correctly notes that the timeline of F.A.'s family move to was unclear based upon the testimony. But this, too, does not rise to the level of reasonable doubt warranting reversal. Burkhead, unpub. op. at *5–6 ("The term reasonable doubt, however, does not mean that the evidence must be free from conflict."). In fact, as noted above, there was no contradiction that this incident occurred in the home when F.A. was seven years old, shortly before Appellant moved to the Netherlands.

Finally, Appellant highlights several inconsistencies in the evidence, but none were enough for the panel, or are enough now, to bring reasonable doubt to the offense. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) ("In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented.") (internal citations omitted).

Based on the evidence presented at trial, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. This Court should therefore deny this assignment of error.

II.

DENYING THE PANEL MEMBER'S REQUEST TO OBTAIN APPELLANT'S OUT OF COURT STATEMENTS WAS NOT ERROR.

Additional Facts

S.K., Appellant's wife, testified that she learned Appellant exposed his penis to F.A before moving to the Netherlands with Appellant in 2016. (R. at 484-485.) She also testified that because of a childhood injury, she suffers from long-term memory issues and has trouble recalling any memories. (R. at 494, 512.) Before S.K. was excused, several court members submitted questions. (*See* App. Ex. XLVIII-LII, ROT, Vol. 4.; R. at 504.) Before questioning S.K., the military judge held an Article 39(a), UCMJ, session outside the presence of the members and reviewed the court member's questions with counsel. (R. at 505-511.) The military judge read one of the court member's questions which asked, "Did [S.K.] speak with [Appellant] about the incident once [S.K.] found out?" and requested the party's position. Trial

counsel objected to the question on hearsay grounds. (R. at 505.) The military judge then posed the court member's question to S.K., who answered, "Yes." (R. at 506.) The military judge followed up with, "What did he say?" to which S.K. replied, "He denied it." Id. When asked by the military judge if she "remember[ed] when that was," S.K. responded, "I don't." Id.

The military judge acknowledged the application of the rules of evidence to questions posed by court members but questioned whether a court member can ask a question of a witness which elicits statements of "a party opponent." (R. at 507.) The government asserted the court does not have an opposing party and therefore hearsay statements of a party opponent, under Mil. R. Evid. 801(d)(2), can be elicited only by the government. Id. Conversely, Appellant contended Mil. R. Evid. 801(d)(2) only acts as a "barrier" for the defense from offering his statement but a question from a court member which elicits the same statement is "fair game." Id.

Thereafter, the military judge and the parties took a step back and analyzed the original question, and both the court and the parties agreed it did not call for hearsay. (R. at 508.) But the court highlighted a concern with the court member's original question under Mil. R. Evid. 403. Id. Trial counsel agreed with the court's concern and changed its objection from hearsay to Mil. R. Evid. 403. Id. The military judge conducted a Mil. R. Evid. 403 analysis and concluded testimony that S.K. spoke to Appellant was permissible and its probative value of was not outweighed by a danger of unfair prejudice. (*See* R. at 508-510.) The military judge then discussed that if there was a follow up question about what Appellant said, he would "simply state that the Rules of Evidence don't permit hearsay." (R. at. 510.) Elaborating, the military

judge explained that stating something is impermissible under the rules of evidence does not carry the "same kind of prejudice" as explaining an accused's constitutional rights. (R. at 510.)

The members were recalled, S.K. was asked if she spoke with Appellant about the incident, and she answered, "Yes." (R. at 513.) During deliberations, the court members requested S.K. be recalled because they had additional questions. (R. at 619.) One member asked, "Asked yesterday, did you confront SSgt Kershaw about incident, you responded yes. Did SSgt Kershaw deny or confirm he had been in room with [F.A.]?" (App. Ex. LXVII, ROT, Vol. 4.; R. at 630, 632.) Only trial counsel objected to the court member's follow up question. (App. Ex. LXVII.) The military judge did not pose the question to S.K., but instructed the court members, "This is not something that is admissible under the Military Rules of Evidence." (R. at 631.)

The members returned to their deliberations and the military judge conducted an Article 39(a), UCMJ, session to address his instruction without a specific request to do so from either party. (R. at 632.) He stated he found the question called for "inadmissible hearsay" for the same reasons discussed earlier. Id.

Standard of Review

"This Court reviews a military judge's decision to admit evidence for an abuse of discretion." United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)). Abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the

law." United States v. Ayala, 81 M.J. 25, 27-28 (C.A.A.F. 2021) (quoting Frost, 79 M.J. at 109). Further, the abuse of discretion standard recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing United States v. Wallace, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)). This standard requires more than just our disagreement with the military judge's decision. United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015).

Law

A. Access to Evidence

Article 46, UCMJ, gives panel members the "opportunity to obtain witnesses and other evidence." "[T]he right of the court members to obtain additional evidence is not absolute." United States v. Lampani, 14 M.J. 22, 26 (C.M.A. 1982). The R.C.M. reflect this statutory entitlement. For example, "[t]he court-martial may act to obtain evidence in addition to that presented by the parties . . . subject to an interlocutory ruling by the military judge." R.C.M. 801(c). After the prosecution and defense have rested, "[m]embers may request that the court-martial be reopened and that . . . additional evidence [be] introduced. The military judge may, in the exercise of discretion, grant such request." R.C.M. 921(b). The Military Rules of Evidence reinforce the role of the military judge in determining the admissibility of evidence requested by members. *See* Mil. R. Evid. 614(a). Mil. R. Evid. 614(b) provides "members may interrogate witnesses, whether called by the military judge, the members, or a party."

B. Hearsay

The Sixth Amendment's Confrontation Clause holds that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S.

Const. amend. VI. "[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." United States v. Bench, 82 M.J. 388 (CA.A.F. 2022) (citing Crawford v. Washington, 541 U.S. 36, 61 (2004)).

The prohibition against the admission of hearsay is contained in Mil. R. Evid 802. Mil. R. Evid. 801(c) states, "'[h]earsay' means a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c). Previous versions of Mil. R. Evid. 801(c) stated, "'Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MCM, pt. III, (2012 ed.), Mil. R. Evid. 801(c). By Executive Order, the words "a party offers" were added to the definition. Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013). Under Mil. R. Evid. 1102, this amendment followed the corresponding amendment to Federal Rule of Evidence. This change simplified but did not change existing law. *See* Fed. R. Evid. 801(c)(2) Advisory Committee's Note (Noting the 2011 amendment was "part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.") In fact, case law supports a traditional view of hearsay: "As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-

martial." Ayala, 81 M.J. at 28 (first citing Mil. R. Evid. 801(c); and then citing Mil. R. Evid. 802); United States v. Finch, 79 M.J. 389, 394 (C.A.A.F. 2020).

A statement made by an opposing party is not hearsay if offered against the opposing party. Mil. R. Evid. 801(d)(2)(A). An accused is a party opponent of the Government, and not the court members. *See* Mil. R. Evid. 614(b) (distinguishing between members and parties); *see also* United States v. Palacios Cueto, ACM 39815, 2021 CCA LEXIS 239, at *24 (A.F. Ct. Crim. App. May 18, 2021), aff'd, 82 M.J. 323 (C.A.A.F. 2022).

In Palacios Cueto, the Court considered whether a military judge abused his discretion by denying court members' request made during deliberations for statements the accused made to law enforcement agents. Palacios Cueto, unpub. op. at 22. This Court rejected the argument that an accused's statements are admissible under Mil. R. Evid. 801(d)(2) when requested be court members, and concluded it was not error that the statements were hearsay and then found that the members were not a party opponent of the accused. Palacios Cueto, unpub. op. at 26.

C. Prejudice

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859. This Court evaluates the harmlessness of an evidentiary ruling by weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999). "[A]n error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and

would have provided new ammunition against an appellant." United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (citing United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)).

Analysis

Appellant argues that his wife, S.K., should have been able to answer a panel member's question about whether Appellant "den[ied] or confirm[ed] he had been in the room with [F.A.]" after S.K. confronted him because that testimony did not meet the definition of "hearsay" under Mil. R. Evid. 801(c) and therefore not prohibited from admission. (App. Br. 17.) Appellant's argument fails for four reasons. First, Appellant's statement was inadmissible hearsay under the Military Rules of Evidence. Second, Appellant's request glosses over the absurd results from a holding allowing court members to sua sponte elicit out of court statements simply because they are not a party offering the statements and do not have a purpose to prove the truth of a statement. (App. Br. 17-19.) Third, the military judge's ruling did not rise to the level of an abuse of discretion because denial of the admission of the statement was within the range of available options for the evidence. Fourth, the statement was not prejudicial to Appellant because the strength of the Government's case on this point was strong: two witnesses—F.A. and K.S.—testified that Appellant in the room with F.A.

A. The military judge did not err because the evidence was inadmissible hearsay.

The court members properly exercised their right to obtain additional evidence during deliberations under R.C.M. 921(b) and exercised their right to submit questions to S.K. under Mil. R. Evid. 614(b). In doing so, questioning S.K. about whether Appellant "denied or confirmed" he was in the room with F.A. attempted to offer an out-of-court statement for the truth contained in that statement without trying to assist either party.

The court member's question called for S.K. to testify to what Appellant said to her after she confronted him about the incident with F.A. in April 2016. Because the military judge previously posed a similar question to S.K., both parties and the military judge knew S.K.'s answer would have likely been that he denied it. (*See* R. at 506.) This evidence was inadmissible hearsay because it was an out of court statement offered into evidence to prove the truth of the matter asserted. *See* Ayala, 81 M.J. at 28. While the current version of Mil. R. Evid. 801(c) states, "a party offers in evidence," the addition of the "a party offers" did not change the rule but addressed stylistic issues to make the rule comprehensible. The addition of the language did not mean to suggest that out-of-court statements can come into evidence so long as they were not introduced by "a party." And court members are not a party to a court-martial. *See* R.C.M. 103(16); *but see* United States v. Anderson, 36 M.J. 963, 983 (A.F.C.M.R. 1993) (concluding that, based on the specific facts of the case, members were a 'party' under Mil. R. Evid. 106). The government, as a party to a court-martial, may offer a statement of an accused under M.R.E. 801(d)(2) because the accused is the opposing party. Members, who are not a party opponent of Appellant, may not. Moreover, the court members had no reason to know what S.K.'s answer would have been before asking the question and were not attempting to help either the government or the defense by asking the question.

The military judge was therefore correct by determining the admissibility of evidence when he concluded that "[t]his is not something that is admissible under the Military Rules of Evidence." (R. at 631.); *see* Palacios Cueto, unpub. op. at 25; *see also* United States v. Melendez-Rivas, 566 F.3d 41, 50 (1st Cir. 2009) (expressing concern that a judge's questioning would bring in "evidence which is both inadmissible and prejudicial hearsay.") Furthermore,

Appellant cites no precedent from any court holding that out-of-court statements offered for their truth elicited following the proper exercise of Mil. R. Evid. 614 are not hearsay.

B. Failing to apply Mil. R. Evid. 801(c) to court members' questions will lead to absurd results.

Appellant's argument overlooks the consequences of this Court holding that his out-of-court statement, elicited by court members, is not hearsay. His argument boils down to this: court members have access to out of court statements because they are never offering evidence as a party to the court martial and do not have a purpose to prove the truth of anything. (*See* App. Br. 18-19) Evidentiary rules are, generally, in place to protect the constitutional rights of the accused and Appellant's argument would allow court members unfettered access to otherwise inadmissible evidence.

Allowing court members to obtain out of court statements, regardless of whether the declarant is testifying, would lead to absurd results because it defies the "bedrock procedure guarantee" afforded by the Sixth Amendment's Confrontation Clause which allows an accused the right to confront witnesses against him. Crawford, 541 U.S. at 42-43. Appellant wants his own self-serving statement admitted thereby preventing cross-examination.

And where would it stop? If this Court ignores the protections of Mil. R. Evid. 801 for the reasons set forth by Appellant, the holding would also lead to other absurd results. For example, in a prosecution under Article 120, UCMJ, the members could theoretically request that the named victim be recalled to catalogue her sexual partners because Mil. R. Evid. 412 on pertains to "a party intending to offer the evidence." Mil. R. Evid. 412. The named victim may be readily available, but the requested evidence is clearly inadmissible under a host of rules,

including Mil. R. Evid. 412. Likewise, the court members could unknowingly request an accused's uncharged or other conduct without notice to the accused because Mil. R. Evid. 404 only sets forth procedural parameters on the trial counsel, not the court. *See* Mil. R. Evid. 404(b)(3).

The rules of evidence apply to court member questions otherwise court members can make unreasonable requests for evidence prejudicial to an accused. *See* Mil. R. Evid. 614(b); *see also* 2016 MCM, United States, App. 22 at A22-58. Appellant's request to have this Court carve out an exception for court members (or the court) simply because the plain language of the rule does not contemplate a request for evidence under Mil. R. Evid. 614 is absurd.

C. The military judge did not err in excluding the evidence because exclusion was within the military judge's range of options.

A military judge's "challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." United States v. Travers, 24 M.J. 61, 62 (C.M.A. 1987). The military judge's ruling is not clearly unreasonable or clearly erroneous. It was a tenable decision that should not be overturned at the appellate level because the military judge ensured the constitutional protections afforded to the defendant were met before decision on trial counsel's objection.

Initially, the military judge held a hearing outside the presence of the members to listen to S.K.'s testimony, gather additional facts about the Appellant's statements to her, and solicit the positions of the counsel. (R. at 506.) The military judge, not a court member, asked S.K. what the Appellant said to her as a follow up question in anticipation that a court member might ask it as well. (R. at 506.) Then, he vocalized what his anticipated findings would be should a court

member request evidence about what Appellant said to S.K. Simply, he was concerned that saying anything more than "it's impermissible under the Rules of Evidence. It's hearsay" would be prejudicial. (R. at 510.) During deliberations, the court members recalled S.K. and asked, whether Appellant "den[ied] or confirm[ed] he had been in the room with [F.A.]." (R. at 632.) At that point the military judge informed the court members that their question was not "admissible under the Military Rules of Evidence." (R. at 631.)

The military judge engaged in thorough discussion with counsel before deciding that the best course of action to limit the potential prejudice against Appellant was to explain to the panel members that the evidence they sought was not admissible. The question posed by the court members during deliberations as was proper under R.C.M. 921(b); however, R.C.M. 921(b) also provides the military judge with wide discretion in admitting or not admitting the hearsay statement into evidence when requested. R.C.M. 921(b). The military judge knew that while S.K. would have stated that Appellant "denied it," the military judge also knew that S.K. suffered long-term memory issues and in this specific instance, failed to remember when the conversation even occurred. (R. at 506, 494, 512.)

Because out of court statements are inherently dangerous due to their reliability, choosing to exclude the statement does not conflict with a statute, court precedent, or the Manual for Courts Martial. Different judges may have differing opinions on whether to admit the statement; however, "[t]o reverse for an abuse of discretion involves far more than a difference in opinion." Travers, 25 M.J. at 62. The military judge's decision did not amount to any error requiring appellate intervention, and this Court should affirm the lower court's decision.

D. Even if this Court finds the military judge abused his discretion, failing to elicit statements made by Appellant to his wife was not prejudicial to Appellant.

Appellant's claim of material prejudice for this alleged error is not supported by the record. Even assuming the military judge erred in not admitting this statement, Appellant's claim still fails because the evidentiary ruling was not materially prejudicial to a substantial right of the Appellant. Article 59(a), 10 U.S.C. § 859. This Court evaluates the harmlessness of an evidentiary ruling by reviewing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Kerr, 51 M.J. at 405.

First, the Government put forth a supportable case against Appellant. To the question posed by a court member as to whether Appellant was in the room with F.A, the government called two witness who testified Appellant was in the room with F.A. at the time of the incident. (R. at 314, 390.) Second, Appellant did not put on any alibi evidence in his case in-chief. (R. at 478-493.) Third and Forth, while the hearsay evidence was material to the panel's resolution of key issue in this case, S.K. admitted to having "very, very, bad long-term memory problem," which would tend to undermine the reliability of her testimony—and consequently, the accuracy of the conversation she had with Appellant when she confronted him. (R. at 485.) Moreover, the court members knew that Appellant plead not guilty to the offense so the value of an out-of-court statement denying that he was in the room with F.A. was low because it would not have changed the court member's view of his position on the offense.

"An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice."

Travers, 25 M.J. at 62. Here the military judge's tenable, decision was not prejudicial to a substantial right of the Appellant. This Court should deny this assignment of error.

III.

APPELLANT HAS WAIVED ANY POTENTIAL ERROR REGARDING AN ARTICLE 6b REPRESENTATIVE, AND HAS NOT SHOWN THE APPOINTMENT WAS ERROR OR THAT HE WAS PREJUDICED BY THE REPRESENTATIVE'S PRESENCE AT TRIAL.

Additional Facts

During pretrial motions, the military judge inquired whether an Article 6b representative was appropriate. (R. at 223.) Both the government and the defense felt that it was not necessary to appoint a representative. (R. at 223.) However, both agreed that if the military judge felt it was necessary, J.S., F.A.'s grandmother, would be the preferred choice. (R. at 223.) The military judge then held a hearing to determine if an appointment was necessary. (R. at 224.)

At the hearing, J.S. testified and explained that she thought a representative was already appointed. (R. at 225.) She noted that the person, a family friend, was on her way to the court-martial, but was unsure if she would be able to attend the proceedings every day. (R. at 225–26.) She also indicated that she would like a representative appointed. (R. at 225, 227.)

The court received testimony from K.S., F.A.'s mother, where she indicated that the family friend who was supposed to serve as the representative was in the middle of nursing school examinations, which might impact her ability to be present at the court-martial. (R. at 228.) Because of this, the judge called F.A. back to the stand and asked if she would be comfortable with her grandmother acting as her representative. (R. at 230.) F.A. responded: "I'd feel way more comfortable with her." (R. at 230.)

The military judge then heard from J.S., F.A.'s grandmother, explained what the role of representative entailed, and asked if she would be willing to be appointed the representative, to which she responded, "Absolutely." (R. at 232.)

The court then informed the parties that he was inclined to appoint a representative and asked for inputs on who each side preferred. (R. at 233.) Both parties indicated they preferred J.S. Id. The court then ruled:

> I'm going to appoint her and I'll email out an order appointing her as legal representative pursuant to Article 6b of the UCMJ. Looking at R.C.M. 801(A)(6) as well and it's within my discretion. She's a member of the family and she's not any of the prohibited members. Understanding that it could change if that – I understand that she is anticipated as a witness but also there haven't been any objections to her serving in that capacity raised. I know that she appeared to have a little bit of a hard time hearing at first, so we'll just speak up when necessary and she appears willing and able. It seems that that's in accordance with [F.A.]'s desires as well and [F.A.], she seems like a 14-year-old kid. So, it seems that an appointment of somebody to help her potentially understand, especially given that she's not represented by counsel, help her understand her rights under 412 and with regard to sentencing and other rights under Article 6(b) of the uniform Code of Military Justice.

Id.

There were no objections.

Standard of Review

The appointment of a representative for the victim under Article 6b is reviewed for an abuse of discretion. *See* Article 6b, UCMJ, 10 U.S.C. § 806b. However, when a party fails to object at trial, the claim is reviewed for plain error. United States v. Tunstall, 72 M.J. 191, 196–97 (C.A.A.F. 2013); *see also* United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014) ("A timely and specific objection is required so that the court is notified of a possible error, and so has an

opportunity to correct the error and obviate the need for appeal.") (cleaned up). To establish plain error, an appellant has the burden to demonstrate: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." Tunstall, 72 M.J. at 197. Finally, although this Court "review[s] forfeited issues for plain error" it ordinarily does not review waived issues because a valid waiver leaves no error for] the Court to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

Law and Analysis

A. Appellant has waived any alleged error regarding the appointment of an Article 6b representative.

Appellant waived any potential error regarding the appointment of an Article 6b representative. "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." Campos, 67 M.J. at 332. Here, not only did the defense fail to object, they also suggested J.S. be the chosen representative. (R. at 233.) This Court should accordingly find that Appellant has waived any alleged error regarding the appointment.

When the trial judge asked the defense their position on the appointment of an Article 6b representative, they responded, "I guess we're not requesting it. . . . If the court does make a decision that a 6b representative would be appointed, it would be our preference that it be [J.S.]" (R. at 223.) Then, after the hearing when the military judge informed counsel that he was "inclined to appoint a representative," and requested input on who it should be, defense "concur[ed] [with J.S.] if the court [took] the steps to have the representative appointed." (R. at 233.) The defense did not object, nor provide any inclination against the appointment, and in

fact, affirmatively acquiesced to it. (R. at 232–33.) Because they failed to do so, this Court should find that Appellant waived the issue.

This Court has previously done so in United States v. McInnis, ACM 39576, 2020 CCA LEXIS 194, *39–40 (A.F. Ct. Crim. App. 29 May 2020) (unpub. op.). There, an Article 6b representative was erroneously not properly designated in writing. Id. at *38. In determining that Appellant had waived the issue, this Court highlighted the fact that senior trial counsel identified the acting-representative as "the Article 6b guardian" and defense did not object. Id. "Under these circumstances, [this Court] [found] trial defense counsel made a deliberate decision not to present a ground for relief that might be available in the law." Id. As a result, this Court noted that Appellant appeared to waive his right to object. Id.

The same could be said here. Appellant had the opportunity to object multiple times to the appointment of a representative, and to the specific appointment of J.S. as the representative. Not only did defense not object, but they offered J.S. as the preferred representative. (R. at 233.) Because Appellant "made a deliberate decision not to present a ground for relief," this Court should find the issue waived. *See* Campos, 67 M.J. at 332 (noting waived issues are not reviewable).

B. Even if this Court proceeds with review, the appointment was not error, let alone plain error.

Despite Appellant's waiver, "C.A.A.F. has made clear that the courts of criminal appeals have discretion in the exercise of their authority under Article 66, UCMJ, 10 U.S.C. § 866, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error." United States v. Lee, ACM 39531, 2020 CCA

LEXIS 61, *6 (A.F. Ct. Cti. App. 26 Feb. 2020) (unpub. op.) (referencing United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018)). Should this Court determine the error was not waived, or in the Court's discretion pierce waiver, this Court should nonetheless determine the military judge's appointment of a representative was not error.

Article 6b, UCMJ, 10 U.S.C. § 806b, provides that a court may appoint a representative "[i]n the case of a victim . . . who is under 18 years of age." The Rule specifically contemplates a family member acting as the representative, as was the case here, and only explicitly excludes the accused as a potential representative. The court maintains discretion in appointing a representative and is not required to hold a hearing before doing so. R.C.M. 801(a)(6)(A).

Previous versions of the Rule provided a court with certain considerations in determining whether the appointment is appropriate. *See* MCM, pt. II, 801(a)(6)(A), Discussion (2016 ed.) These included: "the age and maturity, relationship to the victim, and physical proximity of any proposed designee, the costs incurred in effecting the appointment, the willingness of the proposed designee to serve in such a role, the previous appointment of a guardian by another court of competent jurisdiction, the preference of the victim, any potential delay in any proceeding that may be caused by a specific appointment, and any other relevant information." *See* id. Although a different version of the Rules for Courts-Martial applied during F.A.'s hearing which excluded the above factors, the considerations nevertheless remained instructive through certain other authoritative regulations. *See, e.g.*, Department of Defense Instruction (DoDI) 1030.02*, Victim and Witness Assistance*, 3.6(a)(3) (July 27, 2023) (providing same factors for determination where Service designating authority appoints representative); *see*

generally, United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001) (noting a regulation can have the force of law).

Here, a representative was appropriate based upon F.A.'s age. Article 6b representatives may be appropriate for victims under the age of 18, and at the time she was testifying, F.A. had been 14 for only two months. (R. at 231.) Indeed, immediately after speaking with F.A. during the hearing, the trial judge remarked that F.A. appeared to be a "14-year-old kid," in reference to the need to use a representative. (R. at 233.); *see* United States v. McDowell, 73 M.J. 457, 459–60 (C.A.A.F. 2014) (unpub. op.) (noting military judge is "in the best position to observe the witness and was most able to assess the circumstances surrounding the issue of the witness' expected testimony"). After fully realizing the scope of the representative's duties and understanding she did not currently have a representative in place, F.A. herself requested one be appointed. (R. at 225, 227.)

The fact that neither party requested a representative be appointed is of no consequence. Instead, this was likely due to the fact that all parties were already using a de facto representative. (R. at 219, 223.) The parties and witnesses repeatedly mentioned that F.A. essentially had an acting representative. (R. at 223.) F.A. also believed that a family friend was going to fill this role specifically during the court-martial. (R. at 225–26.)

Furthermore, the appointment specifically of F.A.'s grandmother was also not in error. The Rule expressly includes a family member as a potential representative, excluding only the accused as a potential candidate. Article 6(b)(c), UCMJ, 10 U.S.C. § 806b(c). Of the two available family members, the grandmother was the better option because she had fewer interaction with F.A. regarding the incident, was less directly involved with the incident, and was

not present when it occurred. Outside of the family, the other option available was set aside after it was determined that she could not be present during a majority of the court-martial. Importantly, too, when asked whether she would like her grandmother to serve in the role, F.A. noted that she was "way more comfortable" with her as the representative. (R. at 230.) J.S. also noted her willingness to take on the role and explained that she had a good relationship with F.A. (R. at 231.)

That J.S. and F.A. did not attend the Military Rule of Evidence 412 hearing does not negate the appropriateness of the appointment. (*Cf.* App. Br. at 24.) To the contrary, when told about her new duties, J.S. listened attentively, noted that she understood her role and explained that she would discuss with F.A. to determine the attendance. (R. at 232.) The two did not attend, as was well within their rights. *See* United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018) (noting Article 6(b), UCMJ, bestows a "choice to participate"); *see also* In re KK, 2023 CCA LEXIS 31, *12 (A.F. Ct. Crim. App. 24 Jan. 2023) ("The victim] also has the right—in the absence of process compelling her—to not attend the accused's court-martial, if she so chooses."). J.S. was, in fact, explicitly exercising F.A.'s right *not* to attend the hearing. (R. at 255.)

Even more so, however, there are other rights, outside of attending hearings, that the court explained was reason for the appointment. An Article 6(b) representative serves a number of useful functions and that was sufficiently explained by the trial court during the hearing. These included receiving contacts, asserting rights, representation in hearings, and assistance in rights related to sentencing. (R. at 224–25.)

Based upon F.A.'s age and observed maturity, the willingness of J.S., F.A.'s wishes to have a representative appointed and her comfort with J.S. acting in that role, it was not error to appoint J.S. as the representative.

To be certain, even if it was error for the court to use J.S. as the representative, the designation did not prejudice Appellant. Appellant claims that prejudice resulted from J.S.'s presence in the courtroom prior to her testimony because it caused her to alter her testimony. As F.A.'s Article 6b representative, J.S. held the same rights as that of the named victim, including the right to be present throughout the proceedings unless testimony "would be materially altered if the victim heard other testimony at that hearing or proceeding." Article 6(b)(A)(3), UCMJ, 10 U.S.C. § 806b(A)(3). This must be shown by clear and convincing evidence. *See* id. Despite Appellant's assertions, he has not indicated any testimony that was altered as a result of her presence, let alone materially so. *Cf.* id.

Instead, Appellant claims that the appointment gave "her the opportunity to adjust her testimony based on what she heard and saw." (App. Br. at 27.) This is not enough. Mere opportunity does not reach the required level of clear and convincing evidence had Appellant challenged her presence at trial, and it is not enough to show prejudice on appeal. *See* United States v. Green, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005) (describing clear and convincing evidence as "lying between 'preponderance of the evidence' and 'proof beyond a reasonable doubt'"); *see also* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (noting prejudice requires appellant to show "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different"). Furthermore, had J.S. changed any testimony, the defense could have impeached her for the alteration between the interview and her ultimate

testimony. And an Article 6b representative does not maintain confidentiality with the person they are representing, so Appellant was free to delve into any line of questioning regarding potential influence, which they did here. (R. at 449–50) (discussing defense's observations of courtroom testimony).

Similarly, Appellant fails to show testimony of F.A.'s that was actually altered by the presence of J.S. F.A. was asked on direct examination a series of questions about what electronics belonging to her grandmother she had access to. (R. at 309–10.) She noted that her grandmother allowed her to use her tablet but not her computer because there are "old people stories" on them. (R. at 310.) When asked to describe any stories she had access to, she noted that they are "really boring." (R. at 310.) Although based upon the observations of defense counsel at trial, F.A. may have looked at her grandmother during her response, there was no indication that she materially altered her testimony. In fact, J.S. was unequivocal that the children were prohibited from using the desktop computer in her room and that it was password protected, with only her husband knowing the password. (R. at 442.)

Nonetheless, Appellant surmises that F.A.'s look towards J.S. "suggest[ed] she that was seeking approval" for the answer she provided. (App. Br. at 27.) However, this, too, is not enough to establish prejudice. *See* Lopez, 76 M.J. at 154 (requiring a showing that "but for the error [claimed], the outcome of the proceeding would have been different"). Moreover, the defense was able to highlight to the panel during testimony that J.S. sat through the testimony of F.A. (R. at 450.) And in closing argument, trial defense counsel was able to argue that F.A. was potentially influenced by the presence of J.S. in the courtroom. (R. at 579.) Accordingly, the

panel had the information readily available to consider in determining the credibility of F.A. and J.S., yet still found Appellant guilty.

Because Appellant fails to establish that but for J.S.'s Article 6b representation the outcome of the court-martial would have been different, he cannot show that he was prejudiced either by the appointment, or the presence of J.S. at certain proceedings, such that reversal is warranted.

This Court should deny this assignment of error.

IV.

REMAND IS APPROPRIATE BECAUSE THE RECORD OF TRIAL IS INCOMPLETE.

Additional Facts

A certified verbatim transcript of the court proceedings exists. (*Verbatim Record of Trial*, ROT, Vol. 6-7; *Certification of the Transcript in the case of United States v. Staff Sergeant John D. Kershaw*, ROT, Vol. 6.) On 25 April 2022 the court was convened under Special Order A-06, and Appellant was arraigned on a charge and two specifications and an additional charge and two specifications; pleas were deferred. (*Charge Sheet*, dated 27 January 2022, ROT, Vol. 1.; *Charge Sheet*, dated 22 October 2021, ROT, Vol. 5; R at 13-14.) Trial counsel and trial defense counsel then presented their initial pretrial motions. (*See* App. Ex. II-IX, ROT, Vol. 2-3; R. at 15-23.) The court also received witness testimony on Appellant's motion to suppress his statements and argument on whether there was good cause to accept Appellant's objection and motion in limine to preclude Mil. R. Evid. 404(b) evidence filed after the scheduling order deadline. (*See* App. Ex. VIII, XI; R. at 25-40.) The court recessed until 13 May 2022.

The charge and its two specifications were withdrawn and dismissed on 8 June 2022. (*Charge Sheet*, dated 22 October 2021, ROT, Vol. 5.) Additional pretrial motions, including motions to continue, admit deposition testimony, compel witness production, and admit evidence under Mil. R. Evid. 412, were filed with the court between 27 April 2022 and 12 December 2022. (*See* App. Ex. XIII-XXV; XXX, ROT, Vol. 2-4.) The court reconvened on 12 December 2022, under Special Order A-07. (R. at 43) On 13 December 2022, the court received testimony and argument related to Appellant's motion to admit evidence under Mil. R. Evid. 412. (R. at 43; 256-285; 289-294.) Related written motions and oral testimony were ordered sealed by the court. (R. 256; 289.) Following the announcement of findings and the sentence, the court adjourned on 16 December 2022.

The ROT contains one disk labeled "US v. SSgt Kershaw, John D. GCM-Spangdahlem AB Open Sessions Audio 12-16 Dec 22 Disc 1 of 1" containing audio recordings. The ROT also contains one disk labeled "US v. SSgt Kershaw, John D. GCM-Spangdahlem AB–Child testimony Disc 1 of 1" containing audio records from F.A.'s open session testimony on 13 December 2022. (*Audio Recording of Proceedings*, ROT, Vol. 1.) Neither disk contains an audio recording of the 25 April 2022 court proceedings nor the closed Mil. R. Evid. 412 hearings from 13 December 2022.

The ROT contains Special Order A-06, dated 22 October 2021; Special Order A-29, dated 10 May 2022; Special Order A-33, dated 2 June 2022; and Special Order A-07, dated 6 December 2022. (*Charge Sheet & Convening Orders*, ROT, Vol. 1.) The ROT also contains the 1st Ind to 3 AF/JA, Oct 22, 2021, Pretrial Advice, which is associated with Special Order A-06 and is the only document within the ROT that shows the convening authority's selection of

members (*Pretrial*, ROT, Vol. 5.) The ROT does not contain documents showing the convening authority's selection of members for Special Order A-29, Special Order A-33, and Special Order A-07.

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000). Proper completion of post-trial processing is a question of law subject to de novo review. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 22 Jul. 2004).

Law and Analysis

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial where a sentence of "death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months" is adjudged. Article 54(c)(2), UCMJ. Under United States v. Henry, a substantial omission from the record of trial renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. 53 M.J. 108, 111 (C.A.A.F. 2000). A record of trial must include, among other materials, "[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits." R.C.M. 1112(b)(6). Courts approach the question of what constitutes a substantial omission case-by-case. United States v. Abrams, 53 M.J. 361, 363 (C.A.A.F. 1999). In determining whether an omission is substantial, the courts assess whether the omission impacts "an appellant's substantial rights at trial." United States v. Hill, ACM 38648, 2015 CCA LEXIS 308, *10 (A.F. Ct. Crim. App. July 29, 2015) (unpub. op.). In United States v. Mobley, this Court remanded

proceedings when the audio of an arraignment was missing from the record of trial. ACM 40088, 2022 CCA LEXIS 79, *3 (A.F. Ct. Crim. App. 4 February 2022) (unpub. op). This Court noted that the court reporter erred by failing to attach the transcript to the record. Id.

The ROT contains Charge Sheet, dated 27 January 2022, ROT, Vol. 1 and the Charge Sheet, dated 22 October 2021. (*See Charge Sheet*, dated 27 January 2022, ROT, Vol. 1.; *Charge Sheet*, dated 22 October 2021, ROT, Vol. 5.) However, the government acknowledges that the omitted audio records and member selection documents from the convening authority necessarily implicate an incomplete record of trial. A remand would allow corrections of these omissions.

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Appellant's requested relief is remand for correction. (App. Br. at 33.) Therefore, this Court should remand Appellant's case for correction.

V.

APPELLANT HAS NOT MADE A PRIMA FACIE SHOWING THAT THE CONVENING AUTHORITY IMPROPERLY CONSIDERED RACE OR GENDER IN PANEL SELECTION AND THEREFORE IS NOT ENTITLED TO A PRESUMPTION THAT THE PANEL WAS IMPROPERLY CONSTITUTED.

Additional Facts

Appellant's court-martial was convened via Special Order Number A-06 Headquarters, 3rd Air Force, dated 22 October 2021. Before empanelment, the convening authority excused six officers due to varying conflicts including medical needs, deployment, training, and permanent change of station, and one enlisted member due to involvement as a witness in the case. (*Pretrial Papers*, ROT, Vol. 5.) Prior to the trial on the merits, the convening authority

detailed members to court-martial duty via four convening orders.[4] When detailing members, the convening authority received a list of proposed members and their data sheets, which included copies of each nominee's personnel data in a Single Unit Retrieval Format (SURF). (*Pretrial Papers*, ROT, Vol. 5; Court Member Data Sheets.)

For the first time on appeal, Appellant claims that his panel was improperly constituted. (*See* App. Br. at 33.) To support his claim, Appellant moved this Court to attach some of the court member data sheets considered by the convening authority. (App. Mot. To Attach.) The United States timely opposed Appellant's Motion on the grounds that the data sheets were not "necessary to resolve an issue raised by the record" pursuant to United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020). (United States Response to Mot. to Attach.) This Court granted Appellant's motion to attach, but "specifically defer[red] consideration of the applicability of [Jessie] and related case law to the attachment(s) until it completes its Article 66, Uniform Code of Military Justice, review of Appellant's entire case." (Order, 10 July 2024.)

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123 (citation

[4] Special Order A-06, dated 22 October 2021; Special Order A-29, dated 10 May 2022; Special Order A-33, dated 2 June 2022; Special Order A-07, dated 6 December 2022.

omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law and Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2). Absent indication otherwise, military appellate courts presume that the convening authority acted in accordance with Article 25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (citing United States v. Wise, 6 C.M.A. 472, 478 (1955)).

Here, Appellant contends that "impermissible criteria influenced member selection" in his court-martial, and points to the presence of race and gender identifiers on prospective court members' data sheets and the date of the trial. (App. Br. at 37–38.) But as discussed below, Appellant's claim fails because this Court cannot consider the data sheets, since they are not "necessary to resolve an issue raised by the record." Jessie, 79 M.J. at 444. And even if this Court considers them, Appellant has failed to demonstrate clear or obvious error related to the court-member selection process and is therefore not entitled to relief.

A. This Court cannot consider the data sheets because they are not necessary to resolve an issue raised by the record.

Appellant's claim fails because the court member data sheets are not "necessary to resolve an issue raised by the record." Jessie, 79 M.J. at 444. This Court is reviewing this case

pursuant to Article 66(d), UCMJ.[5] When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)–(3), the briefs, and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440–41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

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

Under this framework, Appellant's claim regarding impermissible use of race and gender in court member selection fails because it can only be raised using matters that are outside the record. Appellant cannot articulate how the issue of improper member selection is raised by any materials in the record before this Court granted his motion to attach, such that this Court's

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

review of court member data sheets would be necessary to resolve it. Jessie, 79 M.J. at 442. Just as the mere fact of an appellant's sentence to confinement did not "raise[] an issue regarding [the confinement facility's] policies," id. at 444, the fact that member data was "available" to the convening authority when detailing the court—without more—does not raise the issue of improper panel constitution based on race. *See* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("We will not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty.")

Critically, there were no motions about improper panel constitution, nor were there any related objections at trial. (*See generally* R. at 1–219) Nowhere in the unsealed portions of the transcript does the word "race" or gender appear. (*See generally* id.) Although Appellant asserts that the issue "was not developed at the trial level because neither the trial participants nor the lower court could have anticipated Jeter's change to the legal landscape," this Court should be uncompelled. (App. Br. at 38.) The trial participants in Jeter could not have anticipated the change their case would bring, but they litigated the issue of "systematic exclusion of members based on race and gender" at the trial level nonetheless. United States v. Jeter, 84 M.J. 68, 71 (C.A.A.F. 2023). Had Appellant done the same, he might have a better argument that this Court should consider the data sheets. But he did not, and his failure to do is fatal to his claim.

Our superior Court has emphasized that "[i]t is important 'to encourage all trial participants to seek a fair and accurate trial the first time around.'" United States v. Causey, 37 M.J. 308, 311 (C.A.A.F. 1993) (quoting United States v. Frady, 456 U.S 152, 163 (1982)). Thus, appeal is not the time to adjudicate this issue for the first time by attaching material from outside

the record, especially where doing so deprived the United States of the opportunity to rebut any prima facie case he might have made at trial.

Ultimately, Appellant cannot point to anything in the transcript, exhibits, or allied papers that even *hints* at this issue, such that this Court would be authorized to consider the court-member data sheets. The issue of improper panel selection was not "raised by materials in the record," so outside materials are not necessary, and therefore not authorized, to resolve it. Jessie, 79 M.J. at 444–45. Without the data sheets, Appellant cannot make a prima facie showing that race or gender entered the member selection process. Accordingly, Appellant's claim fails, and he is not entitled to relief.

B. Race and gender identifiers on personnel data sheets, without more, does not establish a prima facie case that race placed a role in the court member selection process.

In detailing prospective members to court-martial duty, the convening authority may not "exclude or intentionally include prospective members based on their race." Jeter, 84 M.J. at 73. Thus, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." Id. at 70. Appellant claims that the mere presence of the identifiers on certain member data sheets and SURFs, as well as the fact that Jeter had not been decided at the time of his court-martial, establishes a prima facie case. But this is not so. "Prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). There is nothing to even suggest that "at first sight," "race played a role in the panel selection process." Jeter, 84 M.J. at 69. The mere presence of racial identifiers and timing of a court-martial, without more, are insufficient to make this showing.

Military courts "will not presume improper motives from inclusion of racial … identifiers on lists of nominees for court-martial duty." United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994). This holds true even after Jeter, in which our superior Court confirmed that "racial identifiers are neutral." 84 M.J. at 74. In Jeter, the solicitation of racial identifiers was only one of the conditions which justified a presumption that race entered the selection process. Id. In finding that the appellant had made the required prima facie showing, the Court of Appeals for the Armed Forces specifically noted the existence of evidence that "two African American members on the original convening order were subsequently removed pursuant to the first amendment to the convening order; and three other courts-martial with African American accuseds were convened by this convening authority before all-white panel members." Id.

Thus, it was not just the racial identifiers, standing alone, which established the prima facie case in Jeter. Rather, it was the fact that "the effect of the subsequent amending convening orders replacing the original panel of ten members with nine all-white members *at least has the appearance of excluding members of Appellant's cognizable racial group* from his court-martial panel." United States v. Jeter, 81 M.J. 791, 796-97 (N-M Ct. Crim. App. 2021) (emphasis added). In this context, the racial identifiers were a pertinent factor because they might have been used to contribute to that perceived exclusion. *See* Jeter, 84 M.J. at 74 ("Although racial identifiers are neutral, they are capable of being used for proper as well as improper reasons.")

Jeter establishes that a prima facie showing, at a minimum, requires an appearance that race "played a role" in court-martial composition. 84 M.J. at 69. Appellant has not made that showing. He has not pointed to anything about his court-martial's composition that suggests the racial identifiers on the court member data sheets "played a role in the panel selection process."

Id. He also has not provided any indication which remotely suggests that the convening authority detailed members based on their race. *Cf.* id. at 71 (where the court-martial's composition was objected to and litigated at the trial level). Nor can he. *See also* Jessie, 79 M.J. at 444 (holding facts outside the record may be gather only "when doing so is necessary for resolving issues raised by materials in the record).

The fact that Appellant's court-martial occurred before Jeter is also not dispositive. (App. Br. at 38.) To hold otherwise would effectively endorse the presumption of improper panel constitution in every single court-martial that (1) convened prior to Jeter and (2) used member data sheets with racial identifiers, without individualized consideration of the facts in each case. Such indiscriminate application of the presumption is impermissible. *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986) (noting that trial courts must conduct a factual inquiry that "takes into account all possible explanatory factors" when faced with claims of jury discrimination). Moreover, convening authorities are presumed to act in accordance with Article 25, UCMJ, absent evidence to the contrary, United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020), and this Court should not let Appellant force it to presume otherwise.

Where there is no appearance of racially motivated member selection, there is no prima facie showing. Such is the case here. Appellant has not made a prima facie showing that "race played a role in the panel selection process," Jeter, 84 M.J. at 69, and is therefore not entitled to the presumption that his panel was improperly constituted. Further, because he has failed to make the required showing, he cannot demonstrate clear error and is not entitled to relief.

C. There is no evidence that the convening authority impermissibly considered gender.

Appellant also contends that gender was impermissibly used to detail members to his court-martial and asks this Court to apply the same principles from Jeter to his claim. (App. Br. at 7–10.) The Government recognizes that "gender is not an Article 25, UCMJ, factor, and selection on the basis of gender is generally prohibited." United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018). But as Appellant concedes, Jeter did not address whether gender was an appropriate consideration in member selection. (App. Br. at 36.) Thus, the presumption in Jeter does not extend to claims of gender discrimination in member selection, especially under a plain error analysis. 84 M.J. at 71. But even assuming *arguendo* that it did, Appellant's claim fails because he has failed to make a showing that gender played a role in the court-martial composition process.

In asserting that the convening authority impermissibly considered gender, Appellant claims that "the results of at least one selection process indicate a probable use of the gender identifiers." (App. Br. at 38.) But critically, Appellant does not provide any further information.

Appellant offers no reason and no authority for this proposition. In effect, he asks this Court to presume that instead of selecting members who were "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," the convening authority "probably used gender for one selection." (App. Br. at 38.) But as discussed *supra*, this Court presumes the opposite—that convening authorities act in accordance with Article 25, UCMJ—absent evidence to the contrary. Bess, 80 M.J. at 10. Just as "a prima facie claim of discrimination is not established by the absence of minorities on a single panel," Loving, 41 M.J. at 286, neither is a prima facie claim of discrimination established by the

possible detailing of a woman to a particular panel. There is no evidence that the convening authority impermissibly considered gender—accordingly, Appellant is unable to demonstrate error, much less clear error, and is therefore not entitled to relief. This Court should deny this assignment of error.

VI.

THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922(G) IS A COLLATERAL MATTER BEYOND THIS COURT'S LIMITED STATUTORY JURISDICTION.

Additional Facts

The Entry of Judgment and Statement of Trial Results from Appellant's court-martial stated Appellant was subject to "Firearms Prohibition Under 18 U.S.C. § 922(g): Yes." (*Entry of Judgment,* dated 3 January 2023, ROT, Vol. 1*; Statement of Trial Results*, dated 4 January 2023, ROT, Vol. 1.) Neither specified which subsection of § 922(g) applied to Appellant. Id.

Law and Analysis

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.

This Court has considered this issue and should find Appellant is not entitled to relief. "The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court "may only act with respect to the findings and sentence as entered into the record under section 860c of this title." 10 U.S.C. § 866(d). It does not authorize this Court to act on the collateral consequences of a conviction, such as the firearms prohibition. And this Court has said as much before. In United States v. Vanzant, this Court held that "[t]he firearms prohibition

remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review." 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024).

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Appellant is not only unentitled to relief, but also powerless to obtain any from this Court.

B. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

In Bruen, the Supreme Court held the standard for applying the Second Amendment is:

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

142 S. Ct, at 2129-2130.

In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Thus, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant cites United States v. Rahimi, 2024 U.S. LEXIS 2714, *30 (2024)[6], for the proposition that "a lewd act by exposure, event to a child, does not qualify for a lifetime ban on firearms." (App. Br. at 42.) However, Rahimi, upholding 18 U.S.C. § 922(g)(8), does not alter the analysis § 922(g)(1). *See* United States v. Rahimi, 2024 U.S. LEXIS 2714, *30 (2024). At issue in Rahimi was whether § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, infringes the Second Amendment. The Supreme Court reversed the Fifth Circuit and concluded that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment. Id. Rahimi does not speak to § 922(g)(1), which applies categorically to adjudicated felons who possess firearms.

Appellant's conviction, punishable by more than one year of confinement, proves that he

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[6] "This preliminary version is unedited and subject to revision. The pagination of this document is subject to change pending release of the final published version." Rahimi, 2024 U.S. LEXIS 2714, *1.

falls into the categories of felons that should be prohibited from possessing a firearm. Thus, the Statement of Trial Results and Entry of Judgment correctly annotate that Appellant is subject to the prohibitions of 18 U.S.C. § 922. Appellant is not entitled to relief. This Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and 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 on 1 August 2024.

ADAM M. LOVE, Maj, 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

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<tr><td>UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
JOHN D. KERSHAW,
United States Air Force,
Appellant.</td><td>)
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)</td><td>UNITED STATES' MOTION TO EXCEED PAGE LIMIT OUT OF TIME

Before Special Panel

No. ACM 40455

2 August 2024</td></tr>
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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States moves to exceed this Court's 50-page limit on filings.

Rule 17.3 provides that "filings shall not exceed either 50 pages or 20,000 words, excluding indices, tables, attachments, and appendices." There is good cause for exceeding the page limit. The United States' answer to Appellant's assignments of error—which raised six substantive issues—is 55 pages, totaling 16,140 words. Exceeding the page limit was necessary to sufficiently address each issue.

Pursuant to Rule 18.5 of this Honorable Court's Rules of Practice and Procedure, the United States moves to submit this filing out-of-time.

Rule 18.5 provides that "any filing that is submitted out of time…shall articulate good cause for why the filing out-of-time." The motion to exceed page limit is filed out of time due to an administrative oversight. The United States recognizes its error and immediately moves to cure its defect.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to exceed the 50-page limit out-of-time.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 2 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JOHN D. KERSHAW,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40455 15 August 2024

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

Appellant, Staff Sergeant (SSgt) John D. Kershaw, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 1 August 2024 (Ans.).[1] In addition to the arguments in his opening brief, filed on 2 July 2024, SSgt Kershaw submits the following arguments for the issues listed below.

I.

THE FINDINGS OF GUILTY ARE FACTUALLY INSUFFICIENT BECAUSE TESTIMONY FROM MULTIPLE WITNESSES PLACED THE OFFENSE SIGNIFICANTLY OUTSIDE THE CHARGED TIMEFRAME AND RAMPANT INCONSISTENCIES AROSE BETWEEN WITNESSES.

1. Variance is not the proper standard to use when reviewing this issue because there was no variance in the members' findings.

Courts utilize the factual sufficiency standard to assess whether the evidence at trial proved the charged timeframe. *See, e.g., United States v. Gilliam*, No. ARMY 20180209, 2020 CCA LEXIS 236, at *2, 10–11 (A. Ct. Crim. App. July 15, 2020) (holding convictions are factually

[1] The Government also filed a Motion to Exceed Page Limit Out of Time, which this Court granted on 8 August 2024. Motion to Exceed Page Limit Out of Time, 2 August 2024. In accordance with Rule 17.3 of the Court's Rules of Practice and Procedure, this Motion to Exceed Page Limit tolled the due date of SSgt Kershaw's reply until the Court granted the motion.

insufficient because evidence failed to prove the charged timeframe); *United States v. Morgan*, No. ACM 38591, 2015 CCA LEXIS 466, at *17–18 (A.F. Ct. Crim. App. Oct. 30, 2015) (holding findings are factually sufficient where court is convinced appellant committed the charged misconduct on more than one occasion during the charged timeframe). Despite this, the government insists the variance standard must apply here because the issue concerns when the offense occurred. Ans. at 6. For this distinction, it relies primarily on a 36-year-old Army case. *Id.* (citing *United States v. Rath*, 27 M.J. 600, 604 (A.C.M.R. 1988)). However, the Army Court of Criminal Appeals itself has departed from this precedent in recent years, as the government acknowledges, by finding convictions factually insufficient based on a failure to prove the offenses occurred within or reasonably near the charged timeframe. *Id.* at 6 n.2 (citing *Gilliam*, 2020 CCA LEXIS 236).

Variance is the wrong standard to review the proof of the charged timeframe here because there was no variance in the court's findings. The United States Court of Appeals for the Armed Forces (CAAF) previously observed that the *Manual for Courts-Martial, United States* (2002 ed.) (2002 *MCM*) "anticipates the potential for a variance by authorizing findings by exceptions and substitutions." *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) (citing Rule for Courts-Martial (R.C.M.) 918(a)(1)). That remains true in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), which applied at the time of SSgt Kershaw's trial. 2019 *MCM*, Part II, R.C.M. 918(a)(1). Similarly, the CAAF has also noted that "any change *by a factfinder* that is reasonably near to the original charged date is not a material variance." *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022) (emphasis added) (citing *United States v. Hunt*, 37 M.J. 344, 347 (C.A.A.F. 1993)). There was no change by the factfinder here, so there was no variance. The military judge gave the members a variance instruction, telling them they could "make minor

modifications in your findings by changing the time described in the specification, provided that you do not change the nature or identity of the offense." R. at 539–40. Despite receiving this instruction, the members did not alter the language of the specification, as the government noted.[2] R. at 634; Ans. at 15. Since the members made no findings by exceptions or substitutions and did not otherwise change the specification, there was no variance. Assessing the findings based on a non-existent variance, as the government encourages this Court to do, would be erroneous.

This Court has previously recognized this distinction in its unpublished opinion in *United States v. Burkhead*, No. ACM S32281, 2016 CCA LEXIS 73 (A.F. Ct. Crim. App. Feb. 9, 2016). The government reads this case as an example of the Court "reciting variance instruction as satisfaction that an offense was committed 'as [sic] a time, at a place, or in a particular manner that differs slightly from the exact time, place, or manner in the specification,'" Ans. at 6, but that is not what the Court did. Noting that the member's findings did not change the location of the offense, this Court concluded, "[T]his is not a case in which we must determine whether there was a fatal variance between the pleadings and the findings." *Burkhead*, 2016 CCA LEXIS 73, at *6–7. Instead, the Court held it had to determine whether the members could have reasonably found the offense occurred at or near the charged location during the charged timeframe and whether it agreed with that conclusion. *Id.* at *7. In short, it had to assess legal and factual sufficiency. *Id.* at *5. The Court should reach the same conclusion here: since the members' findings did not

[2] The government seems to attempt to use the fact that the members found SSgt Kershaw guilty of one specification to argue that the finding is factually sufficient. Ans. at 16. However, this would not be a proper basis to find factual sufficiency. Instead, factual sufficiency review "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

change the charged timeframe, it need not determine whether there was a fatal variance and should instead assess the factual sufficiency of the findings.

By asking this Court to review this issue as a matter of variance, the government is asking this Court to review, and ultimately affirm, a conviction on a basis that is different from the findings of the members. Ans. at 6. Since the members did not alter the specification with their findings, R. at 634, concluding that a difference between the evidence and the charged timeframe was a permissible variance would mean altering the findings to SSgt Kershaw's detriment. Such a holding would also constitute a finding on appeal that the members could have, but declined to, reach. This would go beyond this Court's power under Article 66, UCMJ, to review the record and "affirm only such findings of guilty . . . as the Court finds correct in law and fact." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "[E]xceptions and substitutions . . . may not be made at the appellate level," and "reviewing courts may not 'revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.'" *United States v. English*, 79 M.J. 116, 119 (C.A.A.F. 2019) (quoting *Dunn v. United States*, 442 U.S. 100, 107 (1979)). The Court must reject the government's entreaties to reach a holding that would require it to make exceptions and substitutions the members did not make themselves and revise the basis on which SSgt Kershaw was convicted. Instead, the Court should exercise its authority to review the factual sufficiency of the members' actual findings.

2. The findings of guilty are factually insufficient.

The evidence in the record does not indicate the offense occurred within or reasonably near the charged timeframe. Rather, it suggests a time as much as a year before the charged timeframe, well beyond the "range of days to weeks" the CAAF has held to be reasonably near charged dates. *Simmons*, 82 M.J. at 139 (C.A.A.F. 2022) (quoting *Hunt*, 37 M.J. at 347). The government

attempts to overcome this by repeatedly indicating that "[e]very witness noted F.A. was 'six or seven years old.'" Ans. at 14; *see also* Ans. at 7–10, 12, 16–17. Curiously, this means all the witnesses used exactly the same two-year estimate for F.A.'s age, but it also fails to narrow the timeframe to something within or reasonably near the month charged by the government. DD Form 458, *Charge Sheet,* 29 November 2021. It is clear from the record that none of the witness remember a specific time when this offense allegedly occurred. *E.g.*, R. at 306, 394. What they all do remember is that F.A. and her family moved to , Texas, shortly after the alleged incident and stayed there until approximately the time when SSgt Kershaw and his family moved to the Netherlands. R. at 340–42, 393–94, 444. F.A. remembered them staying almost a year, while her mother remembered it being six months to a year. R. at 340–42, 393–94. Since SSgt Kershaw's move to the Netherlands occurred immediately after the charged timeframe (1–30 April 2016), the time in recalled by the witnesses places the alleged offense much more than days or weeks away from the charged timeframe. Pros. Ex. 4; Def. Ex. C; DD Form 458, *Charge Sheet*, 29 November 2021. Thus, the charged offense could not have occurred within or reasonably near the charged timeframe.

There were also myriad other contradictions and inconsistencies between the witnesses regarding the alleged incident and the events surrounding it. Br. on Behalf of Appellant at 11–14. Only F.A. could testify to the alleged misconduct itself, but her testimony about the surrounding circumstances repeatedly contradicted the recollections of her mother and grandmother, resulting in vastly different stories about what happened around this alleged event. *Id.* The government attempts to minimize this by pointing out a few aspects in which the witnesses' testimonies broadly agree, Ans. at 16–17, but the Court should not be so quick to dismiss glaring contradictions. Moreover, the government's concession that F.A.'s recollection was "not perfect in every respect"

drastically understates the evidentiary problems. Ans. at 17. For instance, F.A. testified about watching her mother try to fight SSgt Kershaw while being restrained by her uncle, but her mother's testimony indicated this simply did not happen because she never confronted SSgt Kershaw at all. R. at 339, 359, 409. Describing a significant event that another witness insists did not occur is more than imperfect recall; it is a glaring inconsistency that should lead one to question the veracity of that witness's testimony. The Court should have many such questions based on the numerous contradictions and inconsistencies in the evidence. Contrary to the government's claim, without further explanation, that inconsistencies in the evidence are not enough "to bring reasonable doubt to the offense," Ans. at 19, the inconsistencies and the questions they beg provide many bases for reasonable doubt. Consequently, this Court should not be convinced of SSgt Kershaw's guilt beyond a reasonable doubt and should find the conviction factually insufficient.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and dismiss the Charge and Specification.

II.

THE MILITARY JUDGE ERRED IN REFUSING TO ASK A QUESTION FROM A COURT MEMBER ON THE BASIS THAT THE ANSWER WAS INADMISSIBLE HEARSAY BECAUSE AN ANSWER TO A QUESTION FROM A COURT MEMBER DOES NOT MEET THE DEFINITION OF HEARSAY.

The rule against hearsay in Mil. R. Evid. 802 does not apply to statements elicited by court members' questions because those statements do not meet the definition of hearsay in Mil. R. Evid. 901(c). The Military Rules of Evidence plainly state that hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) *a party offers* in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c) (emphasis added). The government attempts to get around the plain meaning of the phrase "a party offers"

by wrongly arguing that the history of the rule shows it means something other than its plain meaning. The government observes that this language was added following an identical change to the Federal Rules of Evidence, which was accompanied by an advisory committee note that indicated it was meant to simplify the law and make it more easily understood." Ans. at 23 (quoting Fed. R. Evid. 801(c)(2) Advisory Committee's Note). Based on this, the government concludes that the language "a party offers" does not actually mean "that out-of-court statements can come into evidence so long as they were not introduced by 'a party.'" Ans. at 26. While the government correctly describes this history, which SSgt Kershaw also recognized in his initial brief, its conclusion that the rule does not actually mean what it says is incorrect. Br. on Behalf of Appellant at 18. Consistent with the advisory committee's note, the change made this rule more easily understood by clarifying that when the rule previously said "offered," it meant "offered by a party." *See* Fed. R. Evid. 801(c)(2) Advisory Committee's Note (noting mere stylistic changes, not substantive). This note is better read as indicating that the change confirmed the rule means, and apparently always has meant, that *a party* must offer the statement for it to be hearsay. As a result, a statement elicited by a panel member's question does not qualify as hearsay.

Careful consideration of the rule against hearsay shows why statements elicited by a panel member should not fall within its ambit. The definition of hearsay is inextricably linked to the purpose for which the evidence is offered. An out-of-court statement offered to prove the truth of the matter asserted in the statement is inadmissible, absent an exception, but the very same statement offered for another purpose could very well be perfectly admissible. Mil. R. Evid. 801, 802; *see also, e.g., United States v. Leach*, No. ACM 39805 (f rev), 2022 CCA LEXIS 76, at *15-16 (A.F. Ct. Crim. App. Feb. 3, 2022) (citing *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) (interpreting Fed. R. Evid. 801(c)(2), a provision that is identical to Mil. R. Evid. 801(c)(2)))

(stating out of court statements offered for other reasons, like effect on the listener, may be admitted as non-hearsay). When the purpose of the evidence is not considered, the rule against hearsay loses a key element and drifts away from its goal of preventing a statement from being considered for the truth of the matter it asserts when the declarant cannot be cross-examined.

This is exactly what happens when the rule is applied to a member's question. Even if members were to be considered a "party," it would be improper for them to have a specific purpose when eliciting an out-of-court statement because they cannot seek to help either side with their questions. R. at 75. Further, they likely would not be equipped to form such a purpose because, unlike the actual parties, members do not likely know the answers to their questions before asking them. They cannot "offer" evidence for one purpose or another when they do not yet know what that evidence will be. The government points to a theoretical parade of horribles it claims would ensue for other rules should the Court follow this reasoning.[3] Ans. at 27–28. SSgt Kershaw's argument is limited to the rule against hearsay because that is the rule at issue here. The government also claims this argument is absurd because it defies the Sixth Amendment's Confrontation Clause, Ans. at 27, but that clause is likewise not at issue because there is no indication the statement was testimonial. *Crawford v. Washington*, 51 U.S. 36, 68–69 (2004). The military judge refused to ask the question because he believed the answer was inadmissible hearsay, R. at 632, and it is that decision that was an abuse of discretion because the statement in

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[3] The government claims that agreeing with SSgt Kershaw's argument would also allow court members to elicit evidence without limitations from rules such as Mil. R. Evid. 412 and Mil. R. Evid. 404(b). Ans. at 27–28. However, the argument here is that the statement at issue is not hearsay in the first place under the definition in Mil. R. Evid. 801(c), which means it is admissible without invoking an exception. In contrast, the passages highlighted by the government concern exceptions to the rules, not foundational definitions that determine whether the rules apply at all. Because of this distinction, the reasoning would not apply to those rules, and the parade of horribles proposed by the government is a red herring.

this context cannot satisfy the hearsay definition in Mil. R. Evid. 801(c).

The government's approach would also improperly limit panel members' ability to examine witnesses under Mil. R. Evid. 614. The government argues that the military judge's decision should not be overturned because it was a "tenable decision" that was "within the military judge's range of options." Ans. at 28. However, allowing a military judge to exclude a statement under these circumstances would effectively allow military judges to prevent panel members from ever eliciting out-of-court statements, even those that would be used for purposes other than proving the truth of the matter they assert. Even if a panel member could have a purpose for eliciting such a statement, the court could not inquire into this purpose without compromising closed deliberations, especially when, as here, the member's question came after deliberations began. R.C.M. 921(a) ("[T]he members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting."); R.C.M. 922(e) ("[M]embers may not be questioned about their deliberations."); R. at 637 (instructing members not to discuss anything about deliberations, including what they thought, what other people thought, and how anybody voted); R. at 619 (indicating questions came from the members after they began deliberating). Without the ability to ascertain the purpose for which members would use a statement, military judges would be left to speculate as to how they might use it, potentially excluding statements that they think could be used to prove the truth of the matter asserted, even if the statements could also be used for other purposes. Since almost any statement could conceivably be used to prove the truth of the matter asserted, the ability to prevent members from eliciting statements that might be so used amounts to the ability to prevent them from eliciting any out-of-court statements, including

those that could be used for other purposes.[4] This improperly curtails the members' ability to question witnesses.

This case demonstrates the problem inherent in limiting members' questions because the responsive statement could have been used for purposes other than proving the truth of the matter asserted in the statement, such as evaluating the effect on the listener. Despite the military judge's expressed reasoning, neither the parties, nor the military judge, nor this Court truly know why the member asked the question at issue or how they or any other member would have considered the answer. The members could have used the responsive statement for purposes other than proving the truth of the matter asserted, but the chance to do this was foreclosed when the military judge refused to ask the question. Doing so limited the members' ability to question witnesses in a manner that went beyond the reach of the rule against hearsay and was therefore an abuse of discretion.

Lastly, the military judge's decision prejudiced SSgt Kershaw because it kept out strong, material evidence that would have bolstered his already strong case against a relatively weak government case. Br. on Behalf of Appellant at 21–22; *see also United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)) (listing the four factors to weigh when evaluating prejudice as "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question"). The government's argument that the military judge's decision did not prejudice SSgt Kershaw includes a troubling contention. The

[4] A better approach might be to allow members to elicit out-of-court statements but provide appropriate limiting instructions, including that they may not consider the statements for the truth of the matters asserted in them. Such an aspirational solution is, unfortunately, beyond the scope of this case since the military judge simply denied the member the chance to ask the desired question because he considered it inadmissible hearsay. R. at 632.

government asserts, "Moreover, the court members knew that Appellant plead not guilty to the offense so the value of an out-of-court statement denying that he was in the room with F.A. was low because it would not have changed the court member's view of his position on the offense." Ans. at 30. This comes dangerously close to commenting on SSgt Kershaw's right to plead not guilty to the offense with which he was charged. *United States v. Garren*, 53 M.J. 142, 144 (C.A.A.F. 2000) (noting the appellant's right to plead not guilty). Moreover, the logic of the argument does not withstand scrutiny. In every litigated court-martial, the accused has pleaded not guilty to something, but applying the government's reasoning would mean that denying the accusations would be of low value in all litigated cases because it would not change "the court member's view of [the accused's] position on the offense." Ans. at 30. The reasoning also seems inapplicable here, where the member was interested enough in SSgt Kershaw's response to ask about it. R. at 630. Denials can be valuable evidence for an accused, and this Court should not dismiss the value S.K.'s answer would have had to the members simply because SSgt Kershaw exercised his right to plead not guilty. The Court should disregard this argument and focus instead on the prejudice that came from refusing to ask a member's question in a case that was clearly a close call, as evidenced by the split verdict. Br. on Behalf of Appellant at 21–22.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY APPOINTING A REPRESENTATIVE FOR F.A. UNDER ARTICLE 6B, UNIFORM CODE OF MILITARY JUSTICE, EVEN THOUGH F.A. HAD PREVIOUSLY INDICATED NO INTEREST IN HAVING A REPRESENTATIVE AND BOTH PARTIES AGREED THE APPOINTMENT WAS NOT NECESSARY.

SSgt Kershaw did not waive the error regarding the appointment of a representative under

Article 6b, UCMJ, 10 U.S.C. § 806b. When the military judge asked the parties about this issue, trial counsel stated the appointment of a representative was not appropriate, and the defense counsel concurred with this statement. R. at 223. Indicating that an action is not appropriate is fairly characterized as an objection to that action, so SSgt Kershaw objected to this appointment from the outset of the discussion about this issue. And he never withdrew that objection. Contrary to the government's argument, the Defense's expressed preference for F.A.'s grandmother to serve as the representative was not a withdrawal of the objection or a concurrence with the appointment itself. R. at 220, 223; Ans. at 33. Rather, it was a conditional indication that, should the military judge appoint a representative despite the opposition of both parties, F.A.'s grandmother would be a better candidate than her mother. R. at 220, 223.

When trying to argue SSgt Kershaw waived this matter, the government seems to fault him and his trial defense counsel for not continuously raising their objection. Ans. at 33–34. It points to several instances when it suggests the Defense should have objected, but all of these come after the Defense had already objected. *Id.* The government cites no authority requiring SSgt Kershaw to continue to object after he already objected and the military judge made a decision contrary to that objection. *See id.* Rather, the reasonable course of action was to engage with the military judge on the next steps following his decision to appoint a representative without withdrawing the objection to that decision, and that is what SSgt Kershaw and his trial defense counsel did. Repeatedly objecting would have served no purpose other than antagonizing the court. *See United States v. Loving*, 34 M.J. 956, 963 n.9 (A.C.M.R. 1992) (describing a situation in which a military judge voiced frustration "when counsel repeatedly raised objections to matters upon which the military judge had already ruled"). Having objected and received the military judge's decision, SSgt Kershaw moved on, but that does not preclude him from challenging the decision to appoint

a representative on appeal.

In assessing the military judge's decision to appoint a representative, the government misinterprets the factors it claims support this decision. Ans. at 35. The factors that previously appeared in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*) were used "[w]hen determining whom to appoint under [the] rule," not when determining whether to appoint a representative at all. 2016 *MCM*, Part II, R.C.M. 801(a)(6), Discussion. Indeed, it would have made no sense for these factors to be intended for determining whether to appoint a representative because the rule at that time required the appointment of a representative under certain conditions. 2016 *MCM*, Part II, R.C.M. 801(a)(6). That is no longer the case, but the new rule does not provide guidance on determining whether a representative should be appointed. 2019 *MCM*, Part II, R.C.M. 801(a)(6). Similar, Department of Defense Instruction (DoDI) 1030.02, *Victim and Witness Assistance*, suggests considering "[t]he representatives age, maturity, and relationship to the victim," qualities that focus on the selection of a representative, not the decision to appoint one at all. DoDI 1030.02 at ¶ 3.6.a(3)(a) (27 July 2023). The government misconstrues this, reading it to call for consideration of the victim's traits. Ans. at 35–36. The government then uses the military judge's vague statement about F.A. being a "14-year-old-kid" to conclude the appointment was based on her age. Ans. at 36 (quoting R. at 233). Age may be one factor to consider, but it should not be dispositive, as evidenced by the fact that appointing a representative for victims who are under 18-years-old is no longer required. *Compare* 2016 *MCM*, Part II, R.C.M. 801(a)(6) *with* 2019 *MCM*, Part II, R.C.M. 801(a)(6). The military judge does not say, and the government does not assert, what other factors led to the conclusion that it was necessary to appoint a representative. R. at 233; App. Ex. XXIX; Ans. at 36. Contrary to the government's argument, there is little explanation for the military judge's decision to appoint a representative, and the

assessment is further complicated by a lack of guidance for this specific decision. In the absence of such an explanation and considering the indicators that the appointment was not necessary, this Court should conclude the appointment was an abuse of discretion that prejudiced SSgt Kershaw. Br. on Behalf of Appellant at 25–28.

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

V.

THE CONVENING AUTHORITY RECEIVED COURT-MEMBER DATA SHEETS INDICATING THE RACES AND GENDERS OF POTENTIAL COURT MEMBERS. THIS CREATES A PRIMA FACIE SHOWING THAT RACE AND GENDER WERE IMPERMISSIBLY CONSIDERED WHEN SELECTING MEMBERS, GIVING RISE TO A PRESUMPTION THAT THE PANEL WAS NOT PROPERLY CONSTITUTED.

1. The Court should consider the court-member data sheets because they are relevant to determine whether the panel was properly constituted, an issue raised by materials in the record.

This Court previously granted SSgt Kershaw's motion to attach court-member data sheets to the record of trial, *see* Order, *United States v. Kershaw*, No. ACM 40455, 10 July 2024, and it can consider them because they are necessary to "resolv[e] issues raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). Contrary to the Government's arguments, Ans. at 45–48, the issue of whether the panel was properly constituted is raised by the record for two reasons. First, a properly constituted panel is an essential part of every court-martial as it is required for jurisdiction. *See United States v. King*, 83 M.J. 115, 121–22 (C.A.A.F. 2023); *United States v. Riesbeck*, 77 M.J. 154, 162–63 (C.A.A.F.

2018) (noting courts must "scrutinize carefully any deviations from the protections designed to provide an accused servicemember with a properly constituted panel" and "even reasonable doubt concerning the use of impermissible selection criteria for members cannot be tolerated"). Second, the record of trial contains the convening orders detailing panel members and some documents used by the convening authority to select panel members from larger pools of applicants.[5] *See* Forwarding of Court-Martial Charges, 19 October 2021.

The fact that SSgt Kershaw did not raise this issue at trial should not prevent this Court from considering the court-member data sheets and deciding this issue. In addition to the proper constitution of a panel being a jurisdictional matter, SSgt Kershaw could not have known the CAAF would end the use of race, and by extension gender, for any purpose when selecting panel members. *United States v. Jeter*, 84 M.J. 68, 74 (C.A.A.F. 2023). The Government attempts to argue around this by noting that the appellant in *Jeter* did raise the issue of the exclusion of members based on race and gender. Ans. at 47. However, this case is distinguishable because the initial litigation in *Jeter* was over a clearly prohibited practice, not a practice that the CAAF would later prohibit. Moreover, the CAAF's opinion in *Jeter* specifically excuses a lack of development of this issue at the trial level because the changed landscape could not be anticipated. 84 M.J. at 74. The Government's approach would eviscerate the well-established concept that "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); *see also Edwards v. Vannoy*, 593 U.S. 255, 262 (2021) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)) (noting that new criminal procedure rules apply to cases on direct review). Even though this issue was not raised at the trial

[5] The government acknowledges some documents relating to the selection of panel members by the convening authority are missing from the record of trial and need to be added to complete the record on remand. Ans. at 43.

level, this Court is well within its authority to consider the court-member data sheets when deciding whether SSgt Kershaw's court-martial panel was properly constituted.

2. The evidence presents a prima facie showing that the convening authority considered gender and race when selecting panel members, and the Government did not rebut this presumption, meaning SSgt Kershaw is entitled to relief.

The decision by the CAAF in *Jeter* changed the landscape for considering panel selection by prohibiting the use of race for any purpose when selecting panel members. 84 M.J. at 69. The Government fails to appreciate the import of this change, continuing to rely on old precedents in an attempt to counter the prima facie showings that the convening authority considered race and gender when selecting members. *See* Ans. at 48–50. For instance, the Government points to *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), highlighting the proposition that "military courts 'will not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty.'" Ans. at 49 (quoting *Loving*, 41 M.J. at 285 (alteration in original)). After *Jeter*, the question is no longer whether there were improper motives; rather, *any* use of race or gender is impermissible, regardless of the motive. *See* 84 M.J. at 73–74.

A prima facie showing is a low standard, and the presence of racial and gender identifiers on court-member data sheets can meet this standard in the absence of rebuttal. *See United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (noting that a prima facie showing is a low burden). The Government quotes part of one of the definitions of "prima facie" from Black's Law Dictionary, but the full definition of the term when it is used as an adjective is: "Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." *Prima Facie*, *Black's Law Dictionary* (11th ed. 2019). On first examination here, the inclusion of racial and gender identifiers on court-member data sheets provided to the convening authority to use when selecting

panel members seems to indicate the convening authority considered that information to select panel members. This satisfies the definition of prima facie. Crucially, the Government offers no rebuttal, focusing instead on refuting the existence of a prima facie showing rather than rebutting it. *See* Ans. at 48–52. This was a choice, not a deprivation of the opportunity to rebut a prima facie case as the Government claims. Ans. at 47–48. The Government could have sought additional information from the convening authority and the staff judge advocate, as in *Jeter*, 84 M.J. at 73, but there is no indication it even attempted to do so.

The fact that member selection and trial in this case occurred before the CAAF's decision in *Jeter* means the convening authority could have considered race and gender for permissible purposes without violating any presumption of action in accordance with Article 25, Uniform Code of Military Justice (UCMJ). It was previously permissible, and even encouraged, to consider race and gender when selecting panel members if that consideration was for a permissible, inclusive purpose. *Jeter*, 84 M.J. at 69–70 (citing *United States v. Crawford*, 35 C.M.R. 3 (U.S. C.M.A. 1964)); *see also United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988). Thus, at the time of SSgt Kershaw's court-martial, the convening authority could consider race and gender for permissible purposes, and the prima facie showing suggests the convening authority did just that by considering the information on the court-member data sheets.[6]

The Government relies upon a presumption that the convening authority acted in accordance with Article 25, UCMJ. Ans. at 50–51 (citing *United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2020)). The fault in this argument is that, at the time, the convening authority was

[6] If this Court concludes the convening authority's consideration of these factors did not fall within the narrow circumstances that previously authorized departure from Article 25, UCMJ, *see Riesbeck*, 77 M.J. at 162–63, then the prima face showings still raise the matter of improper considerations when selecting panel members.

allowed to consider these factors for limited purposes, so that presumption does not make it less likely the convening authority did so. *See Jeter*, 84 M.J. at 72, 74. The Government's argument stretches this presumption beyond its limits by effectively encouraging this Court to presume the convening authority had the clairvoyance to know not to do something that was allowed at the time but would later be deemed prohibited. Such an application of the presumption referenced in *Bess* would be illogical, and the CAAF specifically rejected such reasoning in *Jeter*, stating, "[N]either the trial participants nor the lower court could have anticipated our conclusion that *Crawford* is abrogated, thereby changing the legal landscape." 84 M.J. at 74. These circumstances are sufficient to raise the presumption that the convening authority considered race and gender in a manner seemingly permissible at the time but which, as a result of *Jeter*, now constitutes plain error at the time of appellate review. *See United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (stating "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration").

WHEREFORE, SSgt Kershaw respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 August 2024.

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