IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)	No. ACM 40426 21 April 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **29 June 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

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 21 April 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

21 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 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 21 April 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40426 22 June 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 July 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

From 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years' confinement, and a dishonorable discharge. R. at 985, 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 Joshua A. Patterson*, dated 17 January 2023.

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. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her 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 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 22 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) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 June 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)	No. ACM 40426 19 July 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant withdraws his previous motion for a third enlargement of time and substitutes this motion to correct a typographical error in the date of filing. Appellant requests an enlargement for a period of 30 days, which will end on **28 August 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

From 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced

Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17 years' confinement, and a dishonorable discharge. R. at 985, 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 Joshua A. Patterson*, dated 17 January 2023.

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. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her 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 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 19 July 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

20 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40426**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Joshua A. PATTERSON	)	
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,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME (FOURTH)**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5),	)	No. ACM 40426
JOSHUA A. PATTERSON,	)	
United States Air Force,	)	21 August 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 September 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

After Appellant's last request 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,

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 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of

Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17 years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; ten clients are pending initial AOEs before this Court. Five cases 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 in this case to the U.S. Court of Appeals for the Armed Forces on 25 October 2023.

2) *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 reviewed approximately two-thirds of the record.

3) *United States v. Ollison*, ACM S32745 – 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 reviewed more than three-quarters of the record.

4) *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 begun reviewing the record of trial 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.

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 Appellate Government Division on 21 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

22 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 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

<u>CERTIFICATE OF FILING AND SERVICE</u>

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR WITHDRAWAL OF**
Appellee,	)	**APPELLATE DEFENSE COUNSEL**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5),	)	No. ACM 40426
JOSHUA A. PATTERSON,	)	
United States Air Force,	)	23 August 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 . Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant. Major Frederick Johnson has been detailed substitute counsel in undersigned counsel's stead and made his notice of appearance on 21 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 and 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 23 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 3 No. ACM 40426 20 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 October 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

From 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 24 clients; 13 clients are pending initial AOEs before this Court.[1] Five cases 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 in this case to the U.S. Court of Appeals for the Armed Forces on 25 October 2023.

2) *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 reviewed approximately

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately half of the six-volume record and filed a motion to compel production of post-trial discovery in *U.S. v. Taylor*, ACM 40371, completed his review of the two-volume record and began drafting the AOE in *U.S. v. Ollison*, ACM S32745, and filed a motion for reconsideration in *U.S v. Gonzalez Hernandez*, ACM S32732. Additionally, counsel attended the Joint Appellate Advocacy Training

two-thirds of the record and recently filed a motion to compel production of post-trial discovery in this case.

3) *United States v. Ollison*, ACM S32745 – 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 completed his review of the record and is drafting the assignments of error.

4) *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 begun reviewing the record of trial in this case, but additional counsel has been detailed to assist with this case and is reviewing the record of trial.

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.

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 is aware of his right to timely appeal, was consulted with regard to enlargements of time, and has consented to 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 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

22 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 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 22 September 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40426**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua A. PATTERSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 20 September 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 26th day of September, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **27 October 2023**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME (SIXTH)**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5),	)	No. ACM 40426
JOSHUA A. PATTERSON,	)	
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 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 November 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

From 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. Appellant is currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 25 clients; 18 clients are pending initial AOEs before this Court.[1] Six 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.

[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.

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 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.

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 this enlargement of time, and agrees with this request for an enlargement of time.

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 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) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 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), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 3 No. ACM 40426 17 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, 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 **26 December 2023**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. 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] Five matters have priority over this case:

1) *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 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 – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibit, 31 appellate exhibits, and

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[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.

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.

3) *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.

4) *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.

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.

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 this enlargement of time, and agrees with this request for an enlargement of time.

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 17 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

21 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. 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 21 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,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)	No. ACM 40426 19 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an 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 **25 January 2024**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. 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] Four matters have priority over this case:

1) *United States v. Lake*, ACM 40168, USCA No. 24-0047/AF – 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 has petitioned the CAAF to grant review in this case and drafted the supplement to the petition, which must be filed by 20 December 2023.

2) *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

[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 drafted 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.

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.

3) *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.

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

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 this enlargement of time, and agrees with this request for an enlargement of time.

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 19 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

20 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40426**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua A. PATTERSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 19 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 27th day of December, 2023,

ORDERED:

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

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5), **JOSHUA A. PATTERSON,** United States Air Force, *Appellant.*	)	No. ACM 40426 18 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **24 February 2024**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 5-8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17

years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

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. 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] Two 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.

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[1] Since the filing of Appellant's last request for an enlargement of time, counsel 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. Lake*, ACM 40168, USCA No. 24-0047/AF; 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.

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 this enlargement of time, and agrees with this request for an enlargement of time.

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 18 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

22 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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.

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 22 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 (TENTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)	No. ACM 40426 14 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 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 March 2024**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 1 February, 22–24 August, and 5–8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1,

forfeiture of all pay and allowances, 17 years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

The record of trial is eight volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Appellant is currently confined.

Counsel is currently representing 30 clients; 19 clients are pending initial AOEs before this Court.[1] This case is currently counsel's top priority amongst appellate matters. Counsel has reviewed approximately half of the record of trial, not including sealed materials.[2]

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 this enlargement of time, and agrees with this request for an enlargement of time.

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

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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; 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.

[2] Counsel filed a consent motion to examine sealed materials on the same day as this motion for an enlargement of time.

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 14 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) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant more than 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 a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. 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 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**CONSENT MOTION**
Appellee,	)	**TO EXAMINE SEALED**
	)	**MATERIALS**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40426
JOSHUA A. PATTERSON,	)	
United States Air Force,	)	14 February 2024
Appellant.	)	

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant Joshua A. Patterson, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine the following sealed materials in Appellant's record of trial:

1. Appellate Exhibits XXI–XXXVI and XXXVIII,

2. Transcript pages 78–154, and

3. The materials ordered sealed by the preliminary hearing officer (PHO) in his order dated 30 March 2021, which consist of Government M.R.E. 412 Motion; Government Supplemental M.R.E. 412 Motion; Defense Response to Government M.R.E. 412 Motion; PHO Initial Determination of Admissibility of M.R.E. 412 Evidence, Ruling on Application of M.R.E. 513 and M.R.E. 502 to Certain Evidence; PHO Final Determination of Admissibility of M.R.E. 412 Evidence, Ruling on Application of M.R.E. 513 and M.R.E. 502 to Certain Evidence; PHO Exhibits 3–6; PHO Exhibit 8; and "[a] potion of the audio-recorded record of proceedings, beginning where the PHO verbally identified the start of closed

admissibility hearings, and ending where the PHO verbally identified the end of closed admissibility hearings."

Facts

On 1 February, 22–24 August, and 5–8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* In the course of the proceedings, the parties litigated a series of motions, which were ultimately sealed, concerning evidence under Military Rules of Evidence (Mil. R. Evid.) 403, 404(b), 412, 413, and 414. App. Ex. XLII; ROT Vol. 1, Exhibit Index. The military judge heard arguments on these motions during a closed Article 39(a), UCMJ, session, which was recorded on pages 78–154 of the transcript, and issued written rulings. *Id.*; R. at 77. The military judge also ordered the filings related to these motions, which consist of Appellate Exhibits XXI–XXXVI and XXXVIII, be sealed. R. at 155; App. Ex. XLII.

Prior to referral of charges, the PHO also ordered certain materials from the preliminary hearing sealed. ROT Vol. 5, Sealing of Preliminary Hearing Materials, 30 March 2021. Specifically, this order sealed the following: Government M.R.E. 412 Motion; Government Supplemental M.R.E. 412 Motion; Defense Response to Government M.R.E. 412 Motion; PHO

Initial Determination of Admissibility of M.R.E. 412 Evidence, Ruling on Application of M.R.E. 513 and M.R.E. 502 to Certain Evidence; PHO Final Determination of Admissibility of M.R.E. 412 Evidence, Ruling on Application of M.R.E. 513 and M.R.E. 502 to Certain Evidence; PHO Exhibits 3–6; PHO Exhibit 8; and "[a] potion of the audio-recorded record of proceedings, beginning where the PHO verbally identified the start of closed admissibility hearings, and ending where the PHO verbally identified the end of closed admissibility hearings." *Id.*

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the 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]

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 exhibits are appellate exhibits which were "presented" and "reviewed" by the parties at trial. Similarly, the sealed portions of the transcript record proceedings in which the parties participated. The materials ordered sealed by the PHO were likewise available to the parties as part of the preliminary hearing. 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 or in the course of the preliminary hearing, 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

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

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 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, MD 20762-6604

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40426**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua A. PATTERSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 14 February 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both appellate defense counsel and appellate government counsel be allowed to examine Appellate Exhibits XXI–XXXVI, XXXVIII; transcript pages 78–154; the materials ordered sealed by the preliminary hearing officer (PHO) in his order dated 30 March 2021;[*] and a portion of the preliminary hearing audio sealed by the PHO on the same day. Trial counsel and trial defense counsel had access to the exhibits at trial and were present for the relevant sealed discussions. Further, "[t]he materials ordered sealed by the PHO were likewise available to the parties as part of the preliminary hearing."

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 counsel for 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 both appellate defense counsel and appellate government counsel to examine the materials.

Accordingly, it is by the court on this 22d day of February, 2024,

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[*] Counsel for Appellant specifically requested to view the following materials sealed as part of the PHO's order: Government's Mil. R. Evid. 412 motion; Government's supplemental Mil. R. Evid. 412 motion; Defense response to Government's Mil. R. Evid. 412 motion; PHO's initial determination of admissibility of Mil. R. Evid. 412 motion, ruling on application of Mil. R. Evid. 513 and 502 to certain evidence; PHO's final determination of admissibility of Mil. R. Evid. 412 evidence, ruling on application of Mil. R. Evid. 513 and 502 to certain evidence; and PHO Exhibits 3–6 and 8.

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials is **GRANTED**. Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XXI–XXXVI, XXXVIII; transcript pages 78–154; the materials sealed by the PHO as listed in the note above; and the sealed audio recording of the preliminary hearing recording**, 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

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5), **JOSHUA A. PATTERSON**, United States Air Force, *Appellant.*	)	No. ACM 40426 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 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 April 2024**. The record of trial was docketed with this Court on 1 March 2023. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 1 February, 22–24 August, and 5–8 December 2022, Appellant was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940; Record of Trial (ROT) Vol. 1, Entry of Judgment dated 27 January 2023 (EOJ). The panel acquitted Appellant of one specification of sexual assault of a child. *Id.* The same panel sentenced Appellant to a reprimand, reduction to the grade of E-1,

forfeiture of all pay and allowances, 17 years of confinement, and a dishonorable discharge. R. at 985; 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 Joshua A. Patterson*, dated 17 January 2023.

The record of trial is eight volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Appellant is currently confined.

Counsel is currently representing 30 clients; 18 clients are pending initial AOEs before this Court.[1] This case is currently counsel's top priority amongst cases pending initial AOEs before this Court. However, counsel is also preparing to present oral argument before this Court as lead counsel in *United States v. Taylor*, ACM 40371, on 21 March 2024. Counsel has reviewed the entire record of trial, including sealed materials, and begun drafting the AOE in this case.

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

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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 this case; 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.

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 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) JOSHUA A. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40426 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant more than 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 a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 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 40426**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua A. PATTERSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

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

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 20th day of March 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **24 April 2024**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JOSHUA A. PATTTERSON,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40426 24 April 2024

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

Assignments of Error[1]

I.

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

II.

WHETHER THE FINDINGS AS TO SPECIFICATION 1 OF CHARGE II AND SPECIFICATION 2 OF CHARGE I ARE LEGALLY AND FACTUALLY INSUFFICIENT WHERE C.H. COULD NOT SPECIFY WHEN THE CHARGED OFFENSE OCCURRED BUT CLEARLY INDICATED IT WAS NOT DURING THE CHARGED TIMEFRAME AND S.E. TESTIFIED STAFF SERGEANT PATTERSON WAS NOT ABLE TO COMMIT THE CHARGED ACTION.

III.

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT IN DIGITAL FORENSICS TO ASSIST THE DEFENSE IN ANALYZING VIDEO FILES WHICH PURPORTED TO BE DIFFERENT-LENGTH VERSIONS OF THE SAME VIDEOS.

[1] Additionally, Appellant personally raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

IV.

WHETHER IT WAS PROSECUTORIAL MISCONDUCT FOR TRIAL COUNSEL TO ENCOURAGE THE MEMBERS TO SENTENCE STAFF SERGEANT PATTERSON FOR UNCHARGED MISCONDUCT DURING SENTENCING ARGUMENT.

Statement of the Case

On 1 February, 22–24 August, and 5–8 December 2022, Staff Sergeant (SSgt) Patterson was tried by a general court-martial at Hill Air Force Base, Utah. Contrary to his pleas, the panel of officer and enlisted members found SSgt Patterson guilty of one charge with one specification of rape, one specification of aggravated sexual contact, and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 920; one charge with one specification of rape of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 940. The panel acquitted SSgt Patterson of one specification of sexual assault of a child. *Id.* The same panel sentenced SSgt Patterson to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 17 years of confinement, and a dishonorable discharge. R. at 985. The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action, 17 January 2023.

Statement of Facts

SSgt Patterson's court-martial involved allegations spanning more than a decade. His stepdaughter, C.H., alleged that he assaulted her in 2015 by penetrating her vulva with his fingers

[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*).

in the garage behind their South Carolina house and that he later grabbed her hair and threw her to the ground in 2019 while they lived in Utah. R. at 597, 600, 634–35. When contacted by law enforcement as part of the investigation, SSgt Patterson's ex-wife, A.D., accused him of raping her in 2010. R. at 562. She alleged that, after a Fourth of July party at a friend's house, she and SSgt Patterson stayed at the house to sleep on an air mattress. R. at 551, 553. She testified that she told him she did not want to have sex but that he got on top of her, held her arms, and engaged in vaginal intercourse with her. R. at 554–56. Finally, one of C.H. friends, S.E., accused SSgt Patterson of touching her inappropriately on a camping trip and another time when they were in his garage. R. at 764, 780.

The case proceeded to trial in December 2022. R. at 532. All three complaining witnesses—A.D., C.H., and S.E.—testified against SSgt Patterson. In her testimony, C.H. could not specify when SSgt Patterson allegedly assaulted her, but she was confident it was before the charged timeframe. R. at 597, 600. S.E. testified SSgt Patterson did not actually touch her "vaginal area" because she stopped him. R. at 803. Ultimately, the court convicted SSgt Patterson of charged offenses against all three complaining witnesses, although it acquitted him of an additional charged assault against C.H. R. at 940.

Additional facts are included *infra* as necessary.

Argument

I.

THE CONVENING AUTHORITY RECEIVED COURT-MEMBER DATA SHEETS INDICATING THE RACES AND GENDERS OF POTENTIAL COURT MEMBERS, AND THE COMPOSITION OF AT LEAST SOME GROUPS OF DETAILED MEMBERS SHOWS THE CONVENING AUTHORITY ACTUALLY CONSIDERED THESE FACTORS. 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 three convening authorities detailed members to this court-martial in a series of six convening orders. Special Order A-14, 27 April 2021; Special Order A-17, 12 August 2022; Special Order A-18, 23 August 2022; Special Order A-2, 31 October 2022; Special Order A-5, 21 November 2022; Special Order A-6, 1 December 2022. Before selecting the members to be detailed in each order, the convening authorities received a memorandum with lists of proposed nominees and court member data sheets for each nominee attached. Pretrial Advice, 26 April 2021; Request for Release and Nominees for Replacement Members, 2 August 2022; Request for Release and Nominees for Replacement Members, 4 October 2022; Request for Release and Nominees for Replacement Members, 14 November 2022; Excusal Request, 23 November 2022.[3] The convening authority did not receive a written request for additional members after the court-martial lost quorum in August 2022, but the convening authority still received a list of proposed members and court member data sheets for the proposed members. Memorandum for Record from 75 ABW/JA, 30 December 2022. The court member data sheets listed biographical information about each nominee, and one type of data sheet used for some nominees included a copy of the nominee's Single Unit Retrieval Format (SURF), a summary of that member's personnel data, as an attachment. *See* Court Member Data Sheets.[4] The data sheets indicated each nominee's race

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[3] The documents requesting court members and subsequent indorsements indicating the members detailed by the convening authority are all included in Vol. 4 of the Record of Trial (ROT).
[4] The court member data sheets included with the accompanying Motion to Attach are not all of the data sheets from this court-martial. Although the data sheets are listed as attachments to documents in the ROT, they are not included in the ROT under the provisions of Department of the Air Force Manual 51-203, *Records of Trial*, 21 April 2021. As explained *infra*, these data sheets are representative of the data sheets sent to the convening authority throughout the pretrial

and gender either on the data sheet itself or on the attached SURF. *Id.* 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 Indorsement, AFSC/CC, Pretrial Advice, dated 26 April 2021; Indorsement to Request for Release and Nominees for Replacement Members Memorandum, dated 2 August 2022; Indorsement to Request for Nominees for Replacement Members, submitted 22 August 2022; Indorsement to Request for Release and Nominees for Replacement Members Memorandum, dated 5 October 2022; Indorsement to Request for Release and Nominees for Replacement Members Memorandum, dated 15 November 2022; Indorsement to Request for Excusal Memorandum, dated 23 November 2022 (collectively "Court Member Selection Documents").

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023). 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, "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*, 141 S. Ct. 1547, 1554 (2021).

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process and are sufficient to make a prima facie showing. However, if the Court believes this issue necessitates review 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.

"[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." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). 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 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 Court of Appeals for the Armed Forces (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 Patterson'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 (U.S. 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 Patterson'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* 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, "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. 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,[5] they clearly show provision of these identifiers to the convening authorities when selecting members, establishing a prima facie showing. Moreover, the attached data sheets span the length of time from the first member selection in April 2021 to the second to last in November 2022, showing the provision of this information was consistent across time. *See id.*

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 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 Patterson's court-martial also took place before the court's holding in *Jeter*. *Id.* at 74. Based on these factors, SSgt Patterson has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.

A closer analysis of the court member selection in this case reveals a stronger indication that impermissible criteria influenced member selection, bolstering the prima facie showing. One of the requests sent to the convening authority for new members included nine potential nominees, seven of whom were male and two of whom were female. Request for Release and Nominees for Replacement Members, 14 November 2022; Court Member Data Sheets. The convening authority selected four members: two males and two females. Indorsement to Request for Release and Nominees for Replacement Members Memorandum, dated 15 November 2022; Court Member Data Sheets. It is highly unlikely the convening authority would have selected both female members when picking only four of nine nominees without considering gender. Moreover, the fact that the four selected members were evenly split between male and female, despite a

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[5] 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.

significant gender disparity in the group of nine nominees, implies a deliberate effort to balance the gender composition of the detailed members. This is understandable because, as the *Jeter* court noted, the law at the time authorized and even encouraged such considerations for the purpose of creating more diverse panels. 84 M.J. at 74. However, *Jeter* makes it clear this is not allowed, so the use of this impermissible indicator when selecting court members is a plain error at the time of appellate consideration. *Id.*

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 Patterson respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

II.

THE FINDINGS OF GUILTY AS TO THE SPECIFICATIONS FOR ASSAULTING C.H. IN SOUTH CAROLINA AND TOUCHING S.E. ON A CAMPING TRIP ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE (1) C.H. COULD SPECIFY WHEN THE ALLEGED MISCONDUCT OCCURRED BUT WAS CLEAR IT WAS NOT DURING THE CHARGED TIMEFRAME AND (2) S.E. TESTIFIED THAT STAFF SERGEANT PATTERSON WAS NOT ABLE TO TOUCH HER AS ALLEGED IN THE SPECIFICATION.

Additional Facts

Specification 1 of Charge II alleged SSgt Patterson committed the charged offense against C.H. "between on or about 1 October 2015 and on or about 30 November 2015" and "within the state of South Carolina." DD Form 458, *Charge Sheet*. SSgt Patterson was deployed outside the continental United States (OCONUS) from 6 October 2015 to 17 April 2016. Pros. Ex. 11. When testifying about the alleged incident, C.H. was clear that it occurred before her brother was born on 28 September 2015 because she remembered being carried to the room that was hers at the time but became her brother's nursery after he was born. R. at 597, 600. C.H. further testified that the alleged incident took place after she found out her mother was pregnant with her brother in January and that it was during warmer weather, which she described as being "good for T-shirts basketball shorts." *Id.* at 597. She was not able to indicate when the incident occurred with any more specificity than that. *See id.*

Specification 2 of Charge I alleged SSgt Patterson touched S.E.'s vulva with his hand. DD Form 458, *Charge Sheet*. On cross-examination, S.E. clearly testified SSgt Patterson was not able to touch her "vaginal area" because she stopped him. R. at 803. C.H. was also in the tent where this incident purportedly occurred, and she testified she saw SSgt Patterson's hand "under [S.E.'s] pants." R. at 632. C.H. also testified she and S.E. then moved to a different tent and that they did

not talk about this incident afterwards. R. at 633. S.E. testified she and C.H. went to the bathroom and then returned to the same tent with SSgt Patterson. R. at 803.

Standard of Review

This Court reviews issues of legal and 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 legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). 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." *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)).

<u>1. The finding of guilty for Specification 1 of Charge II is legally and factually insufficient because C.H.'s own testimony clearly established the offense did not occur in the charged timeframe, and the evidence is insufficient to show it was reasonably near the dates in the specification.</u>

The evidence here does not prove the offense charged in Specification 1 of Charge II occurred between 1 October 2015 and 30 November 2015. On the contrary, it clearly points to an occasion outside the charged timeframe. SSgt Patterson's OCONUS deployment beginning on 6 October 2015 means there were only five days within the charged timeframe when he could have possibly committed an offense within the state of South Carolina. Pros. Ex. 11. Moreover, C.H.'s

testimony, which is the only evidence of the charged offense, certainly describes an occurrence before the charged timeframe. R. at 597, 600. C.H. testified the charged offense occurred before 28 September 2015, and she twice explained she knew this because she remembered being carried to the bedroom that became her brother's nursery when he was born on that date. *Id.* There is no evidence suggesting the charged offense occurred in the charged timeframe, and what evidence there is strongly indicates it did not. Based on this evidence, no rational trier of fact could have found the offense occurred between 1 October 2015 and 30 November 2015, and this Court should certainly not be convinced of that beyond a reasonable doubt.

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 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. *Barner*, 56 M.J. 137; *United States v. Brown*, 34 M.J. 105, 106, 110 (C.M.A. 1992); *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 "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, C.H. testified the charged offense occurred sometime between January 2015 and 28 September 2015. R. at 597. The only additional indication she offered was that the weather was "good for T-shirts and basketball shorts," suggesting it was warmer. *Id.* However, this does little to narrow down the timeframe for an offense allegedly committed within the state of South

Carolina, a state with a warm climate that can experience weather suitable for light clothing at almost any time. According to C.H.'s testimony, this offense could have occurred as much as nine months before the charged timeframe, which 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. Even assuming C.H.'s recollection of the weather indicates spring or summer, her testimony would still mean the offense could have occurred as much as six or seven months before the charged timeframe. 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 id.*; *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, no rational trier of fact could have found the essential element of the time of the offense beyond a reasonable doubt, and this court should also 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. Like the victim in that case, C.H.'s testimony indicated the alleged misconduct could have occurred months outside the charged timeframe, and C.H.'s testimony went even further by explicitly denying that it happened within the charged timeframe. By C.H.'s own account, the charged offense could have occurred nine months before the charged time frame, a range which, like the possible eleven-month range in *Gilliam*, is not reasonably near the Government's charged timeframe. *Id.* at *9–10. 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," set aside the finding of guilty on Specification 1 of Charge II, and dismiss this specification and its charge. *Id.* at *10.

<u>2. The finding of guilty on Charge 2 of specification I is legally and factually insufficient because the named victim, S.E., testified SSgt Patterson did not touch her "vaginal area."</u>

On cross-examination, S.E. clearly testified that SSgt Patterson was not able to touch her "vaginal area" because she stopped him. R. at 803. This directly contradicts the charged offense, which alleged he touched her vulva with his hand. DD Form 458, *Charge Sheet*. SSgt Patterson was not charged with an attempted offense, and the elements of the charged offense are not met if he was not able to touch S.E. in the charged area. Trial counsel attempted to remedy this deficiency on redirect, but S.E. only muddied the waters further by contradicting herself and using unclear terminology when she said he touched the "top of [her] vaginal area." R. at 815. The named

victim herself—like the only other witness, described below—failed to testify that the charged act occurred. S.E. affirmed that the charged conduct did not happen. This testimony leaves reasonable doubt that SSgt Patterson touched S.E. as alleged, and her contradictory testimony using imprecise terms like "top of [her] vaginal area" cannot dispel this doubt. This Court should therefore not be convinced of SSgt Patterson's guilt beyond a reasonable doubt.

The testimony of C.H., a purported witness to this incident, also does not resolve this doubt. C.H. testified she saw SSgt Patterson's hand "under [S.E.'s] pants," but she did not indicate what, if any, part of S.E.'s body she saw him touching. R. at 632. It is unlikely she could have seen what SSgt Patterson was touching if his hand was under some clothing, and her testimony on this point could hardly overcome the account of the named victim herself who said he was not able to touch her. R. at 803. There is also no reason to think C.H. had any other knowledge about this interaction because she indicated she did not talk to S.E. about it afterwards. R. at 633. Moreover, C.H.'s testimony raises additional doubt because it differs sharply from S.E.'s regarding what happened after this incident. C.H. testified they went to a different tent, while S.E. claimed they went to the bathroom and then returned to the same tent with SSgt Patterson. R. at 633, 803. In light of all these issues, no rational trier of fact could find the essential elements, and this Court should have reasonable doubt that SSgt Patterson committed the charged offense. Thus, the conviction is legally and factually insufficient.

3. This Court should order a sentence rehearing if it sets aside the findings of guilty as to these specifications.

If this Court sets aside the findings of guilty as to either or both of these specifications, it must also consider the impact on the sentence. This Court has broad discretion to determine whether to reassess a sentence and to decide upon a reassessed sentence. *United States v.*

Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013). *Winckelmann* provides four illustrative, but not dispositive, factors to consider when determining whether to reassess a sentence:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15–16 (citations omitted). Here, these factors strongly favor a sentence rehearing. Specification 1 of Charge II is the most serious convicted offense because it is the only sexual offense against a child of which SSgt Patterson was convicted. *See* R. at 940. Although the maximum term of confinement remains the same based on a specification of another charge, setting aside this conviction eliminates the mandatory dishonorable discharge, a dramatic change in the penalty landscape and exposure.[6] SSgt Patterson chose sentencing by members, so the second factor favors rehearing because the Court is less likely to be certain what members would have done. R. at 942. This also means the adjudged sentence was unitary, so there is no indication of what portion of the sentence is attributable to each offense. *See* R. at 985. For the third factor, the remaining offenses, while still serious, do not capture the gravamen of criminal conduct

[6] Since the offense charged in Specification 1 of Charge I allegedly took place in July 2010, the punishment limitations for that offense under the version of the *MCM* in effect at that time applies. The applicable sentence provisions do not include any mandatory minimum punishment. *See* 2019 *MCM*, App. 21, ¶ 45(f)(1).

included within the original offenses because no conviction for a sexual offense against a child remains. Setting aside the most serious conviction significantly alters the offenses for which a sentence needs to be adjudged, and setting aside an additional conviction for abusive sexual contact furthers this change. While judges of the courts of criminal appeals are, unfortunately, likely to have experience with the types of offenses that remain, the Court cannot be confident it can reliably determine what sentence members would have adjudged at trial under these markedly different circumstances. Thus, this Court should order a sentence rehearing.

If the Court decides to reassess the sentence, it should reduce the term of confinement by ten years for Specification 1 of Charge II and 18 months for Specification 2 of Charge I. The unitary sentence adjudged by the members does not specify what portion of the confinement is attributable to these specifications, but Specification 1 of Charge II likely led to a significant increase in confinement considering it was the most serious conviction and the only conviction for a sexual offense against a child. The abusive sexual contact alleged in Specification 2 of Charge I is also serious and likely resulted in a notable confinement increase. A significant reduction in confinement is therefore warranted.

WHEREFORE, SSgt Patterson respectfully requests this Honorable Court set aside the findings of guilty as to Specification 1 of Charge II, Charge II, and Specification 2 of Charge I; dismiss these Specifications and Charge II; and order a sentence rehearing.

III.

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE'S MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT IN DIGITAL FORENSICS BECAUSE EXPERT ASSISTANCE WAS NECESSARY TO ADDRESS THE CRITICAL ISSUES OF AUTHENTICITY OF A PROSECUTION EXHIBIT AND CREDIBILITY OF A NAMED VICTIM WHO TESTIFIED AT TRIAL.

Additional Facts

Shortly before trial, the Defense discovered there were multiple versions of videos provided by S.E., one of the named victims. R. at 337–38. The lengths of the videos she showed investigators from the Air Force Office of Special Investigations (AFOSI) were different than the lengths of the videos she actually provided, which in turn were given to the Defense in discovery. *Id.* S.E. denied altering the video files. R. at 811. The existence of these different versions made it probable the videos had been manipulated to some extent, and the Defense requested an expert in the field of digital forensics to analyze these videos. App. Ex. LVII at 2. The Defense specifically requested 15 hours of pretrial review and consultation, one day of onsite pretrial consultation, and consultation during trial. *Id.* at Attach. 2. When the convening authority denied this request, the Defense filed a motion to compel this expert. *Id.* at 1–6. The Government opposed this motion, and the military judge ultimately denied it, finding the Defense had not met its burden. App. Ex. LVIII; App. Ex. LIX. All four videos were ultimately admitted as Pros. Ex. 10.

Standard of Review

"A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion." *United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) (citing *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)). An abuse of discretion occurs when (1) the trial court's findings of fact are not supported by the record, (2) the court used incorrect legal principles, or (3) the court's "application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Law and Analysis

"An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity." *Lloyd*, 69 M.J. at 99 (quoting *United States v. Gunkle*, 55 M.J. 26, 31

(C.A.A.F. 2001)). When seeking to compel the appointment of an expert consultant, "the accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citing *Gunkle*, 55 M.J. at 31–32). To determine whether an expert would be of assistance to the defense, courts use the three *Gonzalez* factors: "(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Lloyd*, 69 M.J. at 99 (citing *Untied States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)). Here, the military judge correctly stated these principles when denying the Defense Motion to Compel Expert Assistance, App. Ex. LIX at 4–5, but his application of these principles to the facts led to an abuse of discretion.

1. Expert assistance was necessary to assess the technical data attached to the videos in question, and an expert would have allowed the Defense to fully challenge the authenticity of the videos and the credibility of S.E., the source of the videos.

As the Defense explained in its motion to compel, the assistance of an expert in digital forensics was necessary to analyze different versions of videos provided by a complaining witness. During an interview with AFOSI in May 2020,[7] S.E. played two recordings for the agent and then sent two video files to the agent's phone. App. Ex. LVII at 4. More than two years later in August 2022, S.E. told the Government she possessed longer versions of these two videos and provided two new video files. *Id.* One of the new, longer versions purported to capture audio from the charged act in Specification 3 of Charge I as well as interactions between SSgt Patterson and S.E. before and after the charged act, making it more inculpatory than the previous evidence. *Id.* at 5.

[7] The Defense's motion to compel erroneously listed the year as 2022, but S.E.'s testimony indicated this interviewed occurred in May 2020. R. at 809–10.

The delayed emergence of what purported to be different versions of the same videos also implicated her credibility, which was at issue when she testified both as a named victim for Specifications 2 and 3 of Charge I and an outcry witness for other charged offenses. *Id.*; R. at 753–815. Thus, expert analysis of the video files was necessary to address two critical issues: the authenticity of evidence purporting to capture a charged offense and the credibility of a key witness for multiple charged offenses. On the second *Gonzalez* factor, this necessity also shows what the expert assistance would have given the Defense: an opportunity to vigorously test that authenticity and credibility by determining whether this evidence was what it purported to be—different versions of the same videos— and whether S.E.'s account of turning over the videos matched the data on the files.

The military judge's explanation for why expert assistance was not necessary significantly oversimplified the basis for the Defense's motion. The military judge asserted, "Simply because multiple similar media files exist does not, per se, require expert evaluation and assistance." App. Ex. LIX at 6. The necessity here is not simply because there are multiple, similar media files. Longer videos which were more inculpatory than the originals emerged years after a complaining witness provided the original files to AFOSI, and the source of these files, S.E., offered no explanation when asked about the differences. *See* R. at 811. The totality of these circumstances gives rise to a reasonable probability that the videos were manipulated, and the Defense needed expert assistance to analyze the files and determine the nature and extent of manipulation. The military judge reasoned that the Defense had not demonstrated that more significant manipulation occurred than simply shortening the videos, App. Ex. LIX at 6, but this reasoning presumes that the two shorter videos are simply shortened versions of the longer ones. This may seem like a reasonable presumption to a non-expert, but it is exactly the type of theory expert assistance is

needed to test. Without expert assistance, the Defense could not assess whether other portions had been removed or the longer versions ultimately produced had been manipulated in other ways over the intervening years. By oversimplifying the circumstances and making unwarranted presumptions, the military judge unreasonably applied the law to the facts, abusing his discretion.

<u>2. Defense counsel were not equipped to analyze the videos and their associated data as an expert could.</u>

It is unreasonable to expect defense counsel to learn how to conduct the technical analysis of these video files that an expert would have accomplished. As the Defense pointed out in its motion, the defense counsel did not have the expertise to look at the files or their metadata and determine who made the files or the dates they were made, much less how they had been manipulated since. App. Ex. LVII at 5. The military judge viewed this differently, asserting that exploring the possibility this evidence was altered is something competent counsel should be equipped to handle on their own. App. Ex. LIX at 6. His order also went further, declaring that the defense counsel should have first tried to educate themselves in this area and did not indicate what efforts they had undertaken to do so. *Id.* The Defense motion referred to examining the "properties" of the files but pointed out that counsel was not familiar with the information provided therein and also did not know whether such information could be manipulated. App. Ex. LVII at 5. Expecting counsel to develop the expertise and skill required to conduct a technical assessment of digital files, and to interpret that assessment in context of the possibilities for manipulation, is akin to expecting counsel to become experts themselves. If this was truly the standard, it would be nearly impossible to meet the third *Gonzalez* factor in any case. Digital forensics is a highly technical and specialized field, and the Defense motion described why counsel could not "gather and present the evidence that the expert would be able to develop." *Lloyd*, 69 M.J. at 99; *see also United States v. Vergara*, 884 F.3d 1309, 1316 (11th Cir. 2018) (noting that digital forensic

examinations are "experts' work" performed "by a trained analyst"). The military judge's view that counsel needed to do more to develop expertise in this area before meeting the standard to compel an expert consultant was unreasonable and an abuse of discretion.

3. The denial of the Defense's requested expert resulted in a fundamentally unfair trial by denying the Defense the opportunity to fully address two critical issues in the case.

Finally, the denial of this expert assistance resulted in a fundamentally unfair trial. The Government entered the videos in question into evidence, and when asked about them on cross examination, S.E. offered no explanation for the differences. *See* Pros. Ex. 10; R. at 811. Contrary to the military judge's assertion that the Defense was "well equipped to impeach SE on the manner in which she provided these video files to the Government and to present a theory of potential manipulation by SE from the witnesses and evidence already available," the Defense was unable to effectively challenge the authenticity of the videos or S.E.'s assertion that she had not manipulated them. App. Ex. LIX at 6; R. at 11. Thus, the denial of the requested expert denied the Defense the opportunity to fully address these critical issues. The military judge's analysis on this point missed the mark when it states, "Scientific evidence or expert testimony in the field of digital forensics is not the linchpin of the Government's case." App. Ex. LIX at 6. The evidence itself—a video purporting to capture sounds from the charged misconduct and the testimony of a complaining witness—was a linchpin of the Government's case. In *United States v. Lee*, the court described the critical issue in the case as being whether certain images were real or virtual. 64 M.J. 213, 217 (C.A.A.F. 2006). Although the government utilized forensic testing and expert testimony in that case, these items were not themselves the critical issue; the true issue was the authenticity of the evidence itself. *See id.* The same is true here. Contrary to the military judge's reasoning, the authenticity of evidence and reliability of testimony from a complaining witness are key issues even if there is not yet scientific evidence or expert testimony regarding them.

This analytical error also extends to the military judge's unreasonable focus on the lack of a government expert. The employment of an expert by one party can be a compelling reason for the opposing party to receive expert assistance. *See id.* at 217–18. However, the inverse is not necessarily true: a Defense expert request should not be denied simply because the Government has not requested one. The Government has no incentive to seek adverse information about its evidence and cannot avoid evidentiary problems hidden in technical data by refusing to request an expert, denying the Defense the opportunity for expert consultation. The military judge twice pointed to the lack of a government expert as support for the conclusion that such assistance was unnecessary for the Defense. App. Ex. LIX at 5–6. This reasoning misapplies the applicable legal principles and is an abuse of discretion.

4. This Court should remedy the abuse of discretion by setting aside the guilty findings as to the affected specifications and ordering a sentence rehearing.

Since the military judge's application of the law to the facts is clearly unreasonable, he abused his discretion by denying the Defense's request for the appointment of an expert consultant in the field of digital forensics. An appropriate remedy is to set aside the convictions for the specifications to which the videos and S.E.'s testimony were most important. *See Lee*, 64 M.J. at 218. This evidence was a linchpin for Specification 3 of Charge I because the charged incident was purportedly captured on the videos in Pros. Ex. 10. Likewise, Specifications 2 and 3 of Charge 1 are the specifications for which S.E. is a named victim, meaning evidence which affects her credibility, including that which an expert would have helped the Defense develop, is particularly important to both of these specifications. Thus, this Court should set aside the findings of guilty as to Specifications 2 and 3 of Charge 1.

If the Court sets aside these findings, it would again be necessary to consider the impact on the sentence. The same *Winckelmann* factors discussed *supra* in section II of the argument

should be used to determine whether sentence rehearing or reassessment is appropriate. 73 M.J. at 15–16. Although this is a closer call than the analysis *supra*, the factors still favor a sentence rehearing. The maximum punishment would remain the same after dismissing these specifications because the remaining specifications dictate the maximum, so there is not a significant change in punitive exposure. However, SSgt Patterson still elected sentencing by members, and this Court is less likely to be able to know what members would have done. Setting aside these findings means there would be no remaining convictions with S.E. as the named victim, reducing the number of victims in convicted specifications by one-third. This means the remaining offenses do not fully capture the gravamen of the original convictions. As before, this Court cannot be confident it knows how members would have sentenced SSgt Patterson with these markedly different convictions, despite any familiarity it might have with the remaining offenses. The Court should order a sentence rehearing, but if it disagrees, it should reduce the sentence to confinement by 18 months for each of the two set aside convictions.

WHEREFORE, SSgt Patterson respectfully requests that this Honorable Court set aside the findings of guilty as to Specifications 2 and 3 of Charge I and order a sentence rehearing.

IV.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPROPERLY ARGUING THAT SSGT PATTERSON SHOULD BE SENTENCED FOR UNCHARGED MISCONDUCT.

Additional Facts

Throughout the course of the court-martial, the Government introduced evidence of uncharged sexual misconduct under Mil. R. Evid. 413 and Mil. R. Evid. 414. Specifically, trial counsel elicited testimony from A.D. that between the charged misconduct and their separation, she often woke up to him having sex with her or trying to do so. R. at 557. C.H. also testified that

she woke up multiple times to find SSgt Patterson in her bed, and sometimes his arm would be under her shirt. R. at 605. Trial counsel then asserted during findings argument that these alleged actions showed SSgt Patterson has a propensity for committing sexual offenses. R. at 877.

During sentencing argument, trial counsel repeatedly referred to uncharged sexual offenses as reasons to sentence SSgt Patterson. Regarding A.D., he told the panel SSgt Patterson could have stopped after the convicted offense, "[b]ut he made it a part of their marriage." R. at 971. Trial counsel went on to argue, "He terrorized his wife, [A.D.], a year after he raped her. Over the course of a year, she fell asleep, and she'd wake up to his penis inside of her. Consider the impact that had on [A.D.]." R. at 972. Turning to C.H., trial counsel similarly told the panel SSgt Patterson could have stopped after the convicted offense, "but he made that nightmare a regular part of her life." R. at 971. He further argued, "[C.H.] suffered for multiple years of the accused molesting her and invading her physical autonomy. She was afraid to go to sleep in her own bedroom out of fear that she'd wake up with her stepdad in her bed, touching her, molesting her. Consider the impact that had on [C.H.]." R. at 972. Overall, trial counsel argued SSgt Patterson deserved the recommended sentence because "[h]e is a bad person" and "[h]e has a propensity to sexually assault women and children." *Id.*

Standard of Review

This Court reviews issues of improper argument for plain error when the appellant did not object to the argument during the court-martial. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). To show plain error, the appellant must demonstrate "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)).

Law and Analysis

"When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Erickson*, 65 M.J. 221, 222 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). A court-martial sentence should be based on the charged offenses. *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). R.C.M. 1001(b)(4) specifies that evidence in aggravation must be "directly relating to or arising from the offenses of which the accused has been found guilty." The Government's sentencing argument here went beyond the bounds of a permissible argument by encouraging the panel to sentence SSgt Patterson for uncharged misconduct. Even though SSgt Patterson was only convicted of offenses on distinct occasions against A.D. and C.H., trial counsel argued he repeatedly harmed A.D. for a year and C.H. for multiple years and that he "has a propensity to sexually assault women and children." R. at 971–72. These claims were based on uncharged misconduct which had been previously admitted but for which SSgt Patterson should not have been sentenced because he was not convicted of it. This is similar to the sentencing argument in *Schroder*, where the CAAF found the trial counsel's invitation to punish the accused for uncharged misconduct was a plain and obvious error. 65 M.J. at 58. By encouraging the panel to sentence him based on uncharged misconduct, trial counsel "overstep[ped] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense," committing prosecutorial misconduct by proffering an improper argument. *Norwood*, 81 M.J. at 18 (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005)).

There are limits on the permissible uses of admitted evidence during sentencing arguments. SSgt Patterson recognizes that precedent from the CAAF allows the admission of evidence under Mil. R. Evid. 413 and Mil. R. Evid. 414 for sentencing, but it should be treated as matters in

aggravation, not additional offenses for which the accused may be sentenced. *See United States v. Tanner*, 63 M.J. 445, 448–49 (C.A.A.F. 2006). When evidence is admitted under these rules, "there is a need for procedural safeguards to delimit the use of such evidence. One such safeguard is to ensure that trial counsel does not use such evidence to unduly inflame the members." *Schroder*, 65 M.J. at 58. Admission of the evidence is not at issue here because it was admitted during findings proceedings. *See* R. at 557, 605. Rather, the issue here is whether the trial counsel's argument during sentencing proceedings improperly used this evidence. Although it was couched in terms of victim impact, trial counsel's sentencing argument went beyond aggravating circumstances of the convicted offenses and encouraged the panel to sentence SSgt Patterson for years of alleged offenses that had not been proven beyond a reasonable doubt. R. at 971–72; R.C.M. 1001(b)(4). To allow argument of this nature would permit the Government to secure a conviction for a single instance of misconduct and then pursue a sentence based on years of uncharged misconduct which did not have to be proven to the high standard for a criminal conviction. This is much more than the aggravating circumstances contemplated by R.C.M. 1001(b)(4). This argument also unduly inflamed the members by "express[ing] a sense of outrage and injustice" regarding the uncharged misconduct. *Schroder*, 65 M.J. at 58. Because it invited the members to sentence SSgt Patterson for uncharged misconduct and used the uncharged misconduct to unduly inflame the members, this argument constitutes improper argument and prosecutorial misconduct. Allowing this line of argument, especially multiple times, was obvious error.

To determine whether prosecutorial misconduct caused prejudice in a plain error analysis, the CAAF has promulgated three factors to balance: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the

conviction." *Erickson*, 65 M.J. at 224 (quoting *Fletcher*, 62 M.J. at 184). For severity, the court in both *Fletcher* and *Erickson* looked at the raw number of occurrences of misconduct in the argument compared to the length of the overall argument. 62 M.J. at 184; 65 M.J. at 224. Here, trial counsel's argument occupies only a little more than three pages of the record, and the improper appeals to sentence SSgt Patterson for uncharged misconduct appear repeatedly on two of the pages. This frequent occurrence relative to the overall length of the argument makes the misconduct severe. There were no measures adopted to cure the misconduct because it was not addressed by the trial court. Finally, the weight of the evidence supporting conviction is not particularly strong, as the convictions rested largely on witness testimony about events that purportedly occurred years earlier. *See* Argument, Assignment of Error II *supra.* In particular, the two most serious offenses relied almost entirely on the testimony of the two named victims, A.D. and C.H., who are also the individuals trial counsel improperly argued SSgt Patterson harmed for years. Balancing these factors, the improper argument which occupied a significant portion of trial counsel's sentencing argument prejudiced SSgt Patterson, and there is a reasonable likelihood his sentence would have been different without this improper argument.

The proper remedy for this prosecutorial misconduct during presentencing is to set aside the sentence, and this Court should order a sentence rehearing. This again requires consideration of the *Winckelmann* factors discussed *supra* in sections II and III of the argument. 73 M.J. at 15–16. Setting aside the sentence alone does not change the maximum sentence or the gravamen of misconduct captured by the convictions. Nevertheless, this improper argument tainted the entire sentencing proceeding, for which SSgt Patterson elected to be sentenced by members. To reassess a sentence that was compromised in its entirety by improper argument would deny SSgt Patterson the opportunity to be properly sentenced as he elected to be. This Court cannot be confident it

knows what sentence members would have adjudged in this extensive case if not influenced by improper argument. The appropriate remedy for this prosecutorial misconduct is a sentence rehearing at which SSgt Patterson can receive a new sentence without the stain of improper calls to sentence him for uncharged and unconvicted misconduct.

WHEREFORE, SSgt Patterson respectfully requests that this Honorable Court set aside the sentence and order a sentence rehearing.

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 24 April 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) **JOSHUA A. PATTTERSON,** United States Air Force, *Appellant*.	**MOTION TO ATTACH** Before Panel No. 3 No. ACM 40426 24 April 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) Joshua Patterson, by and through counsel, hereby moves to attach the Appendix to this motion to SSgt Patterson'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 seventy-eight (78) pages in length and consists of the following:

Court Member Data Sheets: Data sheets presenting biographical data for prospective court members and, in some cases, accompanying Single Unit Retrieval Format (SURF) summaries of personnel data.[1] These data sheets are relevant and necessary to resolve SSgt Patterson's first

[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.

assignment of error and determine whether the court-martial panel was properly constituted. *See United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023). The convening authorities received these court member data sheets to review before detailing members to the court-martial, so the data sheets represent the information about each potential member available to the convening authorities at the time of detailing. In fact, the court member data sheets in the Appendix are listed as attachments to the pretrial advice and the request for additional court member from 14 November 2022. Pretrial Advice, 26 April 2021; Request for Release and Nominees for Replacement Members, 14 November 2022. Since they are attachments to documents in the record and 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.

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Appendix

1. Court member Data Sheets, various dates, 78 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 24 April 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
Appellee,	)	TO MOTION TO ATTACH
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40426
JOSHUA A. PATTERSON	)	
United States Air Force	)	1 May 2023
Appellant.	)	

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 Appellant's Motion to Attach, dated 24 April 2024.

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 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

[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).

"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 and the accompanying Single Unit Retrieval Format (SURF) printouts to the record on the grounds that they are "necessary to resolve [Appellant's] first assignment of error and determine whether the court-martial panel was properly constituted." (App. Mot. at 2.) 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 9.)

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

[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 record. (*See generally* App. Mot. at 2; App. Br. at 3-10.) 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 23-201; *see also Exhibit Index*, ROT, Vol. 2.) Nowhere in the unsealed portions of the transcript does the word "race" appear.[3] (*See generally* R. 1-987.) Similarly, the word "gender" only appears once—when the military judge asks for the "gender-neutral reason" for a challenge—and is never invoked in relation to improper panel constitution. (R. at 529.) 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—such as the pretrial advice, which *is* included in the record—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

[3] The sealed portions of the transcript relate to Mil. R. Evid. 412 and 413 matters.

[4] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with DAFMAN 51-203, *Records of Trial*.

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.

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 court member data sheets.

KATE E. LEE, Capt, USAF
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Government Trial and Appellate Operations Division
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United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 May 2024.

K 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 40426**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joshua A. PATTERSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 24 April 2024, Appellant submitted a motion to attach the following documents to the record:

Data sheets presenting biographical data for prospective court members and accompanying Single Unit Retrieval Format summaries of personal data (78 pages).

The Government opposes the motion, asserting that "they are not 'necessary to resolve an issue raised by the record.'" (quoting *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020)).

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 *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.

Accordingly, it is by the court on this 3d day of May 2024,

ORDERED:

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

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v.

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JOSHUA A. PATTERSON, USAF
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UNITED STATES ANSWER TO
ASSIGNMENTS OF ERROR

Before Panel No. 3

No. ACM 40426

28 May 2024</td></tr>
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<u>TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS</u>

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OTHER AUTHORITIES

Black's Law Dictionary (4th pocket ed. 2011).. 14

Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* 28, 30

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **JOSHUA A. PATTERSON** United States Air Force *Appellant.*	)	No. ACM 40426 28 May 2024

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

ISSUES PRESENTED

I.

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

II.

WHETHER THE FINDINGS AS TO SPECIFICATION 1 OF CHARGE II AND SPECIFICATION 2 OF CHARGE I ARE LEGALLY AND FACTUALLY INSUFFICIENT WHERE CH COULD NOT SPECIFY WHEN THE CHARGED OFFENSE OCCURRED BUT CLEARLY INDICATED IT WAS NOT DURING THE CHARGED TIMEFRAME AND SE TESTIFIED STAFF SERGEANT PATTERSON WAS NOT ABLE TO COMMIT THE CHARGED ACTION.

III.

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT IN DIGITAL FORENSICS TO ASSIST THE DEFENSE IN ANALYZING VIDEO FILES WHICH PURPORTED TO BE DIFFERENT-LENGTH VERSIONS OF THE SAME VIDEOS.

IV.

WHETHER IT WAS PROSECUTORIAL MISCONDUCT FOR TRIAL COUNSEL TO ENCOURAGE THE MEMBERS TO SENTENCE STAFF SERGEANT PATTERSON FOR UNCHARGED MISCONDUCT DURING SENTENCING ARGUMENT.

V.

WHETHER STAFF SERGEANT PATTERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.[1]

STATEMENT OF CASE

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

STATEMENT OF FACTS

The Rape of AD

In spring 2008, Appellant met AD and began a relationship with her. (R. at 549.) By summer of that year, they were married. (R. at 550.) A year later, AD became pregnant. (R. at 550.) In May 2010, AD and Appellant welcomed a baby boy. (Id.)

In July 2010, six weeks after their son was born, Appellant and AD went to a party at their friend's house. (R. at 551-52.) Both Appellant and AD became intoxicated and decided to stay the night at their friend's house. (R. at 553.)

As AD laid on an air mattress in their friend's downstairs bedroom, Appellant got on top of her. (R. at 553-54.) Appellant wanted to have sex. (Id.) But AD did not want to—she knew she was allowed to since six weeks had passed since she gave birth, but she "wasn't ready, physically, mentally, and emotionally." (R. at 553-54.) So AD tried to get up. (R. at 554.) Appellant stopped her and pinned her arms down above her head. (Id.) AD told Appellant she

[1] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

was not ready. (Id.) Appellant continued to pull her closer and said, "We can do it. You know, the doctor said six weeks." (R. at 555.) AD again told him, "I'm not ready. I don't want to. I'm not on birth control." (R. at 555.) Undeterred, Appellant told her he had a condom. (R. at 554.) Appellant then forced his penis into AD's vagina. (R. at 555.)

AD attempted to physically resist Appellant. (R. at 556.) She tried to push Appellant off. (R. at 556.) She tried to roll off the air mattress. (R. at 556.) But she could not move. (R. at 556.) As Appellant continued to hold AD down using her arms and head so that she could not fight him, she felt "trapped," and "helpless." (R. at 556.) Eventually, AD stopped resisting because "there was no getting out of it" and waited for Appellant to be done. (R. at 556.)

After the incident, AD felt "violated." (R. at 556.) She did not want to stay with Appellant but did so for the sake of their newborn son. (R. at 556-57.) Over the ensuing year, AD frequently woke up to Appellant trying to "either trying to penetrate [her] or actually having sex with [her]." (R. at 557.) Most of the time, by the time AD woke up, Appellant had his penis inserted in her vagina from behind. (R. at 557.) This continued until Appellant departed for his new assignment at Lajes, Portugal in fall 2011. (R. at 558.) A few months after Appellant left, AD filed for divorce, which became final the following year. (Id.)

The Rape of CH

A few years later, Appellant had found himself a new family, which included his girlfriend's daughter from a previous relationship, CH (R. at 588.)

In summer 2015, CH was twelve years old. (R. at 603.) One night, CH and Appellant were in the garage listening to music and working on their go kart. (R. at 598.) At some point, Appellant offered CH alcohol. (R. at 598.) After having a few drinks, CH was dizzy, nauseous, and hot. (R. at 598-99.) CH, whose head was spinning, laid down on a futon that was against the

wall and closed her eyes. (R. 598-99.) Appellant then turned off the lights and the music. (R. at 599.)

As CH laid on the futon, Appellant slowly got on top of her and stuck his hand under CH's clothing. (R. at 599.) CH, who felt "stuck," kept her eyes closed as if she was asleep. (R. at 599.) Appellant then removed CH's shorts and penetrated her vagina with his fingers. (R. at 599-600.) CH was scared. (R at 601.) This was her first sexual encounter of any kind. (R. at 601.) As Appellant penetrated her with his fingers, CH felt pressure and pain. (R. at 601.) All CH could think about was when it would stop. (R. at 600-601.)

Then, CH heard someone approaching—the air conditioning unit in the garage was not on, so she could hear the outside environment "very clear." (R. at 600.) It was her mother. (Id.) As soon as CH's mother knocked on the garage door, Appellant threw a blanket over CH—who was unclothed from the waist down—and got up "really fast" to answer the door. (R. at 600.) Appellant told CH's mother that CH was laying down because she was not feeling well. (R. at 600.) CH's mother suggested waking CH up and taking her inside, to which Appellant said, "No, I'll pick her up and carry her in." (R. at 600.) Appellant then carried CH—still wrapped in the blanket—to her room. (R. at 600.) At first, CH—who had "never had a father"—thought that Appellant's actions might be "an act of love," or his waying of showing "affection." (R. at 601.) Although a part of her "knew it was wrong," another part of her thought, "maybe this is how it's supposed to be." (R. at 601.)

Over the next few years, CH frequently woke up to find Appellant in bed with her. (R. at 605.) Sometimes, Appellant had his hand inside CH's shirt where he would grope her breast. (R. at 606.) Other times, he rubbed her "vaginal area" over her underwear. (R. at 606.) Afraid that speaking up might break apart her family, CH said nothing. (R. at 609.)

The Aggravated Sexual Contact of SE

In July 2019, Appellant, CH, and her mother went camping in Tooele, Utah, with several people, including CH's friends SE. (R. at 628-29.) When nighttime came, CH and SE got into the tent they were sharing and went to sleep. (R. at 631.)

Sometime in the middle of the night, Appellant crawled into CH and SE's tent. (R. at 763.) SE, who was "half asleep, half awake," noticed Appellant come in and scooted closer to CH to give him some room. (R. at 763.) Appellant, who was behind SE, stuck his hand down her pants and touched "the top of [her] vaginal area," without penetrating it. (R. at 764, 815.) By now fully awake, SE was shocked and scared. (R. at 764.) SE grabbed Appellant's arm and tried her hardest to pull his hand away. (R. at 765.) In response, Appellant locked up his arm and continued to touch SE. (R. at 765.)

After approximately ten minutes, SE woke up CH, lifted the blanket to show her what was happening, and asked for help. (R. at 631, 766.) Upon seeing Appellant's hand inside SE's pants, CH pushed his arm. (R. at 631-32.) Appellant jumped up, acted surprised, and threw his hands in the air as if he did not know what was going on. (R. at 632.) He then proceeded lay back down and go to sleep, while CH and SE left the tent. (R. at 633.)

The Physical Assault of CH

Several months later, CH went home after being kicked out of school for the day. (R. at 634.) When Appellant and CH's mother got home, they demanded to know where her phone was. (Id.) CH, who did not want her phone to be taken away because of how poorly she would be treated when she did not have a way to communicate with others, feigned ignorance: "I don't know." (Id.) When CH refused to say where her phone was, Appellant became angry, grabbed CH by her hair, and threw her off the couch and onto the floor. (R. at 635.)

As Appellant tried to get on top of her, CH pushed him off and ran out of the house. (R. at 635.) Appellant pursued CH onto the driveway and grabbed the back of her neck. (R. at 639.) Seeing other people around, CH yelled as loud as she could to draw their attention. (Id.) Appellant then let go of CH, who continued to run until she reached the gate, where a friend picked her up. (Id.) With the assistance of her childhood friend's mother, KB, CH fled to South Carolina, where she stayed with KB for several months. (R. at 641-42.)

While CH was in South Carolina, Appellant texted her to ask if she was going back to school. (Pros. Ex. 8.) In response, CH warned Appellant not to report her as a runaway otherwise she would "go to court and … explain everything." (Id.) CH told Appellant: "You put your hands on me josh you have hurt me physically and I never thought you would do that and don't even let me bring up how you hurt me the other time (multiple times)." (Id.)

At some point, Appellant called CH and begged her to come back to Utah. (R. at 646, 738.) Appellant told CH, "if you come back, I'll give you whatever you want, I will stay out of your bed and I will quit touching you." (R. at 738.)

The Abusive Sexual Contact of SE

Several weeks after her phone call with Appellant, CH returned to Utah. (R. at 647-48.) Upon CH's return, Appellant kept his distance. (R. at 648.) Meanwhile, CH and SE renewed their friendship, and SE began staying with CH and her family almost every day. (R. at 648.)

One night in March 2020, Appellant and SE were drinking in the garage after everyone else had retired for the night. (R. at 768.) Appellant offered to give SE a hundred dollars if she

gave him a lap dance. (R. at 771.) SE, who was uncomfortable, began recording their interaction. (R. at 771; Pros. Ex. 10.) [2]

Appellant renewed his request for a lap dance, reached over, and touched SE's "vaginal area" over her clothing. (R. at 779.) The recording SE made of the encounter, which was introduced as Prosecution Exhibit 10, captured the following interactions: SE refused and reminded Appellant that he was her friend's dad. (Pros. Ex. 10.) Appellant told SE he was "just horny" and that she was "sexy as fuck," but acknowledged that he "shouldn't even think about it, because [she was] way underage." (Pros. Ex. 10.) He then asked SE, "Can I grab your butt now?" (Pros. Ex. 10.) SE again rebuffed Appellant. (Id.) Appellant told SE that he still wanted to give her a hundred dollars for a lap dance. (Pros. Ex. 10.) Then Appellant asked to see SE's breasts:

> Appellant: Can I please have a look? Can I show you something?
>
> SE: I'd prefer this not to happen.
>
> Appellant: They look nice.
>
> SE: You can't.
>
> Appellant: No, they look nice.
>
> SE: *No, no, no*.
>
> Appellant: I'm just trying to see.

(Pros. Ex. 10) (emphasis added).

Ignoring SE's refusals, Appellant lifted her shirt and put his mouth on her breast. (R. at 780; Pros. Ex. 10.) SE, who felt violated and disrespected, left the garage shortly afterward. (R. at 780, 788.)

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[2] The recordings do not visually capture either Appellant or SE, as the camera lens appears to be pointing face-up towards the ceiling at one point, then face-down or obstructed by some object at another. (*See generally* Pros. Ex. 10.)

The Abuse Comes to Light

In May 2020, CH decided to move out of her family's on-base residence and into her friend M.R.'s home. (R. at 649.) The day that CH was packing to leave, her mother approached M.R. to ask if he knew why CH wanted to move out. (R. at 681.) M.R.—in whom CH had confided about being sexually abused by Appellant—told CH's mother that Appellant was "not the man she believed he was." (R. at 649, 681.)

On the drive to M.R.'s home, CH received a call from her mother, who wanted to know what M.R. meant. (R. at 649.) At first, CH tried to avoid talking to her mother. (Id.) But her mother continued to call. (Id.) Eventually, CH began to cry and told her mother that Appellant had "touched [her] before." (R. at 649, 684.) She then heard her mother run up the stairs, kick open a door, and confront Appellant. (R. at 650.) Because CH's phone was connected to the car via Bluetooth, MR and SE—who had also come along—could hear CH's mother confronting Appellant. (R. at 686; 790.) MR later testified that he heard CH's mother yell, "You're fucking my daughter?" (R. at 686). SE testified that she heard CH's mother say, "You've been touching my baby?" (R. at 790.) The call then became "really loud" and "cracked up," and CH hung up. (R. at 650.)

Concerned about her younger brother, who was still in the house, CH asked MR to drive her back to base. (R. at 650.) On the way, CH then received another call, this time from Appellant. (R. at 650.) Appellant told CH that he was "I'm sorry," that he knew he was "in the wrong and messed up," and that he "wasn't going to run from it." (R. at 650, 691.)

The remaining facts necessary for the disposition of the issues are set forth below.

ARGUMENT

I.

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

Additional Facts

Appellant's court-martial first convened for motions and arraignment on 1 February 2022. (R. at 1.) Six months later, on 22 August 2022, the court-martial convened a second time, during which it completed voir dire and impaneled eight members, and then continued the trial date at the defense's request. (R. at 446; App. Ex. LIV.) Following the continuance, the convening authority excused two enlisted members on the panel based on their projected unavailability due to medical retirement and outpatient treatment, respectively. (App. Ex. LX, LXI; R. at 446, 451.) The excusals caused the court-martial to fall below the required enlisted quorum, which prompted the convening authority to detail additional enlisted members. (R. at 449-450.) The defense did not object to excusal of either member. (R. at 451-52.)

Overall, between referral of charges in April 2021 and the commencement of Appellant's trial on the merits in December 2022, the convening authority detailed members to court-martial duty via six different convening orders.[3] 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. 4; Court Member Data Sheets.) The convening orders and underlying member selection documents were

[3] (Special Order A-14, 27 April 2021; Special Order A-17, 12 August 2022; Special Order A-18, 13 August 2022; Special Order A-2, 31 October 2022; Special Order A-5, 21 November 2022; Special Order A-6, 1 December 2022.)

provided to the defense. (R. at 449.) At no point did the defense file any motions regarding court-martial composition. In December 2022, prior to starting trial on the merits, the military judge asked the parties if they had "any objection to the convening orders or the member selection process in this case." (R. at 450.) Both the prosecution and defense responded, "No, Your Honor." (Id.)

On appeal, Appellant alleged—for the first time—that his panel had been improperly constituted. (*See* App. Br. at 4-10.) To support this claim, Appellant moved this Court to attached 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 attached, 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*, 3 May 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 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 & 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.S. § 825(e)(2). Absent contrary indication, 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, 20 C.M.R. 188, 194 (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. (App. Br. at 6-10.) 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 unentitled 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 first and foremost 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)[4], UCMJ. When reviewing whether findings of guilt are correct

[4] 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).

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) 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.

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(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 (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 were, until a month ago, 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 review of court member data sheets would be necessary to resolve it. Jessie, 79 M.J. at 442. The attachment of the court member data sheets to documents provided to the convening authority—such as the pretrial advice, which *is* included in the record—is insufficient to raise the issue of which Appellant complains.[5] (App. Mot. at 2.) Just as the mere fact of an appellant's

[5] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with DAFMAN 51-203, *Records of Trial*.

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. *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 23-201; *see also Exhibit Index*, ROT, Vol. 2.) Nowhere in the unsealed portions of the transcript does the word "race" appear.[6] (*See generally* R. 1-987.) Similarly, the word "gender" only appears once—when the military judge asks for the "gender-neutral reason" for a challenge—and was never used in relation to panel constitution. (R. at 529.) And before trial on the merits, the defense confirmed that they had no objections to convening orders or the member selection process. (R. at 450.) 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 [United States v. Jeter, 84 M.J. 68, 73 (C.A.A.F. 2023)]'s change to the legal landscape," this Court should be uncompelled. (App. Br. at 9.) 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. Jeter, 84 M.J. at 71. 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

[6] The sealed portions of the transcript relate to Mil. R. Evid. 412 and 413 matters.

(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 Appellant (1) confirmed on the record that he had no issues with panel selection, and (2) by extension, deprived the United States of the opportunity to rebut any prima facie case he might have made.

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. Absent the data sheets, Appellant cannot even come close to making a prima facie showing that race or gender entered the member selection process. Accordingly, Appellant's claim fails, and he is unentitled to relief.

B. Racial identifiers on personnel data sheets, without more, do not establish a prima facie case that race played a role in the court member selection process.

Even if this Court considers the data sheets submitted by Appellant, his argument still fails. 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. Citing the presence of racial 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, Appellant asserts that he has made such a showing. This Court should be unpersuaded. "Prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). Here, there is nothing that suggests "at first sight" that "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.

To start, military courts "will not presume improper motives from inclusion of racial … identifiers on lists of nominees for court-martial duty." Loving, 41 M.J. at 285. 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 but *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." 84 M.J. at 74.

This demonstrates that it was not 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 is clear that a prima facie showing is one where the appellant demonstrates, at a minimum, 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." Jeter, 84 M.J. at 69. He also has not provided any evidence akin to that in Jeter which even remotely suggests that the convening authority detailed members based on their race—quite possibly because there is nothing to point to, which is what his trial defense seemed to think. *Cf.* Jeter, 84 M.J. at 71 (where the court-martial's composition was objected to and litigated at the trial level).

The fact that Appellant's court-martial occurred before Jeter does not make up for the lack of evidence. (App. Br. at 7.) 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, Bess, 80 M.J. at 10, 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 unentitled 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 unentitled 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 7.) 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 points to the fact that the convening authority detailed two males and two females from a list that consisted of seven males and two females. (App. Br. at 9.) According to Appellant, "[it] is highly unlikely the convening authority would have selected both female members when picking only four of nine nominees without considering gender." (App. Br. at 9.)

Appellant offers zero 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 simply tried to "balance the gender composition of the detailed members." (App. Br. at 10.) 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 detailing of women 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 unentitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

II.

APPELLANT'S CONVICTIONS FOR RAPE OF A CHILD AND AGGRAVATED SEXUAL CONTACT ARE LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

For his offenses against CH, Appellant was charged with, *inter alia*, rape of a child by digital penetration "between on or about 1 October 2015 and on or about 30 November 2015." (*Charge Sheet*, ROT, Vol. 1.) At trial, CH testified that Appellant digitally penetrated her vagina in 2015—after her twelfth birthday in January, but before her brother's birth at the end of September. (R. at 597.) According to CH, the weather at the time was "good for T-shirts and basketball shorts," and her mother was five or six months pregnant. (R. at 597.) Based on this, CH estimated that the rape occurred sometime in the spring or summer. (R. at 598-600.) During the prosecution's closing argument, trial counsel addressed this apparent discrepancy by noting the language "on or about," in the specification, which he explained was used "because it's not always perfectly clear, especially in the situation of a child to remember something that happened seven years ago." (R. at 878.) The defense neither objected nor leveraged the discrepancy during its closing argument. (*See generally* R. at 900-920.) Neither the prosecution nor the defense

requested an instruction on variance. (*See* App. Ex. LXXI.) The members found Appellant guilty as charged. (R. at 940; App. Ex. LXX.)

For his sexual abuse of SE, Appellant was charged with "touch[ing] the vulva of [SE] with his hand to gratify his sexual desire by using unlawful force." (*Charge Sheet*, ROT, Vol. 1.) During her direct examination about the offense, SE testified: "He touched the top part of my vagina. I don't know the correct terminology for how to say a word like that." (R. at 764.) On cross examination about the incident, SE responded affirmatively to the defense question, "[I]sn't it true that [Appellant] wasn't actually able to touch your vaginal area because you stopped him?" (R. at 803.) On redirect examination, SE clarified that she meant Appellant did not *penetrate* her vagina, but did touch that area:

> TC: The last little area that I want to talk about here is for the campout, what actually happened there with the touching. On direct when I was asking you, you had said that he had touched you on the top of the vaginal area.
>
> SE: Yes, sir.
>
> TC: But then defense counsel just asked, hey, he didn't actually make it to your vaginal area; you stopped him. Can you clarify, where did he actually touch?
>
> SE: It was the top of my vaginal area. I just didn't know, like, how deep of the question he was trying to get me to answer. So he didn't, like, go in it or anything like that, just touched the top of it.
>
> TC: And that's what I want to clarify. He didn't actually penetrate you, right?
>
> SE: No. No.
>
> TC: And so when you say that you stopped him, are you referring to when you were holding on to his hand?
>
> SE: Yes.

> TC: And so he didn't actually penetrate, but he did touch that vaginal area?
>
> SE: Yes. No, he did not penetrate.

(R. at 815.)

SE's testimony was corroborated by CH, who testified to seeing Appellant's hand inside SE's pants and pushing his arm to free SE from his grip. (R. at 631-32.)

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law & Analysis

The test for a factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

A. The conviction for Charge II, Specification 1 is legally and factually sufficient because CH's testimony established that the offense occurred reasonably near the charged timeframe.

In contending that his conviction for the rape of CH (Charge II, Specification I) is legally and factually insufficient, Appellant does not contest the substantive elements of the offense, such

as whether the sexual act occurred or whether force was used. (*See generally* App. Br. at 12-16.) Instead, Appellant focuses on the difference between the charged timeframe and that which was proven at trial, which he contends is not "reasonably near" the charged timeframe. (App. Br. at 12-13.) But as discussed below, Appellant's contention is without merit, and this Court should affirm his conviction as legally and factually sufficient.

1. CH's testimony established that the rape occurred within a finite window reasonably near the charged timeframe.

Generally, "time is not of the essence of an offense." United States v. Gehring, 20 C.M.R. 373, 376 (C.M.A. 1956). Thus, "unless the date is an *essential element* of the offense, an exact date need not be alleged." United States v. Williams, 40 M.J. 379, 382 (C.M.A. 1994) (emphasis added). By extension, when the Government uses the language "on or about" in a charge, it is not required to prove the specific date alleged in the charge, United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999), provided a date "reasonably near" is established. United States v. Hunt, 37 M.J. 344, 347 (C.M.A. 1993) (citing United States v. Nersesian, 824 F.2d 1294, 1323 (2d Cir. 1987)) (internal quotations omitted).

There is no "crisp delineation" between periods of time that fall within or outside the ambit of "on or about." United States v. Simmons, 82 M.J. 134, 139 (C.A.A.F. 2022). The language "on or about" can mean a range of days to weeks, id., and even months. *See* United States v. Marrie, 39 M.J. 993, 1002 (A.F.C.M.R. 1994); Nersesian, 824 F.2d at 1323 (no variance where "on or about June 1984" was alleged but offense was proven in July or August 1984); United States v. Cochran, 697 F.2d 600, 604 (5th Cir.1983) (no variance where "on or about November 1, 1981" was alleged and September 1981 was proven).

Appellant, for his part, disagrees and cites United States v. Gilliam for the proposition that a difference of months does not fall within the ambit of "on or about." No. ARMY 20180209,

2020 CCA LEXIS 236, at *9 (A. Ct. Crim. App. July 15, 2020). In Gilliam, the Army Court of Criminal Appeals (ACCA) set aside an appellant's convictions for rape of a child and sexual abuse by penile exposure—on divers occasions—based on the "ambiguous" and "vague" evidence regarding the timing of the acts. Id. at *3-9. ACCA opined that it could not determine whether "any of the acts occurred within or reasonably near the timeframes charged" because (1) the victim was unable to specify when all but one of the alleged acts occurred, and (2) her testimony about the one incident she could specify conflicted with other testimony. Id. at *9 n.11. The Court took exception to the possibility that all the charged acts might have occurred approximately eleven months "*after* the last date charged by the government." Id. at *10 (emphasis added).

Appellant's case is distinguishable from Gilliam. In contrast to Gilliam, where the case against the appellant consisted of vague, conflicting testimony about multiple rapes spanning several years, the case against Appellant (with respect to CH) consists of specific, uncontradicted testimony about a discrete instance of rape in 2015. Further, CH's testimony does not extend the timeframe of the offense *beyond* the last date charged by the Government. And unlike the victim in Gilliam, who could not remember the first time she was abused, id., at *5, CH was unequivocal that the 2015 rape she described was the first time Appellant sexually abused her. (R. at 596, 657.)

Moreover, Appellant's reliance on Gilliam—an unpublished Army case—is inapposite considering this Court's published precedent in Marrie. 39 M.J. at 1002. The appellant in Marrie was charged with, *inter alia*, taking indecent liberties with a 9-year-old boy by masturbating in his presence "on or about November 1990." Id. At trial, the victim testified that the appellant "rubb[ed]" his penis in the victim's presence in February 1991. Id. On appeal, the appellant—who was found guilty as charged—asserted that the proof was insufficient because there "no testimony link[ing] any acts which could arguably be masturbation with the month of November

1990." Id. This Court's predecessor disagreed and affirmed the conviction as-is based on its determination that the evidence established the appellant's guilt beyond reasonable doubt. Id.

As evidenced by Marrie, "on or about" can cover a period of several months, provided the appellant is "not misled and is fully protected from further prosecution on the same facts." 39 M.J. at 1002. Such is the case here. CH's testimony at trial established that the rape occurred within several months of the charged timeframe and was specific enough not to mislead Appellant and protect him from further prosecution. First, CH testified that the rape occurred during a finite window in 2015—after her birthday in January, but before her brother's birth in September. (R. at 597.) CH then narrowed that window even further by testifying that her mother was "five, six months" pregnant at the time, which would put the rape in June or July 2015—that is, within three or four months of the charged timeframe. As in Marrie, this falls within the ambit of "on or about," and is therefore "reasonably near" the charged timeframe of "between *on or about* 1 October 2015 and on or about 30 November 2015." (*Charge Sheet*, ROT, Vol. 1.)

As trial counsel aptly observed, "it's not always perfectly clear, especially in the situation of a child to remember something that happened seven years ago." (R. at 879.) With this in mind, any rational factfinder could have found that the rape occurred "reasonably near" the charged timeframe. Based on (1) the fact that both the charge and CH alleged that the rape occurred in 2015; (2) CH's memory of her mother being well into her pregnancy; (3) CH's testimony that the weather being warm enough for shorts but cool enough not to require the air conditioning unit; and (4) the difficulty of remembering trauma from "seven years ago," a rational factfinder drawing every reasonable inference in favor of the prosecution could conclude that the rape occurred while CH's mother was near the end of her pregnancy, as summer transitioned to fall. Robinson, 77 M.J. at 297-98.

But the precise season of Appellant's crime is nonessential. *See* Gehring, 20 C.M.R. at 376 ("Generally time is not of the essence of an offense."). The truly essential elements of the crime are that Appellant committed a sexual act (digital penetration) by using force (his parental position and authority) upon a child over the age of 12 but under the age of 16 (CH).[7] The evidence establishes beyond a reasonable doubt that he did. CH's testimony about the sexual act itself was uncontradicted by any other evidence. In fact, it was buttressed by evidence that Appellant acknowledged his wrongdoing in two different phone calls: (1) when he asked CH to come back to Utah and promised to "stay out of [her] bed" and "quit touching [her]"; and (2) when he apologized to CH and told her he knew he was "in the wrong," after being confronted by CH's mother. (R. at 738; 691.) Similarly uncontroverted was the evidence about Appellant's use of constructive force, which established that Appellant abused his parental position and authority to take advantage of CH, who perceived Appellant as a father figure and thought that his actions might be a sign of affection. (R. at 601.) Finally, as discussed *supra*, CH definitively testified that the rape occurred while she was 12 years old in 2015. Thus, any rational factfinder would have found the essential elements of Appellant's crime beyond a reasonable doubt. Robinson, 77 M.J. at 297-98. Considering the above, this Court should be similarly convinced of Appellant's guilt. Rosario, 76 M.J. at 117. Accordingly, Appellant's conviction is both legally and factually sufficient, and he is unentitled to relief.

[7] Manual for Courts-Martial, United States part IV, para. 45b. (2012 ed.) (MCM).

2. Any variance was immaterial and nonprejudicial to Appellant.

Although Appellant's assignment of error alleges factual insufficiency, the Government is cognizant that it implicates the issue of variance.[8] "A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." Allen, 50 M.J. at 86.

Our superior Court has emphasized that "it must be remembered that even where there is a variance in fact, the critical question is one of prejudice." United States v. Lee, 50 C.M.R. 161, 162 (C.M.A. 1975). Thus, even where the factfinder does not make exceptions and substitutions, a variance between pleadings and proof is not necessarily fatal to the prosecution. Marrie, 39 M.J. at 1002. A variance is not fatal "unless it operates to *substantially* prejudice the rights of the accused." United States v. Hopf, 5 C.M.R. 12, 14 (C.M.A. 1952) (emphasis added). That is because "[t]he law is not so much concerned with the words used as with elemental concepts of justice." Id.

To prevail on a fatal-variance claim, Appellant must show both that (1) the variance was material and (2) it substantially prejudiced him. Hunt, 37 M.J. at 347. As discussed below, the variance is both immaterial and nonprejudicial to Appellant.

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 those conditions are met. To start, "[m]inor 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

[8] *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.").

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). The temporal variance between the pleadings and proof did not change the nature of Appellant's offense—he was charged with rape of a child, and the proof demonstrated that he raped a child. Further, although temporal variance in a child rape charge could potentially change the seriousness of the offense—based on the child's age—that is not the case here. CH's testimony established that she was 12 years old for the entirety of the relevant period—she was unequivocal that "nothing happened" before her twelfth birthday in January, and certain that the rape occurred before her brother's birth later the same year. (R. at 597.) In other words, the temporal variance did not expose Appellant to a potential charge of raping a child *under* the age of 12. *Cf.* Simmons, 82 M.J. at 137 (where the defense argued that enlarging the charged timeframe by 279 days meant the prosecution was now alleging that the accused extorted the victim while she was a minor, which made the offense "absolutely more serious.") Finally, the variance did not change the maximum authorized punishment for Appellant's offense. *See* MCM, part IV, para. 45b.e(1) (2016 ed.). 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. 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). No such showing has been made here. First, there is no evidence Appellant was misled by the temporal variance—he never raised an objection at trial, nor does he allege confusion now. *See* United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001) ("Since counsel did not raise the issue of variance at trial, it is apparent the defense was not

misled by this variance.”). This makes Appellant’s case distinguishable from Simmons, on which he relies. In Simmons, the prosecution amended the charge sheet during the middle of trial—after it rested its case—to expand the timeframe for an extortion charge by 279 days. 82 M.J. at 137. Trial defense counsel “vigorously objected,” citing lack of notice and the possibility that they might have cross-examined the victim differently. Id. In finding prejudice, the Court noted that the change “made it so that the charged extortion dates preceded the charged sexual assault dates, thereby enabling the Government to argue that the sexual assault was accomplished via extortion.” Simmons, 82 M.J. at 140. The Court concluded that “this change in the Government's theory of the case, which was directly predicated on—and inextricably linked with—the amended dates in the charge sheet likely misled the accused as to the offenses which he needed to defend against.” Id. at 140-41. That is not the case here. The date variance did not change the prosecution’s theory of the case, and therefore did not mislead Appellant. This conclusion is supported by the record, which demonstrates that the trial defense did not object or seek additional time to prepare based on the variance. *See* United States v. Carlile, No. ACM 40053, 2022 CCA LEXIS 542, at *23-24 (A.F. Ct. Crim. App. Sep. 21, 2022) (unpub. op.) (concluding that the defense was not misled by changes to the change sheet given that they did not seek further clarification or additional time to prepare).

Second, Appellant cannot demonstrate that the variance puts him at risk of another prosecution for the same conduct. “[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, and here the evidence of record establishes that Appellant abused CH for the first time by raping her via digital penetration when she was twelve and waiting for her brother to be born. This is sufficiently definite to diffuse any ambiguity that could lead to a second prosecution—there can only be one

"first time," and CH only has one brother. Indeed, it is precisely the "on or about" language in Charge II, Specification 1 that enables Appellant to "rely on the record of trial and conviction[] in this case to establish a former jeopardy defense to any subsequent criminal proceeding based on the same conduct." *See* Allen, 50 M.J. at 86.

Because Appellant is unable to demonstrate either materiality or prejudice, the fatal-variance claim—to the extent this Court finds there is one—is without merit and Appellant is not entitled to relief.

B. The conviction for Charge I, Specification 2 is legally and factually sufficient because SE unequivocally testified that Appellant touched her vaginal area.

To sustain Appellant's conviction for aggravated sexual contact of SE in violation of Article 120, UCMJ, the evidence must show that (1) at or near Tooele, Utah, on or about 20 July 2019, Appellant committed sexual contact upon SE by touching her vulva with his hand; and (2) that he did so with unlawful force. *See* MCM, part IV, para. 60.b(3)(a). The term "sexual contact" means "touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." 10 U.S.C.S. § 920. The "vulva" is defined as the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora, colloquially known as "lips."[9]

Appellant contends that his conviction is legally and factually insufficient "because the named victim, SE, testified [Appellant] did not touch her 'vaginal area.'" (App. Br. at 15.)[10] But

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[9] Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3A-44-3 (29 February 2020).

[10] Appellant does not contest the other elements of the offense. (*See generally* App. Br. at 15-16.)

this is premised on a skewed interpretation of the evidence that this Court should decline to adopt, since appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990).

"While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Here, the combination of direct and circumstantial evidence establishes beyond a reasonable doubt that Appellant touched SE's vulva. On direct examination, SE testified that Appellant "touched the top part of [her] vagina," and proffered that she did not know "the correct terminology." (R. at 764.) Although the defense exploited this on cross examination and suggested that Appellant was not "actually able to touch [her] vaginal area," (R. at 803), SE clarified on re-direct examination that she meant Appellant touched but did not *penetrate* her vagina: "[H]e didn't, like, go in it or anything like that, just touched the top of it." (R. at 815.)

Appellant, for his part, contends that this is "imprecise" and leaves reasonable doubt as to whether he touched SE's vulva or not. This Court should be unpersuaded. "[V]iewing the evidence in the light most favorable to the prosecution," *and* "draw[ing] every reasonable inference" in its favor, Robinson, 77 M.J. at 297-298, any rational factfinder could conclude that SE's reference to the "top" of her vagina was a reference to either the surface of the labia (which is on "top" in comparison to the inner portions) or the clitoral area (which is the top-most portion of her external genitalia), especially considering SE's admission that she did not know "the correct terminology" for describing what she called the "top part of [her] vagina." (R. at 764.) This,

combined with CH's testimony that she saw Appellant's hand in SE's pants and the independent evidence of Appellant's propensity to sexually abuse the women around him[11], leaves no *reasonable* doubt that Appellant touched SE's vulva. *See* D.A. Pam. 27-9, para. 8-3 ("There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt."). Thus, "any rational factfinder could have found the essential elements of Appellant's crime beyond a reasonable doubt." Robinson, 77 M.J. at 297-298. After weighing the above, and "making allowances for not having personally observed the witnesses," this Court should be similarly persuaded of Appellant's guilt. Rosario, 76 M.J. at 117. Appellant's conviction for aggravated sexual assault of SE is legally and factually sufficient, therefore he is unentitled to relief.

C. Even if this Court sets aside either conviction, a sentence rehearing is unnecessary because this Court can reassess the sentence itself.

As discussed above, Appellant's convictions are legally and factually sufficient, therefore this Court should not reach the question of sentence reassessment. But if it does, this Court should exercise its discretion to reassess the sentence at its level, rather than ordering a sentence hearing. United States v. Winckelmann, 73 M.J. 11, 14 (C.A.A.F. 2013). When deciding whether to reassess a sentence or order a rehearing, this Court considers four factors:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.

[11] The uncharged, independent Mil. R. Evid. 413 and 414 evidence consisted of (1) AD's testimony about waking up with Appellant's penis inside her, and (2) CH's testimony about waking up to find Appellant in bed with her, often with his hand on her breast. (R. at 556, 605-609.)

(3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.

(4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 16 (citations omitted).

First, there are no dramatic changes to the "penalty landscape and exposure." Id. Just like his conviction for raping CH, Appellant's conviction for raping AD—which he does not challenge on appeal—also exposed him to confinement for life. Although Appellant correctly points out that setting aside the rape conviction related to CH would negate the *mandatory* dishonorable discharge, (App. Br. at 17), this does not dramatically change the penalty landscape because a dishonorable discharge would still be authorized based on Appellant's remaining convictions. Thus, this factor weighs in favor of reassessment, especially if this Court only sets aside the sexual contact conviction related to SE.

By contrast, the second factor does not tip the scales either way. As our superior Court noted, this factor "could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming." Winckelmann, 73 M.J. at 16. However, Appellant's case does not involve such offenses. Thus, the fact that he was sentenced by members does not necessarily justify a rehearing.

The third and fourth factors, like the first, weigh in favor of reassessment. Appellant's unchallenged convictions for rape, abusive sexual contact, and assault consummated by battery capture egregious conduct in and of themselves. Based on the nature of the offenses, much of the aggravating evidence introduced at trial—including the sexual misconduct underlying the

challenged convictions—would remain relevant and could properly be considered by a sentencing authority, including this Court. Further, the remaining convictions are for offenses that the judges on this Court "have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." Id.

In sum, the Winckelmann factors favor reassessment over a sentencing rehearing, as do the interests of justice. Two of the three victims in this case made statements at Appellant's sentencing hearing. Ordering a rehearing could result in the need for the victims to appear again at a new sentencing hearing, which would force them to relive the court-martial experience—and by extension, the pain that Appellant inflicted on them. *See* United States v. Dodge, 60 M.J. 873, 875-76 (A.F. Ct. Crim. App. 2005) (reassessing the sentence instead of ordering a rehearing partly because the latter would force victims to relive experience). Reassessment would also serve "Appellant's, victims', and society's interests in the justice and the finality of verdicts." United States v. Navarro, No. ACM 38790, 2016 CCA LEXIS 576, at *27 n.18 (A.F. Ct. Crim. App. Sep. 29, 2016) (unpub. op.).

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

III.

THE MILITARY JUDGE DID NOT ERR BY DENYING THE DEFENSE REQUEST FOR A DIGITAL FORENSICS EXPERT.

Additional Facts

In her interview with the Office of Special Investigations (OSI), SE showed the agents the recordings she had made while talking to Appellant in the garage in 2019. (R. at 826, 829.) After the interview, she provided two video files—IMG_0167 and IMG_0168—to OSI via AirDrop.

(R. at 828; Pros. Ex. 10; App. Ex. LIX at ¶ 7-9.) Both files were provided to the defense in discovery. (*See* App. Ex. LVII.)

While preparing for trial, the defense reviewed the video of SE's interview and came to believe that IMG_0167 and IMG_0168 were different from the clips SE had played during the interview. (App. Ex. LIX at ¶ 10.) After the defense requested confirmation that the IMG_0167 and IMG_0168 were the complete files, the prosecution inquired with SE, who subsequently provided two additional video files—IMG_0187 and IMG_0189—that were slighter longer than the ones she had provided previously. (App. Ex. LIX at ¶ 13; R. at 829; Pros. Ex. 10.) OSI then reviewed the second set of longer files, IMG_0187 and IMG_0189, and confirmed they were the videos SE had shown them during the interview. (R. at 830.)

After receiving IMG_0187 and IMG_0189, the defense requested a digital forensics expert, which the convening authority denied. (App. Ex. LVII.) The defense then moved to compel the expert, citing the necessity of expert assistance to determine whether SE manipulated the videos beyond merely shortening them. (*See generally* App. Ex. LVII.)

The military judge found that the defense had not met its burden of demonstrating necessity and denied the motion to compel. (App. Ex. LIX.) In his ruling, the military judge opined that the defense had not demonstrated "why or how they believe a more significant file manipulation occurred," or how expert assistance would enable the defense to "discover manipulation based on the evidence in the defense's possession." (App. Ex. LIX at ¶ 36.) The military judge further noted that "[e]xploring the possibility that certain pieces of evidence could have been altered by the victim is a line of inquiry and general theory of defense that falls within the realm of matters competent counsel can and should be equipped to handle on their own," and that the defense could not meet their burden through "unsupported assertions that they lack the necessary capability and

experience." (App. Ex. LIX at ¶ 37.) Finally, the military judge concluded that denial of the expert would not result in a fundamentally unfair trial, given that neither scientific testimony nor expertise in digital forensics appeared to "play any role, let alone a central role, in the presentation of the case from either side." (App. Ex. LIX at ¶ 38.)

At trial, the parties stipulated to the expected testimony of Dr. JR, a digital forensics expert. (R. at 831-32.) Dr. JR's stipulated testimony provided that:

> I understand that IMG_0187 and IMG_0189 are longer in length than IMG_0167 and IMG_0168. In addition, I understand that IMG_0167 and IMG_0168 appear to be clipped, either at the beginning or end.
>
> Based on my experience as a qualified and recognized expert in the field of digital forensics, I am familiar with Apple's iDrop software -- "'AirDrop' software," rather. It is my opinion that AirDropped files are all or nothing. A file that is transferred from one iPhone to another is either completely transferred, or not transferred at all. A file cannot be partially AirDropped by the sending device or partially downloaded on the receiving device.
>
> I understand that, on 4 May 2020, [SE] AirDropped IMG_0167 and IMG_0168 to an investigator's iPhone at OSI. It is my opinion that those files are different files than IMG_0187 and IMG_0189.

(R. at 831-32.)

Standard of Review

"A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion." United States v. Lloyd, 69 M.J. 95, 100 (C.A.A.F. 2010) (citing United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005)). Abuse of discretion standard is a strict standard that calls for more than a mere difference of opinion. Lloyd, 69 M.J. at 99 (C.A.A.F. 2010) (quoting United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is

outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008). Reversal for an abuse of discretion is warranted only if the trial court's ruling is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Lloyd, 69 M.J. at 99.

Law & Analysis

An accused is entitled to expert assistance at the Government's expense only if he can demonstrate necessity. United States v. Gunkle, 55 M.J. 26, 31 (C.A.A.F. 2001). Demonstrating necessity requires the accused to show "something more than a mere possibility of assistance." Id. Thus, an accused who seeks to compel appointment of an expert bears the burden of showing a *reasonable* probability that (1) an expert would be of assistance to the defense, and (2) that denial of expert assistance would result in a fundamentally unfair trial. United States v. Hennis, 79 M.J. 370, 383 (C.A.A.F. 2020) (citing Lloyd, 69 M.J. at 99)).

Here, Appellant contends that the military judge erroneously applied these principles of law in denying his motion to compel expert assistance. But as discussed below, the military judge's conclusions were not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Lloyd, 69 M.J. at 99. Thus, the military judge's decision to deny the defense motion was within the "range of choices reasonably arising from the applicable facts and the law," Miller, 66 M.J. at 307, and Appellant is not entitled to relief.

A. The military judge properly concluded that the defense had failed to demonstrate a reasonable probability that a digital forensics expert would be of assistance.

To meet their burden of demonstrating a reasonable probability that an expert would be of assistance, Appellant had to show (1) why the expert was necessary; (2) what the expert would have accomplished for him; and (3) why his defense counsel was unable to gather and present the evidence that the expert would be able to develop. Lloyd, 69 M.J. at 99.

In contending that the military judge erroneously concluded expert assistance was not necessary, Appellant asserts that "longer videos which were more inculpatory than the originals emerged years after a complaining witness provided the original files," which he contends "gives rise to a reasonable probability that the videos were manipulated." (App. Br. at 21.) But Appellant's position suffers from a fatal flaw: it ignores the fact that the "originals"—that is, the recordings that SE showed OSI in the first place—were the longer, more inculpatory versions. (R. at 829-830.)

Had SE originally played the shorter videos for OSI and later provided the longer versions, Appellant might have been had a better chance of convincing the military judge that there was manipulation "beyond merely shorting the initial versions transferred." (App. Ex. LIX at ¶ 36.) But that is not the case here. The evidence before the military judge established that the files SE played for OSI during her interview were the later-provided IMG_0187 and IMG_0189, not the shorter IMG_0167 and IMG_0168. (App. Ex. LIX at ¶¶ 1-16.) Given that the defense presented no additional evidence to support any theory that IMG_0187 and IMG_0189 had been manipulated or fabricated in some manner, (*see generally* App. Ex. LVII), it was neither arbitrary nor clearly unreasonable for the military judge to conclude that "[s]imply because multiple media files exist does not, per se, require expert evaluation and assistance." (App. Ex. LIX at ¶ 36.)

Further justifying the military judge's ruling is the defense's inability to articulate what an expert would accomplish for them that they could not accomplish themselves. (App. Ex. LIX at ¶ 37.) The fact that expert assistance "could lead to additional lines of cross examination," (App. Ex. LVII at ¶ 16.d.iii), is insufficient to demonstrate a reasonable probability of assistance, as opposed to a mere possibility. Gunkle, 55 M.J. at 31. Further, given that two of the clips are obviously shorter than the others, it would not take an expert to conclude that the clips are different.

(*See generally* Pros. Ex. 10.) Indeed, the fact that the defense identified the discrepancy between the videos SE showed the agents and the videos that she initially provided demonstrates that counsel was capable of basic analysis. Although the defense asserted that they were "not familiar with the information" contained in media files, (App. Ex. LVII at ¶ 16.d.i), this does not automatically establish a basis for expert assistance. "Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case." United States v. Kelly, 39 M.J. 235, 238 (C.M.A. 1994). Here, as noted by the military judge, the trial defense "provided virtually no evidence as to what efforts they made to educate themselves in this area." (App. Ex. LIX at ¶ 37.) But even if the defense had tried and failed to become knowledgeable themselves, this would not have tipped the scales, since the defense failed to demonstrate "why or how they believe[d] a more significant file manipulation occurred," (App. Ex. LIX at ¶ 36), such that an expertly trained eye would be required.

Considering the above, it was neither arbitrary nor clearly unreasonable for the military judge to find that the defense had failed to demonstrate that expert assistance was necessary.

B. The denial did result in a fundamentally unfair trial since scientific evidence was not the linchpin of the prosecution case.

"A trial is fundamentally unfair where the government's conduct is 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" United States v. Anderson, 68 M.J. 378, 383 (C.A.A.F. 2010) (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)). Where expert assistance is "central to the outcome," United States v. Turner, 28 M.J. 487, 488 (C.M.A. 1989) (citing Ake v. Oklahoma, 470 U.S. 68 (1985)), denial of a defense expert could result in a fundamentally unfair trial.

The case of United States v. Lee, 64 M.J. 213 (C.A.A.F. 2006), is instructive in this regard. The appellant in Lee, who was charged with possessing child pornography, requested a digital

forensics expert after determining that the prosecution's case would rely on forensic testing and expert testimony to prove a "critical element"—that the child pornography images were real, rather than virtual. 64 M.J. at 217. In holding that the military judge's denial of this request was an abuse of discretion that resulted in a fundamentally unfair trial, our superior Court noted that "the playing field at trial is rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government's expert." Id. at 218. The Court cautioned that:

> Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense.

Id.

This is not that case. The prosecution neither employed an expert nor presented scientific evidence of any kind. Thus, as the military judge noted, "[s]cientific evidence or expert testimony in the field of digital forensics is not the linchpin of the Government's case." (App. Ex. LIX at ¶ 38.) Accordingly, it was not clearly unreasonably for the military judge to determine that denying the request expert would not result in a fundamentally unfair trial. *Cf.* United States v. McAllister I, 55 M.J. 270, 276 (C.A.A.F. 2001) (military judge abused discretion by denying expert assistance in case where DNA analysis was "linchpin" of the prosecution's case). And contrary to Appellant's assertions, the denial did not actually result in a fundamentally unfair trial. The defense cross-examined SE at length about the video. (R. at 809-811.) Then, through Dr. JR's stipulated testimony, the defense ultimately presented some evidence that an expert would have testified to. (R. at 831-32.) Finally, in closing, the defense argued that the evidence "has been manipulated, has been tampered with." (R. at 917.) Put differently, the absence of an expert did

not hinder the trial defense's ability to present and advance their theory that SE manipulated the videos.

Considering the above, the military judge did not abuse his discretion in denying the defense request for a digital forensic expert. Accordingly, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

IV.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS NOT IMPROPER; EVEN IF IT WAS, APPELLANT'S CLAIM FAILS BECAUSE HE HAS FAILED TO DEMONSTRATE PREJUDICE.

Additional Facts

Prior to sentencing proceedings, the military judge instructed the members that they "must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty." (R. at 965.) The prosecution then presented sentencing argument, during which trial counsel alluded to uncharged sexual misconduct that the prosecution had introduced at trial pursuant to Mil. R. Evid. 413 and 414—specifically, (1) AD's testimony that after the rape, she frequently woke up to Appellant attempting to penetrate her or having sex with her, and (2) CH's testimony that after the rape, she frequently woke up to Appellant in bed with her, groping her breast or rubbing her groin over her clothing. (R. at 556, 605-609.) Trial counsel referred to this uncharged misconduct on two occasions during his sentencing argument. The first reference was a commentary on Appellant's continued abuse:

> And the accused has never taken responsibility for his actions on his own. And you see this by his habitual serial abuse. He raped [AD] in 2010. He could have stopped the assault there. But he made it a part of their marriage. He raped [CH] when she was 12. A child. He could have stopped there, but he made that nightmare a regular

> part of her life. After [CH], he went outside of the family. He cast a wider net. He sexually assaulted [SE]. She was 16 years old. He has gotten worse and more brazen over time.

(R. at 971.)

Trial counsel alluded to the uncharged misconduct a second time while discussing Appellant's the impact of his crimes:

> Consider for this purpose these aggravating factors: He terrorized his wife, [AD], a year after he raped her. Over the course of a year, she fell asleep, and she'd wake up to his penis inside of her. Consider the impact that had on [AD]. [CH] suffered for multiple years of the accused molesting her and invading her physical autonomy. She was afraid to go to sleep in her own bedroom out of fear that she'd wake up with her stepdad in her bed, touching her, molesting her. Consider the impact that had on [CH].

(R. at 972.)

The defense did not object to any part of the prosecution's sentencing argument and did not request any special instructions. (R. at 970-973.)

For his convictions, Appellant faced a maximum punishment of: reduction to the grade of E-1, total forfeiture of pay and allowances, confinement for life without the possibility of parole, and dishonorable discharge. (R. at 961.) The prosecution asked for reduction to the grade of E-1, total forfeitures, 30 years of confinement, and a dishonorable discharge. (R. at 974.) The defense did not make a specific sentence recommendation. (R. at 977.) The members sentenced him to a reprimand; reduction to the grade of E-1; total forfeiture of pay and allowances; confinement for 17 years; and a dishonorable discharge. (R. at 985; *Statement of Trial Results*, ROT, Vol. 1.)

Standard of Review

Claims of prosecutorial misconduct and improper argument are reviewed de novo and where no objection is made, this Court reviews for plain error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citations omitted). Under plain error review, appellant bears the burden of

showing that (1) there is error, (2) the error is clear or obvious, and (3) said error resulted in material prejudice to a substantial right of the appellant. Id. "[T]he failure to establish any one of the prongs is fatal to a plain error claim." Bungert, 62 M.J. at 348.

Law & Analysis

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996). "Improper argument is one facet of prosecutorial misconduct." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). When determining whether prosecutorial argument was improper, "the statement must be examined in light of its context within the entire court-martial." United States v. Lewis, 69 M.J. 379, 384 (C.A.A.F. 2011) (quotations omitted); *see also* Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring) ("In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.").

Appellant contends that the prosecution's sentencing argument was improper. But as discussed below, Appellant has failed to demonstrate either clear error or prejudice, and his claim fails as a result.

A. Trial counsel's sentencing argument was not neither improper nor clear error because it merely placed Appellant's crimes in their proper context.

"A trial counsel is charged with being a zealous advocate for the Government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003). Thus, during sentencing argument, "trial counsel is at liberty to strike hard, but not foul, blows." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In contending that trial counsel in this case struck foul ones, Appellant asserts that the argument "invited the members to sentence [him] for uncharged misconduct and

used the uncharged misconduct to unduly inflame the members," which he claims was "obvious error." (App. Br. at 28.) This Court should be unpersuaded.

During sentencing proceedings, "uncharged misconduct will often be admissible as evidence in aggravation." United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1988). This is because uncharged misconduct evincing a continuous course of conduct demonstrates the "full" or "true" impact of an appellant's crime. Id.; United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001). Thus, uncharged misconduct admitted during findings—as was the case here—may be considered for the same purpose. *See* United States v. Figura, 44 M.J. 308, 310 (C.A.A.F. 1996); R.C.M. 1001(g)(2)(A).[12] And given that "[t]rial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence," United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014), it logically follows that trial counsel may argue the uncharged misconduct in a manner that demonstrates the full impact of Appellant's crimes.

That is what occurred here. The uncharged sexual misconduct related to AD and CH evinced a continuous course of conduct on Appellant's part, given that all of it occurred after the rapes of which he was convicted. Put differently, the rapes of AD and CH served as starting points for Appellant's abuse of both victims. Accordingly, the uncharged sexual misconduct unquestionably constituted "aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4) (emphasis added). Based on this and the fact that the evidence was already before the members by virtue of the prosecution's findings case, trial counsel was "at liberty" to strike hard blows using the evidence. Baer, 53 M.J. at 237.

[12] Pursuant to R.C.M. 1001(g)(2)(A), the sentencing authority may consider "[a]ny evidence properly introduced on the merits before findings, including: [e]vidence of other offenses or acts of misconduct even if introduced for a limited purpose."

And strike hard blows he did. Trial counsel used that evidence to place Appellant's rapes of AD and CH into their proper context—each the beginning of a slippery, abusive slope—and thereby demonstrate the "full" impact of Appellant's crimes. (R. at 971.) As trial counsel noted, Appellant "could have stopped." (R. at 971.) For purposes of sentencing, it mattered that Appellant did not. *See* R.C.M. 1001(b)(4). This Court's recent decision in United States v. Flores is a good example of why. No. ACM 40294, 2023 CCA LEXIS 165, at *12 (A.F. Ct. Crim. App. Apr. 13, 2023). In a case where the appellant was being tried for making a false official statement, the prosecution introduced evidence that the appellant made additional false statements after the charged statement. Id. at *10. During sentencing argument, trial counsel described the appellant as committing "dishonesty after dishonesty," and used the facts related to the uncharged misconduct when arguing rehabilitative potential and aggravation evidence. Id. This Court held that "[t]he fact Appellant repeated the same falsehood to other individuals, even though those individuals were not acting in an official military capacity, in order to deflect responsibility for the same misconduct was a relevant fact in aggravation," and therefore fair game for trial counsel's argument. Id. at *12. Such is the case here. The fact that Appellant repeatedly abused AD and CH, even when he "could have stopped," showed that he was either indifferent to or ignorant of the immorality of his behavior—either would be a relevant fact in aggravation.

Not only did evidence of Appellant's continuous abuse constitute aggravation evidence that negated any "mitigation" evidence, but it also spoke to his rehabilitative potential. It is in this context that trial counsel said: "[Appellant] is a bad person. He has a propensity to sexually assault women and children … He has low rehabilitative potential." (R. at 972.) This was a fair comment on the evidence, given that (1) Appellant had committed egregious crimes and (2) uncharged sexual misconduct evidence had been admitted in findings for the purpose of showing propensity.

Just as "the fact that sentencing evidence shows an accused to be a 'bad person' is not in itself a basis for objection," United States v. Silva, 21 M.J. 336, 337 (C.M.A. 1986) (citing United States v. Martin, 20 M.J. 227, 230 n. 4 (C.M.A.1975)), the fact that trial counsel argued it accordingly is not improper. *Cf.* Voorhees, 79 M.J. at 11 (holding argument improper where trial counsel repeatedly insulted appellant by calling him a "narcissistic, chauvinistic, joke of an officer" and a "pig").

But while trial counsel struck hard blows, he did not strike foul ones. Trial counsel did not ask the members to put themselves in the victims' place, *cf.* Baer, 53 M.J. at 237, nor did he ask the members to render justice for a purported victim of uncharged misconduct alone. *Cf.* United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007).

Appellant, who disagrees, likens his case to Schroder, 65 M.J. at 58. In Schroder, our superior Court held that the prosecution's sentencing presentation—which failed to differentiate between victims of charged and uncharged conduct in its pleas for a sentence that "delivers justice to those girls" [13]—was improper because it invited members to punish the appellant for uncharged misconduct. 65 M.J. at 58. This case is distinguishable. Here, unlike in Schroder, the victims of the charged and uncharged misconduct were the same individuals, and the court was convened to render justice to them. *Cf.* Id. at 58 (finding argument improper where prosecutor demanded justice for a victim of uncharged misconduct because "the court was not convened to render justice to [that victim]."). Trial counsel did not use this evidence to "unduly inflame the members," nor did he invite the members to punish Appellant for uncharged conduct. Id. Instead, he specifically

[13] The prosecution's sentencing argument in Schroder included Powerpoint slides with pictures of the three girls—JPR, SRS, and SJS—that the appellant had allegedly molested; however, the appellant was only charged with abusing JPR and SRS. 65 M.J. at 58.

identified the evidence as "aggravating factors," and asked the members to "consider the impact" of Appellant's crimes, as placed in their proper context. (R. 971-72.)

Considering the above, trial counsel's comments were not error, much less clear or obvious error. Appellant's failure to establish clear error is "fatal" to his claim, and the analysis should end here. Bungert, 62 M.J. at 348.

A. Even if the argument was error, Appellant has failed to demonstrate prejudice.

Assuming *arguendo* this Court disagrees with the United States and finds there was clear error, Appellant's plain error claim still fails because he cannot demonstrate prejudice. Id.

When improper argument is alleged to have occurred during the sentencing phase, prejudice turns on whether or not the Court "can be confident that [the appellant] was sentenced on the basis of the evidence alone." Frey, 73 M.J. at 248 (citing United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013)). In assessing prejudice from improper argument, this Court considers three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). Here, as discussed below, the Fletcher factors favor the Government. 62 M.J. at 175.

To determine the severity of prosecutorial comment, this Court considers various indicators such as the raw numbers—the instances of misconduct as compared to the overall length of the argument—and whether the misconduct was spread throughout the argument or the case as a whole. Fletcher, 62 M.J. at 184. Here, the "raw numbers" overwhelmingly support a finding that trial counsel's conduct was not severe. During sentencing argument, trial counsel's allusions to the uncharged misconduct covered approximately 6 lines (R. at 971, 972) in an argument that spanned five pages pages—totaling 92 lines—of the record. (R. at 970-75.) Any prejudicial

impact that trial counsel's comments may have had is "dampened by the minor part they played." United States v. Moran, 65 M.J. 178, 185 (C.A.A.F. 2007); *cf.* Fletcher, 62 M.J. at 185 (deeming trial counsel's conduct "pervasive and severe" since there were several dozen examples of improper argument across 21 pages). Further, there is no indication that prosecutorial misconduct pervaded the "case as a whole." Fletcher, 62 M.J. at 184. The allegation of impropriety is confined to comments that make up only six percent of trial counsel's sentencing argument. Together, these indicators demonstrate that counsel's comments were of minimal severity.

While there were no "curative measures" in response to trial counsel's argument, this is because the defense did not object or ask for any kind of curative instruction. This lack of defense objection is "relevant to a determination of prejudice" because it is "some measure of the minimal impact of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113 (C.A.A.F. 2001) (quotations omitted); *see also* United States v. Jenkins, 54 M.J. 12, 20 (C.A.A.F. 2000) (noting that defense did not object or request a curative instruction despite trial counsel repeatedly calling appellant a "thief" and a "liar"). But the lack of additional curative measures is not fatal because the military judge instructed the members that Appellant could be sentenced "only for the offenses of which he has been found guilty." (R. at 965.) "Absent evidence to the contrary, this Court may presume that members follow a military judge's instructions." United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). There is no evidence the members in this case are not entitled to that presumption, therefore this Court may—and should—presume that they sentenced Appellant only for the crimes of which he was convicted.

Finally, the weight of the evidence supported Appellant's convictions and sentence. *See* Argument, Issue II, *supra*. Besides the uncontradicted testimony of the victims, the case against Appellant included corroborating evidence such as text messages reflecting the victim's state of

mind, recordings of Appellant begging to see his minor victim's breasts, and his implicit and explicit acknowledgements of wrongdoing. Trial counsel's argument was "unimportant in relation to everything else the [factfinder] considered on the issue in question," United States v. Prasad, 80 M.J. 23, 35-36 (C.A.A.F. 2020), and this Court should be confident that Appellant was "sentenced on the basis of the evidence alone." United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007) (internal quotation marks omitted).

Ultimately, the lack of prejudice is evidenced by the sentence itself. In a case where Appellant was exposed to a life sentence for raping his wife, raping his stepdaughter, and committing aggravated and abusive sexual contact on his stepdaughter's friend, the prosecution asked for 30 years. (R. at 973.) The members adjudged only 17. (*Statement of Trial Results*, ROT, Vol. 1.) This suggests that the members were not inflamed by trial counsel's arguments and instead reached an independent judgment on sentencing. *See* Schroder, 65 M.J. at 58. Appellant has failed to demonstrate prejudice and is therefore unentitled to relief. And as our superior Court recognized, "where, in fact, there is no prejudice to an accused, we should not forsake society's other interests in the timely and efficient administration of justice." United States v. Rodriguez, 60 M.J. 87, 89-90 (C.A.A.F. 2004).

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's sentence.

V.[14]

APPELLANT IS NOT ENTITLED TO A UNANIMOUS VERDICT.

Additional Facts

Prior to trial, Appellant's trial defense counsel filed a motion for appropriate relief requesting a unanimous verdict. (App. Ex. XIX.) The military judge denied the defense motion on 4 February 2022. (App. Ex. XLI.) Less than two months later, this Court its decision in United States v. Anderson, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. Mar. 25, 2022), *aff'd,* 83 M.J. 291 (C.A.A.F. 2023), in which it held that the requirement for unanimous verdicts was inapplicable to courts-martial. (App. Ex. III.)

At trial, the military judge advised Appellant that "three-fourths of the members must agree before [he] could be found guilty of any offense." (R. at 19.) Appellant indicated that he understood his forum rights and elected trial by a panel of officer members. (R. at 20, 203.)

Standard of Review

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

Law & Analysis

"Nonunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system." Anderson, 83 M.J. at 294. To find an accused guilty of an offense under the Code, only three-fourths of the panel members must vote to convict. Article 52, UCMJ. By contrast, unanimous verdicts are required for convictions in *civilian*

[14] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

criminal proceedings. Ramos v. Louisiana, 140 S. Ct. 1390 (2020). In Ramos, the Supreme Court held that the Sixth Amendment right to a jury trial included the right to a unanimous verdict in both federal and state criminal proceedings. 140 S. Ct. at 1396-97.

The Supreme Court did not, however, state that the unanimity requirement extended to military courts-martial—no doubt because its own cases dictate that the Sixth Amendment right to a jury trial does not apply to courts-martial. *See* Ex parte Milligan, 71 U.S. 2, 107 (1866); Ex parte Quirin, 317 U.S. 1, 40 (1942); Whelchel v. McDonald, 340 U.S. 122, 127 (1950). In line with the cases, the Court of Appeals for the Armed Forces recently held that there was no right to a unanimous verdict in courts-martial. Anderson, 83 M.J. at 302.

In nevertheless claiming error, Appellant largely ignores the existence of Anderson and conflates his constitutional right to an *impartial* jury with his nonexistent right to a unanimous one. (App. Br. Appx. A at 3.) Unfortunately for Appellant, "impartiality" is not synonymous with "unanimity." Anderson, 83 M.J. at 297. They are complementary—but distinct—concepts. Id. Thus, this Court should be unpersuaded—as our superior Court was—by any suggestion that only a unanimous jury can be impartial. Anderson, 83 M.J. at 297.

In the absence of Supreme Court action on this issue, Anderson controls. As of this filing, Anderson remains good law and Article 52, UCMJ, remains constitutional. Appellant was not—and still is not—entitled to a unanimous verdict. Accordingly, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

CONCLUSION

For the above-stated 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 28 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) **JOSHUA A. PATTERSON,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40426 4 June 2024

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

Appellant, Staff Sergeant (SSgt) Joshua A. Patterson, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 28 May 2024 (Ans.). In addition to the arguments in his opening brief, filed on 24 April 2024, SSgt Patterson submits the following arguments for the issues listed below.

I.

THE CONVENING AUTHORITY RECEIVED COURT-MEMBER DATA SHEETS INDICATING THE RACES AND GENDERS OF POTENTIAL COURT MEMBERS, AND THE COMPOSITION OF AT LEAST SOME GROUPS OF DETAILED MEMBERS SHOWS THE CONVENING AUTHORITY ACTUALLY CONSIDERED THESE FACTORS. 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 Patterson's motion to attach court-member data sheets to the record of trial, *see* Order, Motion to Attach, 3 May 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 11–14, 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 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 both the convening orders detailing panel members and the documents, except the court-member data sheets, used by the convening authority to select panel members from larger pools of applicants. *See* Pretrial Advice, 26 April 2021; Request for Release and Nominees for Replacement Members, 2 August 2022; Request for Release and Nominees for Replacement Members, 4 October 2022; Request for Release and Nominees for Replacement Members, 14 November 2022; Excusal Request, 23 November 2022.

The fact that SSgt Patterson 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 Patterson 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 13. However, this case is distinguishable because the

initial litigation in *Jeter* was over a clearly prohibited practice, not a practice that the Court of Appeals for the Armed Forces (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*, 141 S. Ct. 1547, 1554 (2021). Even though this issue was not raised at the trial level, this Court is well within its authority to consider the court-member data sheets when deciding whether SSgt Patterson'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 Patterson 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 13, 15. 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 15 (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 14–18. This was a choice, not a deprivation of the opportunity to rebut a prima facie case as the Government claims. Ans. at 14. 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 prima facie case is even stronger concerning gender than it is with regards to race. The court cited some additional factors in *Jeter* regarding race, but that decision only indicates they were sufficient for a prima facie showing in that case, not that such factors are necessary for a prima facie showing in every case. 84 M.J. at 73–74. However, there is additional information here concerning gender, as an analysis of one of the convening orders shows the convening authority selected two male and two female panel members from a pool of seven male and two female potential members. Br. on Behalf of Appellant at 9–10. When a convening authority selected all of the presented female candidates while selecting less than thirty percent of the presented male candidates to create a convening order with an equal number of male and female

members, it appears on first examination like the convening authority considered gender when making the selections.

This is more than enough to establish a prima facie showing, and once again, the Government offers no rebuttal. It chooses instead to deny the existence of a prima facie showing and point out that *Jeter* did not reach the issue of considering gender in member selection. Ans. at 17–18. *Jeter's* reasoning regarding race also applies to gender, as SSgt Patterson detailed in his initial brief. Br. on Behalf of appellant at 7–8. This Court should conclude there is an unrebutted prima facie showing the convening authority impermissibly considered gender, as well as race, when selecting panel members.

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 Patterson's court-martial, the convening authority could consider race and gender for permissible purposes, and the prima facie showing suggests the convening authority tried to do just that, especially by selecting members to achieve gender inclusivity.[1] The Government relies upon a presumption that the convening authority acted in accordance with Article 25, UCMJ. Ans. at 11,

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[1] 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.

16–17 (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 allowed to consider these factors for inclusive 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 Patterson respectfully requests that this Honorable Court set aside the findings of guilty and the sentence.

II.

THE FINDINGS OF GUILTY AS TO THE SPECIFICATIONS FOR ASSAULTING C.H. IN SOUTH CAROLINA AND TOUCHING S.E. ON A CAMPING TRIP ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE (1) C.H. COULD NOT SPECIFY WHEN THE ALLEGED MISCONDUCT OCCURRED BUT WAS CLEAR IT WAS NOT DURING THE CHARGED TIMEFRAME AND (2) S.E. TESTIFIED THAT STAFF SERGEANT PATTERSON WAS NOT ABLE TO TOUCH HER AS ALLEGED IN THE SPECIFICATION.

The CAAF has clearly established, through a line of cases, that being reasonably near the charged timeframe means being within a period of days to weeks of the charged dates. *United States v. Simmons*, 82 M.J. 134, 139–40 (C.A.A.F. 2022) (finding difference of 279 days not reasonably near the charged timeframe); *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001) (finding difference of two to three days encompassed by "on or about" language); *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993) (allowing three-week difference); *United States v. Brown*, 34 M.J. 105, 106, 110 (C.M.A. 1992) (allowing seven-day difference). The Government tries to extend this precedent to include a period of months, relying primarily on a thirty-year-old case in which this Court's predecessor affirmed a conviction where the evidence differed from the charged timeframe by approximately two-and-a-half months. Ans. at 21–23 (citing *United States v. Marrie*, 39 M.J. 993, 1002 (A.F.C.M.R. 1994)).

The problem with the Government's argument is twofold: the difference between the evidence and the charged timeframe is still greater here, and it goes against clear, recent precedent from the CAAF. C.H. testified the alleged misconduct occurred sometime between January and September 2015, meaning it could have been as much as nine months before the charged timeframe. R. at 597. The prosecution's efforts to narrow this timeframe still left a possible difference of six or seven months. *Id.* This is longer than the two-and-a-half-month difference allowed in *Marrie*, and it is much longer than any departure from a charged timeframe allowed by

CAAF precedents. *See Simmons*, 82 M.J. at 139. Any notion that *Marrie* allows a difference of many months between the charged timeframe and the evidence is dispelled by the CAAF's reversal of this Court's decision in *Simmons*, where the CAAF set aside a charge and specification in which the Government amended the charged timeframe by 279 days. *Id.* at 140.

United States v. Gilliam, No. ARMY 20180209, 2020 CCA LEXIS 236 (A. Ct. Crim. App. July 15, 2020) is much closer to this case than *Marrie*, despite the Government's unsuccessful attempt to distinguish *Gilliam* based on distinctions that do not make a difference. Ans. at 22. Even without a "crisp delineation" between what falls within "on or about" language and what is outside it, *id.* at 139, the evidence here is insufficient to find the charged misconduct occurred reasonably near the charged timeframe. The findings of guilty for Specification 1 of Charge II are consequently legally and factually insufficient.

Additionally, *Simmons* and its predecessors also stand for the unremarkable proposition that the Government must prove charged misconduct occurred within or reasonably near the charged timeframe. "Stating on a charge sheet the date of an alleged offense with a certain degree of specificity and accuracy is required." *Id.* at 140. Undeterred by ample recent precedent, the Government endeavors to challenge this notion, reaching back more than sixty years for a case in which a predecessor court to the CAAF noted that "generally time is not of the essence of an offense." Ans. at 21, 24 (quoting *United States v. Gehring*, 20 C.M.R. 373, 376 (U.S. C.M.A. 1956)).[2] In doing so, the Government invites this Court to affirm the findings of guilty regardless of how the evidence relates to the charged timeframe. *Id.* at 24. This Court should firmly reject that invitation. Whatever the state of the law may have been in 1956, it is clear today from, *inter*

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[2] The last time a court cited *Gehring* was in 1994 when this Court's predecessor cited it in *Marrie*, the case on which the Government relies in its answer. 39 M.J. at 1002.

alia, *Simmons*, *Barner*, *Hunt*, and *Brown* that the Government must prove alleged misconduct occurred within or reasonably near the charged timeframe. 82 M.J. at 140; 56 M.J. at 137; 37 M.J. at 347; 34 M.J. at 106. Rather than do so, the Government has relied on the argument advanced by trial counsel during findings that, in essence, the charged timeframe was close enough. Ans. at 23 (citing R. at 879). This Court should not be so persuaded and should set aside the findings of guilty for Specification 1 of Charge II as legally and factually insufficient.

WHEREFORE, SSgt Patterson respectfully requests that this Honorable Court set aside the findings of guilty as to Specification 1 of Charge II, Charge II, and Specification 2 of Charge I; dismiss these Specifications and Charge II; and order a sentence rehearing.

III.

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE'S MOTION TO COMPEL THE APPOINTMENT OF AN EXPERT IN DIGITAL FORENSICS BECAUSE EXPERT ASSISTANCE WAS NECESSARY TO ADDRESS THE CRITICAL ISSUES OF AUTHENTICITY OF A PROSECUTION EXHIBIT AND CREDIBILITY OF A NAMED VICTIM WHO TESTIFIED AT TRIAL.

It is counter-intuitive that a crime victim would withhold inculpatory evidence while providing law enforcement with less-inculpatory versions of the same evidence. Yet, that is what purportedly occurred here. R. at 829–30. It is equally confounding that law enforcement agents, having apparently seen inculpatory evidence, would then accept less-inculpatory versions seemingly without question. Again, that seems to be the case here. *Id.*

The Government suggests that SSgt Patterson's argument for an expert in digital forensics is flawed because the longer videos which emerged later were more inculpatory, Ans. at 36, but this fact pattern actually increases the need for an expert consultant. It was important to determine what about these videos made S.E. create different videos, purportedly shorter versions of the same

videos, and why she initially chose to only provide the less-inculpatory ones. J.R.'s stipulation of expected testimony makes clear that providing these alternate videos was a choice, not the result of technical issues. R. at 831–32. However, it does not say anything about the videos that suggests why S.E. made this choice. Likewise, it was important to know why, after having the videos in her control for months, S.E. willingly turned them over after having opted not to the first time. An expert would have determined whether there was something else about these videos, some additional quality or signs of manipulation not apparent to lay observers, that would answer these questions. The more-inculpatory nature of the newer videos, which the Government introduced against SSgt Patterson, Pros. Ex. 10, raised the stakes and made it more important for SSgt Patterson to have expert assistance in analyzing this evidence.

The ultimately introduced videos which purportedly captured audio of some of the charged misconduct were linchpins of the Government's case, as was S.E.'s credibility as a witness. *See* R. at 887–94 (Trial Counsel describing the videos in detail during argument on findings after characterizing them as "incredible, great evidence"). The government tries to argue around the fact that this evidence played a pivotal role by claiming digital forensics were not the linchpin of its case because "[t]he prosecution neither employed an expert nor presented scientific evidence." Ans. at 38. This argument ignores the importance of the evidence itself—the admitted videos—and the need for expert assistance in addressing that evidence. Allowing the Government to prevent the Defense from receiving expert assistance by choosing not to utilize expert assistance itself enabled the Government to present key evidence without it being fully challenged. It also avoided any issues from the peculiar manner that the Government received the evidence. Denying the Defense the opportunity to fully address this digital evidence, and challenge its source, with

expert assistance resulted in a fundamentally unfair trial,[3] and this Court should set aside the findings of guilty as to the affected offenses.

WHEREFORE, SSgt Patterson respectfully requests that this Honorable Court set aside the findings of guilty as to Specifications 2 and 3 of Charge I and order a sentence rehearing.

IV.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPROPERLY ARGUING THAT SSGT PATTERSON SHOULD BE SENTENCED FOR UNCHARGED MISCONDUCT.

As the military judge instructed the members, SSgt Patterson could "be sentenced only for the offenses of which he has been found guilty." R. at 965. Despite acknowledging this, the Government endorses sentencing him based on much more by arguing that the additional uncharged sexual misconduct emphasized by Trial Counsel in presentencing arguments was proper because it "evinced a continuous course of conduct on Appellant's part." Ans. At 42.

SSgt Patterson was not found guilty of a continuous course of conduct; he was found guilty of discrete acts. *See* R. at 940; DD Form 458, *Charge Sheet*. If the Government wanted to sentence him based on a continuous course of conduct, as it now argues, it needed to charge him with that course of conduct, secure a conviction by proving it beyond a reasonable doubt, and then argue for a sentence based upon it. The Government did not do this, perhaps because doing so would have prevented it from utilizing propensity arguments made by Trial Counsel during findings. *See* R. at 877, 881–82, 887 (using Mil. R. Evid. 413 and 414 evidence to argue SSgt Patterson has a propensity to commit sexual offenses). Permitting the Trial Counsel to use the uncharged misconduct when arguing for a sentence lets the Government have it both ways: it can make these

[3] SSgt Patterson concurs with the statement in the Government's answer that "[t]he denial did result in a fundamentally unfair trial." Ans. at iii, 37. However, SSgt Patterson also recognizes that this statement is contrary to the rest of the Government's argument.

propensity arguments without violating *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) (prohibiting the use of charged sexual misconduct as propensity evidence for other charged sexual misconduct under Mil. R. Evid. 413), but then it can also use that uncharged misconduct to argue for a greater sentence. This goes beyond any permissible use for such evidence at sentencing. *See United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) ("there is a need for procedural safeguards to delimit the use of [Mil. R. Evid. 414] evidence").

The Trial Counsel's improper sentencing argument prejudiced SSgt Patterson. The Government attempts to avoid this conclusion by minimizing the impact of these arguments with faulty reasoning. Ans. at 45–47. First, the Government exaggerates the overall length of the Trial Counsel's sentencing arguments, claiming it goes through page 975 of the record when it actually ends at the very top of page 974. Ans. at 45, R. at 974. This is not a trivial distinction because it allows the Government to claim the entire argument spanned five pages of the transcript, when a close reading shows it really took slightly more than three and a half pages. Ans. at 45; R. at 970–974. By exaggerating the length of this short argument, the Government seeks to diminish the apparent frequency with which the improper arguments appear, lessening the severity. This Court should not be persuaded. These arguments loom large on two of the three and a half pages of sentencing argument, a frequent occurrence that makes this misconduct severe. R. at 971–72; *see also United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005); *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007).

Additionally, the government claims the sentence itself shows the minimal impact of this argument because it was less than the sentence for which the Trial Counsel asked. Ans. at 47. The fact that members still found the Trial Counsel's requested sentence excessive despite the improper argument does not mean it had no effect. Neither the Government nor this Court can know whether

SSgt Patterson would have received a lesser sentence had the members not been exposed to improper argument. *See United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006) (Baker, J., concurring in the result) ("we cannot actually know how a military judge or a panel of members would have sentenced an appellant following a change in factual circumstances"). Consequently, this Court should order a sentence rehearing.

WHEREFORE, SSgt Patterson respectfully requests that this Honorable Court set aside the sentence and order a sentence rehearing.

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 4 June 2024.

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