IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (SSgt)	)	No. ACM 40411
LUKE A. SCOTT	)	
United States Air Force	)	20 March 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for the 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 **6 June 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 42 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,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

21 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (SECOND)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (SSgt)	)	No. ACM 40411
LUKE A. SCOTT	)	
United States Air Force	)	25 May 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (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 **6 July 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

On 25-30 April and 2-3 May 2022, at Misawa Air Base, Japan and Buckley Space Force Base, Colorado, Appellant was tried by a General Court-Martial composed of officers. Record (R.) at 14; Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Luke A. Scott*, dated 8 July 2022 (EOJ). He was convicted of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ) and one charge and two specifications of assault in violation of Article 128, UCMJ.[1] R. at Vol. 1, EOJ. The military judge sentenced Appellant to 30 months confinement, reduction to the grade of E-1, and

[1] Appellant was acquitted of one specification in violation of Article 120, UCMJ, two specifications of assault in violation of Article 128, UCMJ, and one specification of indecent conduct in violation of Article 134, UCMJ. R. at Vol. 1, EOJ.

dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence in the case, denied Appellant's request to defer his reduction in rank, and granted waiver of automatic forfeitures for a period of six months for the benefit of his dependent child. R. at Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Luke A. Scott*, 35th Security Forces Squadron, Misawa Air Base, Japan. The record of trial consists of 14 prosecution exhibits, 14 defense exhibits, 55 appellate exhibits, and one court exhibit; the transcript is 1599 pages. Appellant is currently confined.

Through no fault of Appellant's, Maj Fleszar has been working on other assigned matters and has not yet started review of Appellant's case. Maj Fleszar will be commencing terminal leave and will be unable to complete review of the case prior to terminal leave. Maj Bosner has just been assigned as new counsel for Appellant, and has similarly not yet started review of Appellant's case. Through no fault of Appellant's, undersigned counsel have been working on other assigned matters and have not yet started review of Appellant's case. Accordingly, an enlargement of time is necessary to allow Maj Bosner to 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,

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

DAVID L. BOSNER, 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 25 May 2023.

Respectfully submitted,

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

31 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 May 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	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) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 August 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	28 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 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his 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 **4 September 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined.

Counsel is currently assigned 38 cases; 18 cases are pending initial AOEs before this Court. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet completed review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors. In full disclosure to the Court, it is likely undersigned counsel will not get this AOE brief filed with this Court before his upcoming reassignment, at which time the case will be transferred to a new attorney. At least six cases have priority over the present case:

1. *United States v. Leipart*, ACM 39711, Misc. Dkt. No. 2021-03: The CAAF granted review on 20 July 2023. The Brief on Behalf of Appellant is due on 21 August 2023.
2. *United States v. Martinez*, ACM 39973: After the CAAF's decision in *United States v. Anderson*, __ M.J. __, 2023 CAAF LEXIS 439 (C.A.A.F. 29 Jun. 2023), counsel is preparing a consolidated petition for a writ of certiorari to file at the Supreme Court of the United States.
3. *United States v. Thompson*, ACM 40019 (rem): The appellant's supplement to the petition for grant of review is due to the CAAF on 2 August 2023.
4. *United States v. Daddario*, ACM 40351: Counsel will draft a reply brief for this Court in August 2023.
5. *United States v. Nestor*, ACM 40250: The appellant's petition for grant of review is due to the CAAF on 29 August 2023.

6. *United States v. Daughma*, ACM 40385: The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 28 July 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

28 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 July 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	23 August 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his 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 **4 October 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 198 days have elapsed. On the date requested, 240 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined.

Counsel is currently assigned 11 cases; 8 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun reviewing the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has begun reviewing the record of trial.

Through no fault of Appellant, the undersigned counsel was newly detailed to represent Appellant on 28 July 2023. Counsel's initial review of the ROT remains ongoing in light of the ROT's high volume. Additionally, the undersigned counsel has been working on other assigned matters. These other matters include a previous detailing as trial defense counsel in the matter of *United States v. TSgt Samoy Young*, a special court-martial docketed to take place at Osan Air Base, Republic of Korea beginning on 11 September 2023 for approximately five days.

Accordingly, an enlargement of time is necessary to allow the undersigned 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 August 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke A. SCOTT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 August 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 25th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **4 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, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411 23 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Captain Michael Bruzik has been detailed substitute counsel in undersigned counsel's stead; a notice of appearance will be filed within ten days of this motion. A thorough turnover of the record between counsel has been completed. The undersigned counsel will be departing from the Air Force Appellate Defense Division and beginning a new assignment on 5 September 2023.

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,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 August 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	28 September 2023

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

Pursuant to Rule 23.3(m)(3), (6), and (7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Counsel is filing this motion out of time because the original Motion for Enlargement of Time (Sixth), filed on 27 September 2023, contained a scrivener's error in the calculation of elapsed days from when the record of trial was docketed with this court and was missing certain information in the justification for the enlargement. Counsel respectfully withdraws the motion filed on 27 September 2023. Appellant requests an enlargement for a period of 30 days, which will end on **3 November 2023**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 234 days have elapsed. On the date requested, 270 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct,

in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 11 cases; 8 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun reviewing the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has begun reviewing the record of trial.

Through no fault of Appellant, the undersigned counsel was newly detailed to represent Appellant on 28 July 2023. Counsel's initial review of the ROT remains ongoing in light of the ROT's high volume. Additionally, the undersigned counsel has been working on other assigned matters. These other matters include a previous detailing as trial defense counsel in the matter of *United States v. TSgt Samoy Young*, a special court-martial that took placed at Osan Air Base during the week of 11 September 2023. Counsel returned from this overseas temporary duty . Accordingly, an enlargement of time is necessary to allow the undersigned 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 28 September 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

2 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME - OUT OF TIME ACM 40411 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time, Out 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 2 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,*	)	**MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	27 October 2023

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

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

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 10 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun reviewing the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been unable to continue further in-depth review of and prepare a brief for Appellant's case. Undersigned counsel has completed an initial review of the ROT and begun drafting materials for the assignment of error. However, given the large volume of the ROT, further time is necessary to fully analyze the case.

Undersigned counsel was on temporary duty for training

Additionally, counsel has been focusing his efforts on completion of a response to a petition for extraordinary relief before this Court in the matter of *In re RW v. United States*, due 30 October 2023. Accordingly, an enlargement of time is necessary to allow the undersigned counsel to further 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 27 October 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

30 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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 30 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,*	)	**MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	26 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 his 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 **2 January 2024**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has hindered his ability to complete work on Appellant's case. Undersigned counsel has begun drafting an AOE and continues to work diligently on its completion, while balancing other pressing matters. Accordingly, an enlargement of time is necessary to allow undersigned counsel to continue advising Appellant regarding potential errors and to fully draft an AOE.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 26 November 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

27 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

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

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 27 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,*	)	**MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	22 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 his 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 **1 February 2024**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 319 days have elapsed. Appellant withdraws the motion for enlargement of time originally submitted on 22 December 2023 and submits this renewed motion in order to correct the time that had elapsed between docketing and the present, which was erroneously described as 318 days. On the date requested, 360 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more

specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial and is intending to submit a dispositive motion.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has hindered his ability to complete work on Appellant's case. Undersigned counsel has begun drafting an AOE and continues to work diligently on its completion, while balancing other

pressing matters. These other matters include submitting a petition and supplement for review before the Court of Appeals for the Armed Forces in the matter of *United States v. Holt*. Additionally, counsel will be on leave . Counsel's hope and intention is to submit the AOE without any further requests for enlargement of time following this one. Accordingly, an enlargement of time is necessary to allow undersigned counsel to continue advising Appellant regarding potential errors and to fully draft an AOE.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 December 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 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.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 December 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke A. SCOTT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 22 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time Out of Time (Ninth) 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 28th day of December, 2023,

ORDERED:

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

It is further ordered:

At the time of filing further enlargement of time, in addition to matters required by the court's rules and by prior orders of the court, Appellant's counsel will also identify the assignments of error Appellant reasonably expects to raise to the court, recognizing such identification will not bind or constrain Appellant with respect to which assignments he ultimately raises.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	25 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 his 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 **2 March 2024**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.
3) *United States v. Bates*, ACM S32752 – The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been unable to complete work on an assignment of error despite diligent efforts to do so due to other pressing matters. This includes submission of a petition and supplement for review before the Court of Appeals for the Armed Forces in the matter of *U.S. v. Holt*, ACM ACM 40390. This submission is due on the second week of February. Additionally, undersigned counsel is also at work on a petition and supplement for review

before that court in the matter of *United States v. Zier*, ACM 21014. Moreover, counsel will be providing training for two trial defense districts on 5 February 2024. Despite this, undersigned counsel is hard at work on an assignment of error while also balancing other cases before this Court that have had long lifespans. Accordingly, an enlargement of time is necessary to allow undersigned counsel to continue advising Appellant regarding potential errors and to fully draft an AOE.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 25 January 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

29 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 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.

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 29 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke A. SCOTT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 25 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 31 January 2024 to discuss the progress of Appellant's case. Lieutenant Colonel (Lt Col) J. Pete Ferrell represented the Government, and Captain Michael Bruzik represented Appellant. Lt Col Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division. Appellant's counsel believed there would be eight or nine assignments of error raised on appeal and that this request would likely be the last request for an enlargement of time in this case, if granted.

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 1st day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **2 March 2024**.

Appellant's counsel is advised that given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **LUKE A. SCOTT,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40411 9 February 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following appellate exhibits:

- Appellate Exhibit XIV – "Defense Notice and Motion to Admit Evidence under M.R.E. 412, (J.K.)";
- Appellate Exhibit XV – Government Response to Defense Motion to Admit M.R.E. 412 Evidence, (J.K.); and
- Appellate Exhibit XVI – Victim (J.K.) Response to Defense Motion to Admit M.R.E. 412 Evidence, (J.K.).

These exhibits are currently located in volume 11 of the original and base record of trial (ROT) copies. Additionally, undersigned counsel moves to examine pages 82-112 & 185-189 of the trial transcript, also located in volume of 11 of the original and base ROT copies.

The exhibits and transcript portions concern a defense motion for admission under Military Rule of Evidence (M.R.E.) 412 that was litigated and disposed of by the trial court. Given the absence of M.R.E. 412 evidence presented on the record, it is presumable that the military judge denied the defense motion which could have had an impact on the findings of the court-martial. Both trial counsel and trial defense counsel had access to the exhibits and were present during the closed session. (R. at 81.)

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether the military judge's ruling on the defense motion was erroneous.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine "the entire record."

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

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his

duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing these exhibits and transcript pages.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 9 February 2024.

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40411 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Materials. The United States does not object to Appellant's counsel reviewing the named appellate exhibits and sealed transcript pages, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke A. SCOTT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 9 February 2024, counsel for Appellant submitted a Motion to Examine Sealed Materials. Specifically, counsel seeks to examine Appellate Exhibits XIV–XVI, and trial transcript pages 82–112 and 185–189. The Government does not oppose the motion as long as its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 9th day of February, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view, **Appellate Exhibits XIV–XVI**, and t**rial transcript pages 82–112** and **185–189** 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

apt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	23 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 his eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 7 days, which will end on **9 March 2024**. The record of trial was docketed with this Court on 6 February 2023. From the date of docketing to the present date, 382 days have elapsed. On the date requested, 397 days will have elapsed.

On 25-30 April and 2-3 May 2022, Appellant was tried by a general court-martial at Misawa Air Base, Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 16, 1519. The members acquitted Appellant of one charge and one specification of indecent conduct, in violation of Article 134, UCMJ, one specification under Article 120, UCMJ, and two more specifications under Article 128, UCMJ. *Id*. The court-martial sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. R. at 1598.

The record of trial consists of eight volumes. The transcript is 1,599 pages. There are 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, this one has highest priority. The undersigned counsel's three other high priority cases include the following:

1) *United States v. Schneider*, ACM 40403 - The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has reviewed the record of trial.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.
3) *United States v. Bates*, ACM S32752 – The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has yet to finalize the assignment of errors for internal leadership review and submission to this Court. Undersigned counsel has been working closely with Appellant to ensure he is satisfied with the issues identified and briefed. This

process has been complicated by Appellant's continued confinement which makes communication difficult.

Counsel anticipates that the following issues will be argued in the assignment of errors:

- Legal insufficiency
- Factual insufficiency
- Improper Denial of Motion to Suppress Statements (Article 31)
- Improper Panel Composition
- Speedy Post-Trial Processing
- Prosecutorial Misconduct
- Unanimous Verdict
- Sentence Appropriateness

Counsel has been hard at work and has completed roughly 70% of the brief. However, the sections on speedy appellate review, prosecutorial misconduct, and sentence appropriateness remain incomplete.

Exceptional circumstances exist so as to warrant granting this final enlargement of time. In particular, undersigned counsel had to resolve issues specified by this Court in *United States v. Thomas*, ACM S32748. Additionally, counsel has been at work on a supplement to a petition for review before the Court of Appeals for the Armed Forces in the matter of *United States v. Holt*, ACM 40390. Both of these matters ended up taking considerably more time than anticipated during the status conference on 29 January 2024. The net result of this has been less opportunity for undersigned counsel to work on Appellant's brief.

Undersigned counsel will not be asking for any additional enlargements of time. However, an enlargement of time is necessary to allow undersigned counsel to continue advising Appellant regarding potential errors and to finalize the assignment of errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 February 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

26 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40411 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 397 days in length. Appellant's 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 26 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

LUKE A. SCOTT,
Staff Sergeant (E-5),
United States Air Force
Appellant.

No. ACM 40411

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **LUKE A. SCOTT** United States Air Force *Appellant*	)	No. ACM 40411 11 March 2024

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

Assignment of Errors

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS SSGT SCOTT'S STATEMENTS TAKEN BY A COMMAND STAFF MEMBER IN VIOLATION OF ARTICLE 31, UCMJ.

II.

WHETHER THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE MAJORITY OF THE MEMBERS BEING FROM A DIFFERENT ARMED SERVICE FROM SSGT SCOTT.

III.

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION FOR AGGRAVATED ASSAULT CONSUMATED BY BATTERY BY STRAGULATION.

IV.

WHETHER SSGT SCOTT'S CONVICTIONS FOR SEXUAL ASSAULT, ASSAULT CONSUMMATED BY BATTERY, AND AGGRAVATED ASSAULT ARE FACTUALLY INSUFFICIENT.

V.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL ERROR BY SHIFTING THE BURDEN DURING CLOSING ARGUMENT BY ASSERTING TO THE PANEL THAT SSGT SCOTT HAD THE BURDEN OF PROVING CONSENT.

VI.

WHETHER SSGT SCOTT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

VII.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION FOR UNANIMOUS VERDICT.

VIII.[1]

WHETHER THE SENTENCE IMPOSED AGAINST SSGT SCOTT WAS EXCESSIVE.

Statement of the Case

On 25-30 April and 2-3 May 2022, Staff Sergeant (SSgt) Luke A. Scott was tried by a general court-martial at Misawa Air Base (AB), Japan, and Buckley Space Force Base, Colorado. Contrary to his pleas, a panel of officer members convicted Appellant of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2018) and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018); and one specification of aggravated assault by strangulation in

[1] Issues VIII is raised in the Appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

violation of Article 128, UCMJ. (R. at 16, 1519.) Each of these offenses named J.K. as the victim. (Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 8 July 2022.) The military judge sentenced Appellant to reduction to E-1, a total of 30 months confinement, and a dishonorable discharge. (R. at 1598.) The convening authority took no action on the findings but granted SSgt Scott's request to have automatic forfeitures waived for six months to be paid to the mother of his son for the child's benefit. (ROT Vol. 1, EOJ.)

Statement of Facts

The Appellant, SSgt Luke A. Scott, began his career with the United States Air Force on 14 January 2014. As a member of the security forces career field, SSgt Scott found his calling as an instructor with Combat Arms Training & Maintenance (CATM). (Def. Ex. N, at 2). SSgt Scott Particularly thrived as a teacher and enjoyed working directly with other Airmen. (*Id.*) SSgt Scott received numerous accolades, including the Commandant's Award at Airman Leadership School. (*Id.* at 3.) SSgt Scott balanced his career aspirations while helping raise his son, who was only five years old at the time of the court-martial. (*Id.* at 2.) In 2017, SSgt Scott was excited to learn that he had received orders to Misawa AB, Japan. (*Id.* at 2.) From January 2018 to January 2021, he served as a CATM noncommissioned officer in charge.

SSgt Scott initially met J.K. after she was assigned to Misawa AB and the two became acquainted during a squadron physical training session. (R. at 1072-73.) J.K. worked directly for SSgt Scott's commander as the noncommissioned officer in charge of the commander's support staff (CSS). In this role, J.K. served as the commander's adjunct on administrative and other tasks. (R. at 48; 1069.) At trial, J.K. described her initial impression of SSgt Scott as a nice person. (R. at 1073.) SSgt and J.K. later played together on the same intermural volleyball and softballs teams. (R. at 1210.) The two would also communicate through Facebook messenger. (R. at 1166.)

Despite this, J.K. did not necessarily consider SSgt Scott a friend. (R. at 1081.) Rather, she considered him one of her members. (R. at 1071.)

On the evening of 28 September 2019, J.K. attended a going away event for Master Sergeant (MSgt) Diana Valdez, who was preparing for a deployment. (R. at 1073-72.) J.K. arrived by car, parking her vehicle by the main gate of the air base. (R. at 1073.) The evening began an at off-base hookah bar where J.K. consumed approximately one to two alcoholic beverages. (R. at 1074.) The group then went to a karaoke bar where J.K. consumed an additional one to two alcoholic beverages. (R. at 1075.) J.K. described this level of alcoholic consumption as "unordinary" for her. (R. at 1193.) When leaving the karaoke bar, J.K. encountered SSgt Scott who was walking along the street back towards the base. (R. at 1076-77.) J.K. greeted SSgt Scott and asked what his plans were for the evening. (R. at 1077.) J.K. then asked SSgt Scott if she could spend the night at his residence, which was located on-base, to which SSgt Scott agreed. (R. at 1077.) J.K. committed to this despite the availability of taxi service, which could have taken her home had she been concerned about her alcohol consumption impacting her ability to drive. (R. at 1078.)

J.K. testified that before arriving at SSgt Scott's home, SSgt Scott stopped at the enlisted club to get a car ride from the volunteers with the Airmen Against Drunk Driving Program. (R. at 1078.) J.K. waited for SSgt Scott while sitting in her car, which had remained parked by the main gate. (R. at 1087.) On cross-examination, J.K. provided a different sequence of events. She testified that she first encountered SSgt Scott outside of a restaurant called "Tubes." (R. at 1161.) Following this, SSgt Scott went into a bar off-base while J.K. waited for him in her parked car for approximately ten minutes. (R. at 1163.) While waiting, J.K. texted with SSgt Scott concerning her whereabouts and to ensure that he would meet back up with her by the main gate. (*Id.*)

Once at SSgt Scott's residence, J.K. declined to sleep on the couch and instead joined SSgt Scott in his bedroom. J.K. rationalized that "it had been awhile, since I had had an opportunity to make out with a guy or just be around a guy." (R. at 1088.) J.K. got into bed with SSgt Scott and took off the flannel top that she had been wearing. (R. at 1169.) Following this J.K. began consensually kissing SSgt Scott. (R. at 1171.) While kissing, SSgt Scott attempted to move J.K. on top of his body to straddle him, although J.K.'s tight jeans prevented that. (R. at 1089.) J.K. initially kept her hand on the button of her jeans so that it could not be undone. (*Id.*) The two rolled around in bed, until SSgt Scott said, "fine, I'm tired," and got up to go to the bathroom. (R. at 1095.) J.K. changed out of her jeans into a pair of gym shorts that SSgt Scott gave her, and she got in bed with SSgt Scott. (R. at 1090; 1180.) Following this, SSgt Scott once again attempted to place J.K. on top of him for her to straddle him. (R. at 1091.) During this interaction, SSgt Scott inserted his finger into J.K.'s vagina before J.K. pushed him away with her leg, after which SSgt Scott ceased in his advances by stating that he had no intention of raping her. (*Id.*) J.K. could not recall at trial how SSgt Scott managed to place his finger inside her vagina while she was still wearing the gym shorts and underwear. (R. at 1098.) Shortly after, J.K. grabbed her things and left the apartment while SSgt Scott was asleep. (R. at 1101.)

Upon waking up and learning that J.K. was no longer in his home, SSgt Scott texted J.K. to ask if she was alright. J.K. replied, "I really didn't go home with you expecting to hook up at all. I thought I could trust you because you're a great guy. And I know it was my decision and my decision to get in your bed. But you didn't listen." (Pros. Ex. 4, at 3.) SSgt Scott responded, "Yeah I guess I might have read different signs last night. You can trust me but I guess I was on a different page. I didn't mean to hurt you." (*Id.*) Despite this, the two continued to play intermural volleyball and softball together. (R. at 1210.)

Some time later, SSgt Scott was placed under investigation by Air Force Office of Special Investigations (AFOSI) based on allegations made by C.G.[2] J.K. learned that SSgt Scott was under investigation. (R. at 1112.) Specifically, she became aware that SSgt Scott had been placed on a "do not arm" status due to the investigation and utilized her position as CSS to deduce that his date of expected return from overseas (DEROS) date had been extended. (*Id.*) J.K. reached out to her friend who was a member of the Government legal office responsible for prosecuting SSgt Scott. (R. at 1202-03; 1222.) The member of the legal office provided details about the investigation with C.G., which J.K. instantly said she believed as true. (*Id.*) J.K. testified at trial that after learning about the allegations, she believed it was her responsibility to protect C.G. "and any women in the future." (R. at 1114.) Speaking with her best friend, A.R., J.K. explained that she wanted to "nail this motherfucker." (R. at 1235.)

J.K. then went to OSI with her own set of accusations against SSgt Scott. The reporting of these allegations was roughly 18 months after they had supposedly happened. (R. at 1112-13.) J.K. accused SSgt Scott of wrestling with her in bed while persistently trying to get her to have sex, and digitally penetrating her vagina without her consent. (R. at 1090-91.) J.K. testified that throughout this interaction she verbally refused SSgt Scott's advances. (R. at 1093.)

AFOSI interviewed J.K. (R. at 1170.) Near the end of that interview, J.K. said that SSgt Scott had placed his hand on her neck, but that she had "totally forgot" until that very moment. (R. at 1173.) But interviewed by trial counsel prior to the court-martial, J.K. explained that SSgt Scott's hand did not obstruct her airway. (R. at 1174.) At trial, J.K. again denied that SSgt Scott's

[2] C.G.'s allegations against SSgt Scott formed the basis for Charge I, Specification 2; Charge II, Specifications 3 & 4; and the lone specification under Charge III. SSgt Scott was acquitted by the panel of all specifications naming C.G. as victim.

hand prevented her from breathing or that it caused her to feel as though she was going to black out or lose consciousness. (R. at 1096-97.)

Additional relevant facts to each assignment of error are included in the respective argument sections below.

Argument

I.

THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS SSGT SCOTT'S STATEMENTS TAKEN BY A COMMAND STAFF MEMBER IN VIOLATION OF ARTICLE 31, UCMJ.

Additional Facts

After J.K. reported her allegations against SSgt Scott, AFOSI Special Agent (SA) J.B. interrogated SSgt Scott. (R. at 33; 174.) SSgt Scott invoked his right to remain silent and requested legal counsel. (*Id.*)

Following the terminated interview, SA J.B. enlisted J.K. to try and re-engage with SSgt Scott (R. at 30.) In deciding where this follow-up conversation would take place, J.K.'s CSS office was selected, in part, because it would serve as a controlled environment. (R. at 35.) J.K.'s office was located in close proximity to the squadron commander and the chief. (*Id.*) Under typical circumstances, individuals would stop by J.K.'s office in anticipation of talking with unit leadership. (*Id.*) As CSS, J.K. possessed the authority to notify members that they had to appear in her office for command related functions, and that compliance would be mandatory. (R. at 40.)

After agreeing to work with SA J.B., J.K. understood her official duties to include assisting in the investigation against SSgt Scott. (R. at 50.) Prior to the meeting, AFOSI agents fitted J.K.'s office with microphones and cameras to record the planned encounter. (R. at 1204-1205.) SA J.B. understood that this method of engaging with SSgt Scott would circumvent the provision of an

Article 31 rights advisement. (R. at 36.) J.K. received instructions from AFOSI for how to carry out the conversation, namely to try and "get him to talk about the situation." (R. at 57.) The investigative plan involved SSgt Scott meeting with J.K. at her office under the guise of an order for him to appear. (R. at 32.) On 20 January 2023, J.K. coordinated with SSgt Scott's direct supervisor to secure SSgt Scott's presence. (R. at 58.) Specifically, J.K. told the supervisor that "we need[ed] to see [SSgt Scott]." (R at 58.) At trial, the Government acknowledged that this was a coercive method. (R. at 1399.) The notification relayed by SSgt Scott's supervisor provided no other context other than for him to appear at the CSS's office.

Once SSgt Scott arrived at J.K.'s office, J.K. instructed SSgt Scott to close the door to her office. (Pros. Ex. 7 at 00:02.) Before questioning SSgt Scott, J.K. explained that she had become aware of his "do not arm status" and DEROS extension, both matters within her purview as CSS. (*Id.* at 00:15.) J.K. further indicated that no one in the unit knew what was going on and she needed an explanation. (*Id.*) J.K. then began questioning SSgt Scott, including the following inquiries and comments:

- I just need to know if it was involving another female, like what happened with you and me? (R at 1400.)
- "So it wasn't like what happened with you and me?" (R. at 1401.)
- "At all?" (*Id.*)
- "Promise me that you did not, like wrestle with her." (R. at 1405.)
- "You didn't hold her down . . . like you held me down?" (R. at 1405-06.)
- "Or choke her like you choked me?" (R. at 1406.)
- "Do you promise?" (*Id.*)
- "But you did say you'd never do it again." (*Id.*)

At no point did J.K. provide SSgt Scott with a rights advisement under Article 31. Nor was SSgt Scott provided any explanation for why he was ordered to appear before J.K. that would give any context other than the questions she asked him. Although J.K. testified that the meeting was designed to appear like an order for random urinalysis selection, J.K. never instructed SSgt Scott to complete any of the drug testing sign in procedures, nor was that articulated in the notification. (R. at 62.) To the contrary, J.K. explained to SSgt Scott that he was not there for random urinalysis. (R. at 80.) Rather, their entire meeting consisted of J.K. questioning SSgt Scott. When asked by SSgt Scott if there were microphones in the room, J.K. lied and denied that there was any recording equipment. (R. at 1120.) When further asked by SSgt Scott if J.K. had spoken with AFOSI, J.K. falsely denied her involvement. (*Id.*)

At trial, the video recording of J.K.'s questioning of SSgt Scott played a prominent role in the Government's case. During their opening statement, the prosecution played a portion of the video recording and presented SSgt Scott's statements as an admission of the accusations made against him by J.K. (R. at 849-50.) The recording was played again in its entirety during J.K.'s direct testimony. (R. at 1117.) In closing argument, the Government argued that SSgt Scott agreed with J.K. that her accusations against him were true during the recorded interrogation. (R. at 1398.) Following this, the prosecution again played the excerpts from the video clip. (R. at 1402.) After this third presentation of the video clip, the Government argued that SSgt Scott "acknowledg[ed] that he committed a wrong against [J.K.]." (R. at 1403.) Moreover, the Government emphasized an exchange in which J.K. stated "what you did to me was wrong," to which SSgt Scott replied, "Yeah. No, I a hundred percent agree." (R. at 1408.)

Before arraignment, trial defense counsel moved to suppress the recording on the basis that it was taken in violation of Article 31, UCMJ, principally due to the fact that J.K. never

provided SSgt Scott a rights advisement. The military judge denied the motion. Although finding that J.K. was, in fact, acting in an official disciplinary capacity, the military judge found that no reasonable person in SSgt Scott's position would have believed she was questioning him in an official disciplinary capacity. (R. at 183-84.)

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). When the basis of the motion to suppress rests on the grounds that no rights advisement was given, this Court reviews the military judge's findings of fact on a clearly-erroneous standard, while conclusions of law are reviewed *de novo*. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000). Mixed questions of law and fact are resolved under the abuse of discretion standard by examining findings of fact for whether they are clearly erroneous, and conclusion of law for whether they are incorrect. *Ayala*, 43 M.J. at 298.

Law & Analysis

No person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. Amend. V. Similarly, "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article 31(a), UCMJ, 10 U.S.C. § 831(a). Furthermore:

> No person subject to [Article 31] may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspect and that any statement made by him may be used as evidence against him in a trial by court-martial. 10 U.S.C. § 831(b).

The Fifth Amendment taken in tandem with Article 31 provides a level of protection unparalleled in the civilian sector. *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2022) (*quoting United States v. Mapes*, 59 M.J. 60, 65 (C.A.A.F. 2003)).

Per Mil. R. Evid. 304(a), "an involuntary statement from the accused . . . is inadmissible at trial" except under the circumstances described in M.R.E. 304(e). An "involuntary statement" is one "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." M.R.E. 304(a)(1)(A). "A statement obtained from an accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible . . . ." M.R.E. 305(c)(1).

Article 31 warnings are therefore required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). Facially, Article 31 offers a broad sweeping prohibition against all questioning by members subject to the code who suspect the individual being questioned of an offense. However, the Court of Appeals for the Armed Forces (C.A.A.F.) has interpreted this provision to only apply where the questioner is acting in a law enforcement or disciplinary capacity. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).

In *United States v. Jones*, C.A.A.F. articulated a two-part test for determining whether the questioner was acting in a law enforcement or disciplinary capacity. This includes (1) whether the person questioning was in fact acting in an official capacity, and (2) whether a reasonable person in the accused position would believe that the questioner was acting in official capacity. 73 M.J. at 361-62. This determination is made by assessing all the facts and circumstances at the time of

the interview. *United States v. Ramos*, 76 M.J. 372, 376 (C.A.A.F. 2017). In dicta, the *Jones* court said that "[t]his objective standard on its face is potentially problematic in relation to the use of undercover officers or informants who clearly act in an official capacity." *Id.* at n.5. Moreover, the court reasoned that a rights advisement might still be necessary under that context "where a reasonable person in the accused's position would feel compelled to reply to questions." *Id.* Similarly, a reasonable person may feel compelled to answer questions where the environment that the questioning takes place in is coercive. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). This Court has recognized that a supervisory order for a member to speak with a victim is a troubling factor in this calculation. *United States v. Rios*, 45 M.J. 558, 564 (A.F. Ct. Crim. App. 1997), *aff'd on other grounds*, 48 M.J. 261 (C.A.A.F. 1998).

"Questioning by a military superior in the immediate chain of command 'will normally be presumed to be for disciplinary purposes.'" *Swift* 53 M.J. at 446 (*quoting United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991)). This pressure can be manifest through "rank, duty, or other similar relationship." *United States v. Duga*, 10 M.J. 206, 210 (C.A.A.F. 1981).

A. *The Military Judge Misapplied the* Jones *Test.*

Although not specifically addressed by the military judge, the record abundantly supports the conclusion that J.K. was subject to the UCMJ by virtue of her status as a member of the United States Air Force. Moreover, the record demonstrates that J.K. suspected SSgt Scott of an offense and her questioning was intended to illicit statements from SSgt Scott concerning those allegations. The military judge correctly analyzed the first prong of the *Jones* test to find that J.K. was acting in an official law enforcement capacity. In particular, the military judge concluded:

> J.K. was participating in an official law enforcement investigation. OSI had already opened an investigation into the accused's alleged assault of [C.G.], prior to J.K. becoming involved. J.K. did not approach OSI with her desire to

> gather information from the accused. Rather, she became involved at the request of Special Agent J.B.

(R. at 180.)

But the military judge abused his discretion when addressing the second prong of *Jones*. Namely, the military judge misapplied the facts to reach the erroneous conclusion that a reasonable person would not have understood that J.K. was acting in official capacity based on the conversation having been pretextual.

1. *SSgt Scott Was Entitled to the Command Presumption of J.K.'s Disciplinary Capacity*

The military judge's assessment that J.K.'s questioning was merely a pretext conversation was erroneous. The circumstances reasonably created the perception that J.K. was using her command staff position to compel SSgt Scott's participation. The conversation was not casual, which might have precluded the need for a rights advisement.

Although J.K.'s role as CSS had administrative functions, her interrogation of SSgt Scott used those functions in a way that was perceptively disciplinary. An intermingling of administrative duties with disciplinary intentions does not absolve a questioner of providing a rights advisement. In *United States v. Swift*, a unit first sergeant suspected the accused of committing bigamy. 53 M.J. at 448. The first sergeant reviewed the bigamy provisions of the UCMJ prior to calling Swift to his office under the auspices of resolving administrative matters related to Swift's marital status. *Id.* at 443. The first sergeant asked Swift to provide "his side of the story" without a rights advisement. C.A.A.F. held that the administrative aspects of the first sergeant's duty position where insufficient to overcome the presumption that Swift was compelled to speak due to his questioners membership on the command staff. *Id.* at 447.

Similarly, J.K.'s use of her role as a command staff member creates the presumption that SSgt Scott was compelled to answer questions. This presumption is not overcome by J.K.'s

administrative duties. To the contrary, her position was used as a coercive mechanism to bring SSgt Scott in and question him. The military judge recognized this, in part, by acknowledging that J.K. functioned in "support of the commander." (R. at 175.) Using this role, J.K. coordinated with SSgt Scott's supervisor to order his appearance in her office. This vague order gave no context for why he needed to appear. However, once arriving he was instructed to close the door. Moreover, J.K. prefaced her questions based on information specific to her role as CSS, namely SSgt Scott's "do not arm" status and his DEROS. J.K. asked her questions in an interrogating manner. All of this created the reasonable appearance that SSgt Scott was being questioned under the weight of J.K.'s command staff position. SSgt Scott appeared to recognize this by asking J.K. if she was working with AFOSI, and whether the conversation was being recorded. Given J.K.'s explicit use of her role on the command staff, SSgt Scott was entitled to the disciplinary presumption and a rights advisement.

2. *Command Presumption Aside, a Reasonable Person Would Have Concluded That J.K.'s Interrogation of SSgt Scott was Done in an Official Capacity*

Assuming, without conceding, that the disciplinary presumption does not apply by virtue of J.K.'s duty position, the manner in which J.K. questioned SSgt Scott supports the reasonable belief that she was acting in an official capacity. The coercive environment that J.K. questioned SSgt Scott in was underscored by the interrogative manner that she questioned him. *See United States v. Harpole*, 81 M.J. 8, 9-10 (C.A.A.F. 2021) (indicating that questioning by an informant made in an interrogating manner may create the reasonable perception that there is a disciplinary capacity at play).

Even where there is a non-duty relationship, which could be used as pretext, a conversation between an informant and an accused still requires a rights advisement were the conversation is "calculated to evoke incriminating responses." *United States v. Johnstone*, 5 M.J. 744, 747

(A.F.C.M.R. 1978) (finding unadvised questioning impermissible where informant acted at direction of OSI and asked questions designed to elicit admissions from accused). This is especially so where the questioning appears designed to evade a previous declination to answer questions. *Id.* at 747 ("We hold that the sending of [the informant] to accomplish precisely that which the OSI could not personally do rendered Stokes' conduct 'official' for purposes of Article 31, and the resultant incriminating admissions were, accordingly, inadmissible in evidence."). Rather, a valid pretext requires a far more casual interaction to circumvent Article 31's requirements. *See Jones* 73 M.J. at 362 (finding no reasonable perception of disciplinary capacity where questioner approached accused independent of law enforcement, accused locked door, and accused tried to enlist questioner in criminal enterprise); *United States v. Kmet*, No. ACM 38755, 2016 CCA LEXIS 339, *13 (A.F. Ct. Crim. App. June 2, 2016) (finding no reasonable perception of informant acting in an official capacity where informant and the appellant had a long history of close friendship, met in public place, and nature of questions gave appearance of trying to resolve conflict between the two and give victim closure).

Here, SSgt Scott was questioned in the purview of J.K.'s position on the command staff. Rather than being independently questioned, J.K. acted under the direction of AFOSI. The military judge seemingly agreed that SSgt Scott and J.K. did not have a friendly relationship, yet paradoxically found that their conversation was somehow casual in nature. (R. at 183.) This overlooks the interrogative methods employed by J.K. to illicit incriminating responses, which she employed under AFOSI's guidance. This created a situation where AFOSI used J.K. to do what they could not do on their own, after SSgt Scott evoked his right to remain silent. Moreover, they did so using J.K.'s official capacity.

United States v. Gilbreath is instructive. 74 M.J. 11, 2014 CAAF LEXIS 1206 (C.A.A.F. 2014). In that case, C.A.A.F. declined to find that a reasonable perception of official capacity was absent merely because the conversation had administrative undertones and was between friends. *Id.* at *20. In that case, Sgt Muratori was instructed by the officer in charge to question Gilbreath about a missing firearm. *Id.* Sgt Muratori suspected Gilbreath of taking the firearm due to his previous position in the armory. *Id.* at *5. Sgt Muratori called Gilbreath and asked him if knew anything about a missing firearm which had created a paperwork discrepancy. *Id.* Gilbreath responded by referencing the specific missing weapon and saying that it had been destroyed. *Id.* at *6. Following this, Sgt Muratori asked Gilbreath to "come clean," upon which Gilbreath confessed to stealing the weapon. *Id.* Sgt Muratori reported these results to the officer in charge. *Id*. C.A.A.F. rejected the notion that this was an informal conversation between friends that obviated Article 31. *Id.* at *19-20. In particular, the court noted that Sgt Muratori was acting at the behest of the officer in charge, to whom he reported the progress. *Id.* at 20. Moreover, Sgt Muratori used elicitation tactics to secure the confession. *Id.* C.A.A.F. found that these circumstances created the reasonable perception that Sgt Muratori was acting in an official capacity. *Id*.

Similarly, J.K. employed elicitation tactics when questioning SSgt Scott at the direction of AFOSI. J.K. used questions designed to get SSgt Scott to incriminate himself. Although Sgt Muratori and Gilbreath were friends, which may have lent itself to the conversation being more informal, here, J.K. denied that she had any friendship with SSgt Scott. In fact, J.K. referred to SSgt Scott as one of her members. The entire conversation took place through the lens of her official role as CSS. Applying *Gilbreath* demonstrates that a reasonable person would have perceived the conversation to be within an official disciplinary capacity.

3. *The Military Judge's Relied-Upon Case Law was Inapposite*

The military judge's reliance on *United States v. Rios* was misplaced. 48 M.J. 261 (C.A.A.F. 1998). In that case, the accused was directed by his commander to speak to the victim, his daughter, by phone. Despite this command direction, Rios testified that he was not thinking of his commander when talking to the victim. *Id.* at 264. The court found that Rios was not subject to command pressure when speaking on the phone with his daughter. 48 M.J. at 264. Like *Rios*, SSgt Scott was ordered by his supervisor to speak to J.K. However, her position as CSS reasonably created pressure for SSgt Scott to talk. Similarly, J.K.'s use of her official position, and her trappings of command authority, relegated her beyond that of an informant with no appearance of law enforcement capacity. *Cf. United States v. Parillo*, 31 M.J. 886 (A.F.C.M.R. 1990) (finding that no rights advisement necessary where informant had longstanding relationship with the accused). All of this was minimized by the military judges lone assessment that "one would not characterize their relationship as one between mutual friends." (R. at 183.)

B. *The Admission of the Recording was Prejudicial.*

Admission of the unlawfully obtained recording was substantially prejudicial to SSgt Scott. The assessment of prejudice depends on "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). The admission of a confession is prejudicial if, after reviewing the entire record of an individual case, "'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *United States v. Mott*, 72 M.J. 319, 332 (C.A.A.F. 2013) (*quoting United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). "Indeed, 'the defendant's own confession is probably the most

probative and damaging evidence that can be admitted against him.'" *United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296, (1991)).

Here, the Government's evidence without the recording was questionable at best. The case principally devolved into a question of J.K.'s credibility. *See infra* p. 28. To that end, SSgt Scott's statements could have easily been interpreted by the panel as a confession that resolved the credibility issues in favor of the prosecution. The Government seized on this by using the recording as a central component in their evidence, playing it for the panel three times. During closing argument, trial counsel asserted that the statements were a confession. Hence, had the video not been admitted, there is a reasonable probability that the remaining evidence would have been insufficient for the panel to convict SSgt Scott. For this reason, ruling of the trial court was erroneous.

WHEREFORE, SSgt Scott respectfully request that this Court set aside the findings and sentence for Charge I, Specification 1 and Charge II, Specifications 1 & 2.

II.

THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE MAJORITY OF THE MEMBERS BEING FROM A DIFFERENT ARMED SERVICE FROM SSGT SCOTT.

Additional Facts

On 7 April 2022, the convening authority issued an amended convening order changing the venue of SSgt Scott's court-martial from Misawa AB to Buckley Space Force Base. (R. at 820.) Although trial defense counsel consented the change of venue, they noted and preserved the opportunity to object should the panel not meet the requirements of R.C.M. 503. (R. at 821.) After the subsequent excusal of two members and the detailing of new members, the venire consisted of 10 Air Force officers and five Space Force officers. (R. at 820.) Following challenges for cause

and peremptory challenges, the panel dropped below the required number of eight members. (*Id.*) The convening authority then detailed six additional members—three Air Force officers and three Space Force officers. (*Id*.) After further challenges for cause and peremptory challenges, the panel was left with eight members. (R. at 821.) This included four Air Force officers and four Space Force officers, leaving the panel without a majority of members from SSgt Scott's same armed force. (*Id.*) Trial defense counsel objected to the non-majority panel and requested a stay of proceedings so the convening authority could detail new Air Force members. (R. at 776.) The military judge denied the motion. (R. at 833.)

Standard of Review

An error in the selection of court members is a question of law that is reviewed *de novo*. *United States v. Bartlett*, 66 M.J. 426, 427 (C.A.A.F. 2008).

Law & Analysis

"[C]ourt members are, unless properly waived, an indispensable jurisdictional element of a general court-martial." *United States v. King*, 83 M.J. 115, 121 (C.A.A.F. 2023) (*quoting United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978)). "Jurisdictional error occurs when a court-martial is not constituted in accordance with the UCMJ." *Id.* at 122 (*quoting United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008)). It is incumbent upon the convening authority to "detail not less than the number of members necessary to impanel the court-martial." Article 25, UCMJ, 10 USC 825(e)(3) (2018). In a general court-martial adjudicating a noncapital case, the panel must consist of eight members. Article 29, UCMJ, 10 USC § 829(b)(2)(B) (2018). A court-martial is not properly convened, and therefore without jurisdiction, where it is composed of members who are barred from participating by operation of law. *Adams* 66 M.J. at 258-259.

Article 25(a), UCMJ, provides that any commissioned officer is eligible to serve as a member for a court-martial, regardless of whether the accused is an enlisted or officer member. *Cf.* Article 25; 10 U.S.C. § 825(c)(1) (limiting participation of enlisted members a courts-martial panel where the accused is also enlisted). However, selection of court members is not unconstrained. Rather, Article 25, UCMJ, requires that the convening authority select members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 25(e)(2). Members may be detailed from a branch of service different than the accused. R.C.M. 503(a)(3). However, "[w]hen a court-martial composed of members of different armed forces is selected, at least a majority of the members should be the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the Service." R.C.M. 503(a)(3), Discussion.

"An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on unlawfully influencing a court-martial." *United States v. Bess*, 80 M.J. 1, 7 (C.A.A.F. 2020). However, courts-martial are not subject to the same jury requirements outlined in the Sixth Amendment of the United States Constitution. *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018). The primary deviation being that panel members are ultimately selected by the convening authority, rather than a cross-section of the community. *Id.* For this reason, "it is incumbent upon this Court to scrutinize carefully any deviations from the protections designed to provide an accused servicemember with a properly constituted panel." *Id.* (quoting *United States v. Upshaw*, 49 M.J. 111, 116 (C.A.A.F. 1998) (Effron, J., dissenting)).

SSgt Scott's court-martial lacked jurisdiction because the panel was improperly constituted. The panel lacked a majority of members from SSgt Scott's own armed force—the Air

Force—and the court found no exigent circumstances justifying this deviation from Rules for Courts-Martial. This rendered the panel composition violative of R.C.M. 503(a)(3).

A. *The Non-Majority Panel Was Noncompliant with R.C.M. 503(a)(3).*

Rule for Courts-Martial 503(a)(3) allows the convening authority to detail members from a different armed service than the accused. But the rule requires that the majority of the panel be composed of members of the same armed service as the accused unless "exigent circumstances make it impractical to do so without manifest injury to the service." R.C.M. 503(a)(3), Discussion. In the case at bar, the military judge gave no consideration for whether exigent circumstances were present, largely dismissing this provision of R.C.M. 503(a)(3) because it was found in the discussion section. This was error.

Rule for Courts-Martial 503(a)(3)'s discussion section references binding principles of fairness and impartiality that should have been taken into consideration by the military judge. While this provision is delegated to the discussion section, such guidance is instrumental when reflective of longstanding principles of military justice. In *United States v. Quiroz*, C.A.A.F. recognized that relegation of a previously binding rule in the Manual for Courts-Martial to the discussion section is not tantamount to repeal. 55 M.J. 334, 337 (C.A.A.F. 2001). In that case, the court held that the doctrine of "unreasonable multiplication of charges" remained in effect even though the principle was moved from rules to discussion section. *Id.* This was based on the fact that the doctrine of unreasonable multiplication was a longstanding principle in military jurisprudence that had its roots in the double jeopardy clause of the constitution. *Id.* In particular, the C.A.A.F. agreed with the lower court's analysis, recognizing that the principle outlined in the discussion section "promotes fairness considerations separate from an analysis of the statutes, their

elements, and the intent of Congress." *Id.* (quoting *United States v. Quiroz*, 53 M.J. 600, 604-605 (N-M. Ct. Crim. App. 2001)).

Similarly, the longstanding nature of R.C.M. 503(a)(3)'s discussion section is reflected in the fact that the same language was codified in the revised version of the 1969 Manual for Courts-Martial, only moved to the discussion section when the manual was amended in 1984. *Manual for Courts-Martial* (1969 rev. ed.) (1968 *MCM*), Ch. II, ¶ 4g(1); *Manual for Courts-Martial* (1984 *MCM*), App. 21, R. 503, ¶ (3).[3] Prior to the enactment of the UCMJ, the Articles of War contained a similar provision. *United States v. Brown*, 206 U.S. 240, 243 (1907). Hence, the rule requiring that an accused be tried by members of their same armed service was explicitly prescribed law for a substantial portion of the military justice system's history.

The Supreme Court opined on the matter in *McClaughry v. Deming*, 186 U.S. 49 (1902). In that case, the Supreme Court held that it was unlawful for a militia member to be convicted at court-martial by a panel of regular officers. *Id.* at 62. Specifically, the court held that the militia and the regular arm were two separate armed forces, and thus a panel of regulars could not try a militia member. *Id.* at 59. This case was decided, in part, based on the statutory prohibition under the Articles of War, against members of one armed service being tried by members of another. *Id.* at 62. Despite this, the Supreme Court elaborated that the concern was not merely the effect of the statute, but also about underlying concerns for the fairness of the proceeding, explaining:

> There was a recognition of the undoubted fact that at all times there has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can be readily seen that there might naturally be apt to exist a feeling among the militia that they would

[3] "The discussion repeats the preference for members, or at least a majority thereof, to be of the same service as the accused which was found in paragraph 4 dl) of MCM, 1969 (Rev.)"

> not be as likely to receive what they would think to be as fair treatment from regulars, as from members of their own force.

Id. at 56.

There is a disruption of fundamental fairness where a member is subject to a court-martial by members of another branch. *See United States v. Caternolo*, 2 C.M.R. 385, 386 (A.B.R. 1952) ("While it is clear that the appointment of an Air Force officer as a member of an Army court-martial is permitted by Article 25a, supra, and is therefore not fatal to the court's jurisdiction, it is equally clear that such action is contrary to the general policy set forth in [the Manual for Courts-Martial]."). These same principles of fairness underly the discussion section found in R.C.M. 503(a)(3). *See United States v. Nerad*, 69 M.J. 138, n.10 (C.A.A.F. 2010) (recognizing that narrowing construction in the analysis section which is favorable to the accused should be undisturbed). Moreover, the absolute right to a fair and impartial panel is guaranteed by the Constitution. *Bess* 80 M.J. at 7.

B. *Navy Cases are Instructive.*

The concept of fairness at play with this principle was taken up by the Navy-Marine Court of Military Review in *United States v. Negron*, 19 M.J. 629 (N.M.C.M.R. 1984). In that case, a Navy officer was convicted by a panel consisting entirely of marine officers, despite the availability of 155 naval officers assigned the same command as the appellant. *Id.* at 631. In fact, the court noted that there was a large concentration of naval officers within an hour driving distance of the naval base where the court-martial took place. *Id*. Crucially, the court recognized that the Navy and the Marine Corps., were considered a single branch of service by operation of statute under Article 1, UCMJ, 10 U.S.C. § 801, which resulted in no *per se* error in the detailing process. *Id*. Despite this, the court held that "under the circumstances, such actions present an image of unfairness and an attitude of unnecessary inflexibility by the convening authority." *Id.*

By contrast, in *United States v. Van Steenwyk*, 21 M.J. 795, 811-812 (N.M.C.M.R. 1985), the court declined to extend *Negron* where a naval officer had requested a panel consisting exclusively of fellow naval officers. There, the appellant was convicted of a panel that included a single naval officer and eight marines officers. Like *Negron*, the court recognized that the Navy and Marine Corps were a single armed service under federal law. But the court distinguished *Negron* on the basis that the convening authority was a marine officer, and the appellant proffered no information about the proportion of Navy officers to Marine Corps officers that would have been available to serve on the panel. *Id.* at 811. To that end, the court determined that the panel composition actually reflected a cross-section of the community where appellant committed the alleged acts of fraternization, thus obviating the fairness concerns raised in *Negron*. *Id.* The court further determined that the convening authority had not applied any improper criteria in the member selection process.

The instant case raises fairness concern reflected in R.C.M. 503(a)(3). In fact, the issue presented is of an even greater magnitude than that found in *Negron*. Unlike the Navy and Marine Corps cases, there is no federal law specifically pronouncing the Air Force and Space Force to be the same armed service. Rather, the Space Force was established as a separate armed force. 10 U.S.C. § 9081. The statute establishing the Space Force contains no similar language to that in Article 1, UCMJ, pronouncing it as one with Air Force.

Here, the member selection process is more fraught than *Negron*. While that case dealt with a commander that apparently failed to utilize the large pool of naval officers within their command, in this case the convening authority changed the venue from Misawa AB to a Space Force installation. In doing so, the convening authority invited the probability that the panel would

have a higher proportion of Space Force members. Like *Negron*, this creates the appearance of unfairness and a lack of impartiality which SSgt Scott was entitled to have addressed.

C. *The Military Judge Failed to Correctly Apply R.C.M. 503(a)(3)*

The military judge erred by failing to apply the very safeguard designed to prevent this type of situation, that being the standard outlined in the discussion section of R.C.M. 503(a)(3). The military judge did not address whether there were "exigent circumstances" that would make it impractical to proceed with a non-majority Air Force panel without "manifest injury to the Service." R.C.M. 503(a)(3), Discussion. In fact, the record shows that there were no exigent circumstances. The pool of member candidates was skewed to contain a higher proportion Space Force officers by virtue of the venue being changed from Misawa AB to Buckley Space Force Base. Earlier in the proceeding, the member pool fell below the number required to form a quorum, thus requiring new members to be detailed. Despite this, the convening authority did nothing to try and shift the balance to ensure that Air Force officers remained in a majority of representation, nor did they provide any explanation for why a non-majority panel would be necessary. Presumably, the high level of officer representation at Buckley would have permitted for a panel composition that was majority Air Force.

Finally, there is no indication that the non-majority panel was necessary to avoid manifest injury to the service.[4] Rather, the only reason promoted for the non-majority panel appeared to be expediency by avoiding detailing new members and recommencing the *voir dire* process. However, that would have hardly been an unusual occurrence, but instead a mere inconvenience.

[4] Although not defined in R.C.M. 503(a)(3), the discussion section of R.C.M. 201(e)(7)(B) explains that "'[m]anifest injury' does not mean minor inconvenience or expense . . . [e]xamples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses."

To the contrary, proceeding with the non-majority panel without exigent circumstances created the appearance of unfairness. Moreover, it rendered the panel invalid thereby depriving the court of jurisdiction.

WHEREFORE, SSgt Scott respectfully request that this Honorable Court set aside the findings and sentence Charge I, Specification 1 and Charge II, Specifications 1 & 2.

III.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION FOR AGGRAVATED ASSAULT CONSUMATED BY BATTERY BY STRAGULATION.

Standard of Review

The legal sufficiency of a conviction is reviewed de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law & Analysis

SSgt Scott's conviction for strangulation was legally insufficient because there was no evidence establishing that J.K.'s breathing or circulation were impeded. "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. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citations omitted). The review for legal sufficiency "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Plant*, 74 M.J. 297, 301 (C.A.A.F. 2015) (quoting *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)).

Aggravated assault by strangulation in violation of Article 128, UCMJ, requires that the following elements be proven beyond a reasonable doubt:

(1) That the accused assaulted a certain person;

(2) That the accused did so by strangulation or suffocation; and

(3) That the strangulation or suffocation was done with unlawful force or violence.

(R. at 1370.) The military judge instructed the panel that "strangulation" is "[i]ntentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." (R. at 1372.)

The evidence adduced at trial was devoid of anything establishing that SSgt Scott had impeded J.K.'s normal breathing. To the contrary, J.K. testified that SSgt Scott's hand did not prevent her from breathing, nor did she start to black out or lose consciousness. (R. at 1096-97.) In fact, J.K. qualified this situation: "[I]t was getting tighter," but "I didn't lose consciousness." (R. at 1091.) J.K. further explained that SSgt Scott was not holding her neck tight enough to prevent her from pushing him away. (R. at 1096.) J.K. was still able to talk. (*Id.*) On cross-examination, J.K. admitted that during a pretrial interview with the prosecution team she explained that SSgt Scott's hand on her neck did not obstruct her airway. (R. at 1174.)

J.K.'s testimony precludes any possibility that SSgt Scott could have been found guilty of strangulation. The panel was left without any evidence to establish an essential element of the offense, namely that J.K.'s normal breathing or circulation was impeded. This case contrasts with this Court's unpublished opinion in *United States v. Webb.* No. ACM 39904, 2021 CCA Lexis 607 (A.F. Ct. Crim. App. 18 Nov. 2021). In that case, Webb argued that his conviction for strangulation could not be sustained because the victim was still able to breath and talk. *Id.* at *23. However, this Court found that there was legally sufficient evidence based on the victim's testimony that she "became 'dizzy,' started seeing stars, and commented that 'I thought that maybe if I could let myself pass out that I would be able to breathe though.'" *Id.* at *24. Here, the record

is devoid of any similar evidence. To the contrary, J.K. repeatedly denied that she was unable to breathe. She did not indicate that she was about the lose consciousness or that she was physically impacted like the victim in *Webb*. Finally, J.K.'s testimony gave no indication of how her breathing may have been made more difficult. In short, the evidence presented did not meet the minimum threshold necessary to sustain a conviction, even under the low standard required for legal sufficiency.

WHEREFORE, SSgt Scott respectfully request that this Honorable Court set aside the findings and sentence for Charge II, Specification 2.

IV.

SSGT SCOTT'S CONVICTIONS FOR SEXUAL ASSAULT, ASSAULT CONSUMMATED BY BATTERY, AND AGGRAVATED ASSAULT ARE FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of factual sufficiency de novo. 10 U.S.C. § 866(c) (2018); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Factual sufficiency review is "limited to the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Law & Analysis

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is] convinced of [the Appellant's] guilt beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quotation omitted). This Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to

"make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Wheeler*, 76 M.J. at 568 (quotation omitted).

A. *The Evidence Shows that SSgt Scott Had a Reasonable Mistake of Fact for All Specifications that he was Convicted of.*

All of the charged specifications that SSgt Scott was convicted of rest principally on the testimony of J.K. However, J.K.'s testimony contradicts the notion that SSgt Scott had a criminal state of mind during the alleged offenses. Rather, J.K.'s testimony indicates that SSgt Scott was operating under a mistake of fact as to consent throughout their alleged encounter.

For SSgt Scott to be convicted of the offense of sexual assault in violation of Article 120, UCMJ, the Government needed to prove beyond a reasonable doubt that (1) SSgt Scott committed a sexual act upon J.K., and (2) that he did so without the consent of J.K. Per R.C.M. 916(j)(1),

> The mistake of fact is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused belied them, the accused would not be guilty of the offense . . . If the ignorance or mistake goes to any other element requiring a general intent or knowledge, the ignorance of mistake must have existed in the mind of the accuse and must have been reasonable under all the circumstances.

To convict SSgt Scott of the offenses listed under Article 128, UCMJ the evidence had to prove beyond a reasonable doubt that SSgt Scott inflicted bodily harm—offensive touching, however slight. (R. at 1371.)

The record amply supports the finding that SSgt Scott had a reasonable mistake of fact during the encounter with J.K. that he was convicted of. In particular, J.K.'s positive response to his advances gave the impression that she was willing participant. J.K.'s interaction with SSgt Scott began when she ran into him outside of Misawa AB and inquired about what he was doing that evening. (R. at 1077). After initiating this conversation, J.K. immediately asked if she could stay with him that night. (*Id.*) J.K. went with SSgt Scott despite the availability of taxis that could

have taken her home, had she been concerned about driving with alcohol in her system. (R. at 1078).

Upon arrival at this apartment, J.K. declined to sleep on the couch, but instead willingly got into bed with him where they made out. (R. at 1088). In her testimony, J.K. defined making out as prolonged and passionate kissing. (R. at 1170). J.K. described all of this as being consensual. (R. at 1171; 1237). Moreover, she testified that she "wasn't trying to stop him from kissing me" throughout the encounter. (R. at 1181).

J.K. told her best friend, A.R., that this kissing actually began in SSgt Scott's living room while watching a movie. (R. at 1296.) A.R. described the event as a "Netflix and chill" type situation, and detailed that SSgt Scott consensually touched J.K.'s breast. (R. at 1290-98). Prior to getting into bed, J.K. removed her flannel top. (R. at 1169.) All of these circumstances leading up to J.K. getting in bed with SSgt Scott reasonably led SSgt Scott to mistakenly believe that J.K. was consenting to their encounter. When J.K. apparently protested while the two were in bed, SSgt Scott ceased to make further advances. (R. at 1090.)

Despite this, J.K.'s interaction with SSgt Scott continued to inform a reasonable, albeit mistaken, belief that she was a willing participant in the encounter. Although J.K. testified that her jeans were the only thing keeping SSgt Scott from "getting in [her] pants," J.K. removed her jeans while still in bed and replaced them with gym shorts to appease him. (R. at 1180-81.) The two continued to kiss. (R. at 1181; 1188-89.) It is in this context that SSgt Scott digitally penetrated J.K. Yet, after she physically pushed him away, SSgt Scott again ceased any further advances. (R. at 1091-92). All of this speaks to a reasonable mistake of fact as to consent which casts doubt on the findings.

Moreover, the sincerity of SSgt Scott's reasonably held belief was affirmed the following day when he texted J.K. by asking if she was "good." (Pros. Ex. 4 at 2.) After J.K. replied by calling SSgt Scott an "ass hole [sic]," SSgt Scott responded with confusion: "[W]hoa whoa. Explain." (*Id.*) J.K. conveyed that the experience was more intense than she was expecting, to which SSgt Scott said, "Yeah I guess I might have read different signs last night. You can trust me but I guess I was on a different page. I didn't mean to hurt you." (*Id.* at 3.) The Government conceded that SSgt Scott's belief was sincere. (R. at 1393.) This raises reasonable doubt and demonstrates the factual insufficiency of the conviction. Similarly, SSgt Scott reasonably was led to mistakenly believe that the touching captured in the specifications under Charge II were inoffensive to J.K., thus calling the evidence supporting those convictions into reasonable doubt. *See also United States v. Mader*, 81 M.J. 105, 105 (C.A.A.F. 2021) (recognizing that the affirmative defense for mistake of fact as to consent applies to Article 128 offenses).

B. *J.K's Testimony Lacked Credibility*

J.K.'s testimony raised serious issues about her credibility as a witness, which casts doubt on the convicted specifications. When speaking with A.R., J.K. expressed an apparent vendetta against SSgt Scott, explaining that she wanted to "nail this motherfucker." (R. at 1235.) J.K. did not report any offense against SSgt Scott until over a year and half after their encounter. J.K.'s decision to report was driven by her learning that SSgt Scott was under investigation. (R. at 1112.) She consulted with a member of the Government's legal office who gave her details of that investigation. This included details that curiously resembled the same allegations that J.K. made towards SSgt Scott, despite the long passage of time. (R. at 1222.) This account appeared to only be formed *after* J.K. spoke with the member of the Government legal office. Furthermore, after

speaking with them, J.K. developed a hero mentality where she felt compelled to protect other alleged victims. (R. at 1114.)

J.K.'s testimony was inconsistent and illogical. This included fuzzy details about the time frame between when she first encountered SSgt Scott and then ended up at his apartment. Moreover, J.K. testified that while in bed with SSgt Scott, she was on top of him. (R. at 1095; 1089). This positioning belies the notion that SSgt Scott was being forceful with her or physically positioned to overcome her lack of consent. When asked how the penetration of her vagina could take place while she was wearing shorts and underwear, J.K. simply testified that she did not know. Given these serious credibility issues, the evidence presented is insufficient to demonstrate to this Court SSgt Scott's guilt beyond a reasonable doubt.

Similarly, the Government's evidence concerning the Charge II, Specification 2 was factually insufficient to sustain a conviction. The offense of strangulation required for the Government to prove that SSgt Scott had impeded J.K.'s breath or circulation. However, the record is devoid of evidence establishing beyond a reasonable doubt that J.K. experienced anything like that. *See supra.* p. 26. To the contrary, J.K. testified that SSgt Scott's hand was not so tight that she was incapable of pushing him away and preventing him from holding her neck. (R. at 1096.) Moreover, the strangulation allegedly occurred during an episode where SSgt Scott was operating under a mistake of fact as to consent. Given this, the conviction for strangulation was factually insufficient and this Court should find that SSgt was not proven guilty beyond a reasonable doubt.

WHEREFORE, SSgt Scott respectfully request that this Honorable Court set aside the findings and sentence Charge I, Specification 1 and Charge II, Specifications 1 & 2.

V.

TRIAL COUNSEL COMMITTED PROSECUTORIAL ERROR BY SHIFTING THE BURDEN DURING CLOSING ARGUMENT BY ASSERTING TO THE PANEL THAT SSGT SCOTT HAD THE BURDEN OF PROVING CONSENT.

Additional Facts

During closing argument, trial counsel asserted to the panel that, "the burden is on . . . the accused . . . in that moment to obtain consent . . . to act as reasonable diligence . . . he simply failed to do that." (R. at 1394.) This line of argument went without objection. Following closing arguments, the military judge provided supplemental instructions. (R. at 1490.) The supplemental instructions contained no clarification regarding the legal burden of proof as it related to trial counsel's argument.

Standard of Review

Prosecutorial misconduct and improper argument is reviewed *de novo*. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). Where there was no objection at the trial level, the standard of review is plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). "The burden of proof under plain error review is on the appellant." *Id.*

Law & Analysis

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (*quoting Berger v. United States*, 295 U.S. 78, 84 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Andrews*, 77 M.J. at 402 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F.

1996)). Improper argument is one facet of prosecutorial misconduct. *Sewell*, 76 M.J. at 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1 (1985)).

"Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Fletcher*, 62 M.J. at 179. In the context of improper argument by trial counsel, this Court must determine (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

A. *Trial Counsel's Improper Argument was Clear and Obvious Error as it Amounted to an Unconstitutional Burden Shift.*

Trial counsel's improper argument that SSgt Scott possessed the burden as to consent was clear and obvious error. It is a long established and foundational principle of criminal law that the burden of proof rests solely with the Government. *Davis v. United States*, 160 U.S. 469, 487 (1895) ("[The burden] is on the prosecution from the beginning to the end of trial and applies to every element necessary to constitute the crime.") This principle is reflected in Article 51, UCMJ, which requires that the military judge instruct the members "that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States." 10 U.S.C. § 851(c)(4) (2018). *See also* R.C.M. 916(e)(5)(D) (requiring that the military judge instruct members that the burden is on the Government). Similarly, where affirmative defenses are raised, such as mistake of fact, "the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist." R.C.M. 916(b)(1).

In *United States v. Prather*, CAAF considered whether Article 120, UCMJ, 10 U.S.C. § 901 (2006) presented an unconstitutional burden shift for its treatment of the affirmative defenses. 69 M.J. 338, 341 (C.A.A.F. 2011). That version of Article 120 identified both consent and mistake

of fact as affirmative defenses. *Id.* However, it placed the burden of establishing these defenses on the accused to show by a preponderance of the evidence. *Id.* C.A.A.F. held that this scheme created an unconstitutional shift in burden. (*Id.* at 343). Put differently, *Prather* stands for the proposition that the affirmative defense of mistake of fact places no burden of proof on the accused. *See also United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998) (recognizing improper argument where trial counsel commented on accused's failure to present evidence to support defense of duress in prosecution for assault consummated by battery).

In *United States v. McDonald*, C.A.A.F. stated in *dicta* that "[t]he burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." 78 M.J. 376, 380 (C.A.A.F. 2019). Despite this, the court maintained the essential aspects of its holding in *Prather* by explaining that "[an accused's] actions could only be considered innocent if he formed a reasonable belief that he had obtained consent." *Id.* The court then summarized how this fit within the burden of proof by stating that the Government held the burden of disproving the affirmative defense. *Id. See also United States v. Prasad*, 80 M.J. 23, 25 (C.A.A.F. 2020) (citing *McDonald* for the lone proposition that mistake of fact as to consent must be an honest and reasonable belief to be disproven by the Government).

Trial Counsel's assertion before the panel that SSgt Scott had the burden to establish consent was an improper argument amounting to a clear and obvious error. This improper shift infringed upon the long-established principle of the burden of proof resting solely with the Government. Moreover, trial counsel's argument was contrary to C.A.A.F's holding *Prather* that a shift in the burden of proof for the defense of mistake of act as to consent was unconstitutional. 69 M.J. at 338. Trial counsel's actions were a violation of a fundamental constitutional norm, thereby establishing clear and obvious error.

B. *SSgt Scott was Prejudiced.*

But for trial counsel's error, the outcome of SSgt Scott's court-martial would have been different, thereby demonstrating prejudice. "[P]rosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). Three factors weigh into consideration for whether prosecutorial misconduct is prejudicial: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184. The severity of the misconduct is informed by (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184.

Trial Counsel's improper argument was sufficiently prejudicial to SSgt Scott so as to warrant relief. In particular, the misconduct of trial counsel was severe, there was a lack appropriate remedial measures, and the overall weight of the Government's case was weak enough to suggest that the prejudice had an impact on the convictions.

The severity of the misconduct is demonstrated by the indicators outlined in *Fletcher*. Concerning the first factor, the raw numbers; although trial counsel's improper argument occurred only on a discrete occasion, "[I]t is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct."

Meek 44 M.J. at 6. Trial counsel's shift of burden during closing argument carried a severe impact, especially since it pertained to consent, the most crucial evidentiary issue raised during the trial. Hence, while this factor facially is not necessarily in SSgt Scott's favor, it is not dispositive.

The second factor is pervasiveness of trial counsel's misconduct throughout the proceeding. Again, the Government's primary evidentiary challenge during the court-martial was to demonstrate whether SSgt Scott reasonably believed that J.K. had consented. To that extent, trial counsel's improper argument captured the central issue of the trial and defined the thrust of their presentation. Hence, this factor weights, if only slightly, in favor of SSgt Scott.

The third factor is the length of the trial. The court-martial lasted eight days, while the findings case lasted for three. This shows the complexity of the evidence and the likelihood that trial counsel's improper argument was a means of simplifying the Government's crucial burden of proving a lack of mistaken belief by shifting the burden. This factor weights towards the severity of the misconduct.

The fourth factor, the time that the panel spent deliberating, also favors SSgt Scott. The panel deliberated for just over three and half hours. *See Andrews* 77 M.J. at 402 (finding that deliberations lasting three hours for five day trial indicative of severe misconduct).

The final factor remains neutral because the military judge provided no specific instructions which trial counsel infringed upon. In the aggregate, these factors indicate that the misconduct was severe enough to warrant relief.

Although defense counsel did not object, the record is bereft of any remedial measures, despite ample opportunity to do so. The military judge's initial instructions gave no specific treatment to preclude the panel from believing that SSgt Scott had an initial burden to show that he obtained consent. (R. at 1366.) Granted, preliminary instructions occurred before the parties

gave closing arguments to include trial counsel's improper one. More pressingly, following closing arguments, the military judge provided supplemental instructions. Yet these instructions contained no reference to trial counsel's improper argument, nor did it give any reference to the burden of proof related to mistake of fact. (R. at 1490.) This being so, the panel entered deliberations without any corrective instructions. Thus, the panel voted after receiving misleading interpretations of the law.

Finally, the Government's evidence was tenuous at best to support the conviction. Central to this case was the issue of whether SSgt Scott mistakenly believed that J.K. had consented to their encounter. Hence, the crucial factual issue that the panel had to resolved was the very one improperly addressed by trial counsel during closing argument. The circumstances demonstrating this mistake of fact are numerous and apparent. *See supra* p. 28. Additionally, the panel had to contend with serious issues of J.K.'s credibility. This essentially devolved the case into an assessment of J.K.'s viability as the sole witness to the alleged crimes. However, trial counsel's improper argument only served to tip the scales of this issue in favor of the Government, by misleading the panel concerning the burden of proof. Therefore, the situation was one in which there was a reasonable probability that the panel could have come to a different outcome if not in receipt of trial counsel's unconstitutional interpretation of the law.

WHEREFORE, SSgt Scott respectfully requests that this Court set aside the findings and sentence for Charge I, Specification 1 and Charge II, Specifications 1 & 2.

VI.

SSGT SCOTT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law & Analysis

This Court should find that the Government's 279-day delay in docketing SSgt Scott's case with this Court is a due process violation. SSgt Scott has suffered particularized anxiety and concern because of the delay. Mot. to Attach, App., Mar. 11, 2024. Even if this Court finds that SSgt Scott was not prejudiced, this Court should find a due process violation as the delay adversely affects the public's perception of the fairness and integrity of the military justice system. Finally, if this Court does not find a due process violation, it should still grant SSgt Scott relief as the Government acted with gross indifference, there was harm to SSgt Scott, and relief is consistent with the goals of both justice and good order and discipline.

A. *The Barker Analysis Favors SSgt Scott.*

The *Barker* factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id*. at 133 (citation omitted). When examining the reason for the delay this Court determines "how much of the delay was under the Government's control [and] assess[es] any legitimate reasons for the delay" *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors"). Analyzing these factors requires determining which factors favor the Government or the

appellant and then balancing these factors. *Id.* No single factor is dispositive, and the absence of a given factor does not prevent this Court from finding a due process violation. *Id.*

1. *A 279-Day Delay is Presumptively Unreasonable.*

The Government took 279 days from sentencing to docket SSgt Scott's case with this court, which makes the delay presumptively unreasonable. *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *131-32 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020) (finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in [*United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006)]"). When a case does not meet the 150-day standard it triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Id*. at 132. The delay is over a hundred days greater than the 150-day benchmark outlined in *Livak* and more than double what was allowed under the 120-day *Moreno* standard. Moreover, the ROT contains no confirmation that the Government tendered the record to SSgt Scott. Rather, it contains only an unsigned receipt with SSgt Scott's name listed in the signature block. (ROT, Vol. 4, Receipt for Copy of Record). In his affidavit, SSgt Scott explains that he eventually received the ROT, although apparently some months after the case had been docketed with this Court.

2. *There is No Justification for the Lengthy Delay.*

The record of trial contains no explanation for why this case was subject to such a lengthy delay before docketing with this Court. Indeed, the chronology provided suggests that the record of trial was completed sometime after 9 November 2023 without confirmation of exactly when. (ROT, Vol.4, US v. Moreno Chronology – *United States v. Staff Sergeant Luke A. Scott*). The gap of time between that date and the eventual docketing is without commentary from the Government.

This Court should use the fact that the Government failed to provide reasons for the delay as a negative presumption against them. If the Government cared about speedy post-trial processing, it would have provided an explanation for why it was unable to meet speedy post-trial processing standards like it has done in other cases. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *5 (A.F. Ct. Crim. App. 2 Nov. 2023). From the silence in the record, this Court should presume the Government did not have any valid reason for the delay. *See Id.* ("We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant.").

3. *SSgt Scott Asserts His Right to Speedy Post-Trial Processing.*

Third, SSgt Scott hereby asserts his right to timely appellate review. Although this factor favors the Government, it is through no fault of SSgt Scott as undersigned counsel had cases to review prior SSgt Scott's case. Additionally, no one factor is dispositive in the *Barker* analysis. *See also Moreno*, 63 M.J. 129, 138 ("While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.").

4. *SSgt Scott Suffered Prejudice from the Government's Delay.*

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138-39. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay and [the CAAF] require[s] an appellant to show particularized anxiety or concern that is

distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Anderson*, 82 M.J. at 87 (internal quotation marks and citations omitted).

SSgt Scott has suffered constitutionally cognizable anxiety from the Government's delay. SSgt Scott spent the entirely of the delay in confinement. Furthermore, he has been separated from his son, and suffered considerable mental health issues. Another type of prejudice that SSgt Scott has faced is the "impairment of [his] grounds for appeal" *Moreno*, 63 M.J at 138-39. Because of the 129 days of presumptive, unreasonable delay—279 days in total—SSgt Scott was unable to petition this Court for relief sooner. Like the appellant in *United States v. Turpiano*, SSgt Scott has been "impeded in his ability to exercise his post-trial rights because of the actions, or more aptly delayed actions, of the Government." No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *19 (A.F. Ct. Crim. App. 10 Sep. 2019) (unpub. op.).

5. *Even if this Court Finds no* Barker *Prejudice, the Government's Delay Adversely Affects the Public's Perception of the Military Justice System*

Where an appellant does not show prejudice from the delay, there is no due process violation unless "in balancing the three other factors, the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). Assuming, *arguendo*, this Court is unconvinced SSgt Scott was not prejudiced by the Government's 279-day delay, this Court should consider the C.A.A.F.'s admonition when deciding if there is a due process violation: "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court -- is the least defensible of all and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.A.A.F. 1990). The reason this Court should have little patience with the Government is because "this stage involves no discretion or judgment; and, unlike an appellate court's consideration of an appeal, this stage involves no complex legal or

factual issues or weighing of policy considerations." *Id*. This Court should find a due process violation because a member of the public could reasonably question the "integrity" of the military justice system in this case. In this case, the military justice system failed to prevent SSgt Scott from being "subjected to inordinate and inexcusable delay after he has been tried." *Dunbar*, 31 M.J. at 70.

WHEREFORE, SSgt Scott respectfully request that this Court set aside the findings and sentence for Charge I, Specification 1 and Charge II, Specifications 1 & 2, or by reducing his sentence to include disapproving the punitive discharge and reducing his confinement.

VII.

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION FOR UNANIMOUS VERDICT.

Additional Facts

During discussion concerning findings instruction, trial defense counsel moved the court to add an instruction for unanimous verdict. (R. at 1327.) This request was denied by the military judge. (R. at 1329.)

Standard of Review

A military judge's instructions are reviewed de novo. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). The constitutionality of a statute is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law & Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1575 (2021). Following *Ramos*, SSgt Scott was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment

because unanimity is part of the requirement for an impartial jury and is central to the fundamental fairness of a jury verdict; (2) under the Fifth Amendment's Due Process Clause; and (3) under the Fifth Amendment's Equal Protection Clause. U.S. CONST. amends. V, VI.

There is no way of knowing whether a nonunanimous verdict secured SSgt Scott's conviction. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. Because there is no way of knowing the vote count, the Government cannot meet this already onerous burden. See R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . ."). SSgt Scott understands that C.A.A.F. previously concluded that the United States Constitution does not guarantee a right to a unanimous guilty verdict in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), and he is raising this issue for preservation purposes.[5]

WHEREFORE, SSgt Scott respectfully request that this Court set aside the findings and sentence for Charge I, Specification 1 and Charge II, Specifications 1 & 2.

[5] A petition for writ of certiorari has been filed with the Supreme Court on this issue in *United States v. Cunningham*. 83 M.J. 367 (C.A.A.F. 2023), petition for cert. filed (U.S. Sept. 28, 2023) (No. 23-0027).

Respectfully submitted,

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APPENDIX

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

VIII.

THE SENTENCE IMPOSED AGAINST APPELLANT WAS EXCESSIVE.

Standard of Review

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019). Considerations include "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

Analysis

The sentenced imposed on SSgt Scott was excessive given the circumstances. During sentencing, SSgt Scott presented ample evidence of his exemplary career in the Air Force. This

included numerous accolades and recognitions. In his unsworn statement, SSgt Scott explained the difficulties that come with being a single father while trying to be a top contributor as a CATM instructor. Additionally, he detailed difficulties arising simply by virtue of the investigation that have had a substantially negative impact on his life, mainly by way of his cancelled permanent change of station.

Moreover, the evidence presented at trial mitigated against the severity of the sentence. Considerable evidence was presented to show a mistake of fact as to the consent of SSgt Scott's encounter with J.K. All of this strikes against the notion that SSgt Scott was predatory aggressor. Accordingly, the sentence imposed was excessive and should be reduced.

WHEREFORE, SSgt Scott respectfully requests that this court grant relief by reducing his sentence.

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on 11 March 2024.

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Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **LUKE A. SCOTT,** United States Air Force, *Appellant.*	)	No. ACM 40411
	)	11 March 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, undersigned counsel hereby moves to attach the Appendix to this motion to Appellant'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 two (2) pages in length and consists of the following:

Declaration of SSgt Luke A. Scott: A Declaration made under penalty of perjury and signed by SSgt Scott. This declaration is relevant and necessary in resolving the sixth Assignment of Error SSgt Scott has raised before this Court. In determining whether there has been a due process violation for post-trial delays, this Court is required to examine whether an appellant has suffered prejudice from the delay. *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022). Even if this Court finds no due process violation, it can still determine whether an appellant was harmed by a delay and grant relief accordingly. *United States v. Jackson*, No. ACM 39955, 2022

CCA LEXIS 300, at *133 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)). In his Declaration, SSgt Scott outlines the prejudice he has suffered as a result in the Government's delay in filing his case with this Court.

Consideration of the matters described above is necessary for this Court to resolve a matter already raised in the record itself. That is, whether SSgt Scott suffered prejudice as a result of the Government's delay in filing his case with this court.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 March 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

10 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40411
Staff Sergeant (E-5)	)	
LUKE A. SCOTT, USAF	)	Panel No. 2
Appellant.	)	

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40411
Staff Sergeant (E-5) LUKE A. SCOTT, USAF *Appellant*.	)	Panel No. 2

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS [APPELLANT'S] STATEMENTS TAKEN BY A COMMAND STAFF MEMBER IN VIOLATION OF ARTICLE 31, UCMJ.

II.

WHETHER THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES JUSTIFYING THE MAJORITY OF THE MEMBERS BEING FROM A DIFFERENT ARMED SERVICE FROM [APPELLANT].

III.

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION FOR AGGRAVATED ASSAULT CONSUMATED BY BATTERY BY STRAGULATION [sic].

IV.

WHETHER [APPELLANT'S] CONVICTIONS FOR SEXUAL ASSAULT, ASSAULT CONSUMMATED BY BATTERY, AND AGGRAVATED ASSAULT ARE FACTUALLY INSUFFICIENT.

V.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL ERROR BY SHIFTING THE BURDEN DURING CLOSING ARGUMENT BY ASSERTING TO THE PANEL THAT SSGT SCOTT HAD THE BURDEN OF PROVING CONSENT.

VI.

WHETHER SSGT SCOTT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

VII.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION FOR UNANIMOUS VERDICT.

VIII.[1]

WHETHER THE SENTENCE IMPOSED AGAINST SSGT SCOTT WAS EXCESSIVE.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant faced the following charges and specifications at trial:

- JK

Specification 1 of Charge I and Specifications 1 and 2 of Charge II involved JK and stemmed from events occurring on or about 29 September 2019 at or near Misawa Air Base. (ROT, Vol. I, Charge Sheet). In Specification 1 of Charge I, Appellant was charged with

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

committing a sexual act upon JK by penetrating her vulva with is finger. (Id.) In Specification 1 of Charge II, Appellant was charged with grabbing JK's body with is hands. (Id.) In Specification 2 of Charge II, Appellant was charged with assaulting JK by strangling her. The member panel convicted Appellant of all specifications involving JK. (R. at 1519.)

- CG

Specification 2 of Charge I, Specifications 3 and 4 of Charge II, and the Specification of Charge III involved SrA CG. (ROT, Vol. I, Charge Sheet). In Specification 2 of Charge I, Appellant was charged with touching CG's breast on or about 25 September 2020 at or near Misawa Air Base. (Id.) In Specification 3 of Charge II, Appellant was charged with licking CG's face with his tongue on or about 25 September 2020 at or near Misawa Air Base. (Id.) In Specification 4 of Charge II, Appellant was charged with kissing CG's on the mouth with his mouth on or about 25 September 2020 at or near Misawa Air Base. (Id.) In the Specification of Charge III, Appellant was charged with indecent conduct by sending two images of an erect penis to CG on or about 21 August 2020 at or near Misawa Air Base. (Id.) The member panel acquitted Appellant of all specifications involving CG.

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO JK.

Additional Facts

- *Motion Testimony*

At trial, Appellant moved to suppress statements made by Appellant to JK during a pretext conversation on the basis that the statements were taken in violation of Article 31, UCMJ. During the motion hearing, Air Force Office of Special Investigations (AFOSI) Special Agent (SA) JB, the lead agent for Appellant's investigation, testified about his involvement in the investigation. SA JB stated that he interviewed Appellant on 25 November 2020 regarding of allegation of abusive sexual contact involving Amn CG. (R. at 34, 44.) SA JB said Appellant initially waived his Article 31, UCMJ, right to counsel, but that he later invoked his right to counsel. (Id.) SA JB stated that, at the time of Appellant's interview and rights invocation, JK was not mentioned because, as SA JB testified, "she was not in the picture, at the time." SA JB said he did not know about JK at that point.

On 17 December 2020, SA JB conducted a victim interview with JK. At the end of the interview, SA JB spoke with JK about participating in a pretext encounter with Appellant. (R. at 25-28.) JK agreed. (R. at 29.)

SA JB stated that he met with other agents to discuss where the pretext should take place. (R. at 32.) Locations such as the Misawa Air Base golf course or a parking lot were discussed. SA JB stated, "So, ultimately, I sat down with [JK] and she thought of, like, her CSS office,

and I agreed that that was probably a good location." (Id.) SA JB also stated the Command Support Staff (CSS) office was to support the Security Forces Squadron Commander and that the location of the CSS office was on the same floor and in the same area as the Security Forces Squadron Commander and Chief Master Sergeant. (R. at 38-39.) The pretext conversation between Appellant and JK occurred on 20 January 2021. (R. at 35.)

During the motions hearing, JK stated that she worked on the CCS doing administrative duties such as updating member's personnel information, and working the fitness program and drug demand reduction program (DDRP). (R. at 48.) JK said there were no doors that connected her work area to either the commander's or chief's office. (R. at 49.) JK said when individuals would come to see either the commander or chief, she would interact with them but never ask about why they were there. (R. at 50.) JK said her CSS position at Security Forces did not involve any sort of law enforcement role, and she did not wear a beret. (R. at 51.)

Part of her duties involved being a trusted agent for the DDRP, which included notifying supervisors that a member was selected for testing. (R. at 51-52.) Typically, the supervisors would then notify the member to go to the CSS. Even though she or the supervisors could not tell the members why they would need to come to the CSS at first notification, JK said that members usually knew when they got a call from her or were notified to come to the CSS, that they had been selected for drug testing. (R. at 52.) JK said she would not have long conversations with members reporting to the CSS "because I was trying to get through all of the DDRP people." (R. at 54.)

JK recalled that Appellant had previously been selected for drug testing a couple of times prior to January 2021. (Id.) JK said she "didn't talk too much" to Appellant because

his unit usually "just wanted to come get it done and over with so they could go back out." (Id.) When asked if she ever talked to Appellant about personal matters, JK said, "No, not that I recall," adding that they did not really talk about personal stuff because "we weren't friends. The few times that we did talk, it wasn't me prying. It was him offering." (R. at 55.) JK said on the occasions Appellant had come for DDRP testing, she agreed that she would immediately or nearly immediately present him with the DDRP paperwork. (Id.)

JK also stated that she applied to become an AFOSI special agent in 2020 but had been notified of her non-selection before she first met with AFOSI in December 2020 regarding her allegation against Appellant. (Id.)

JK then explained how she initially came forward to AFOSI regarding her allegations against Appellant and how the pretext conversation originated as follows:

> So, I had found out that [Appellant] had been involved with another female. And, I knew, at that point, I needed to come forward. So, I went and I talked to OSI. And, OSI asked me if I would be willing to possibly confront him in a safe way with them around, just to see if they can get information from him to show that he, in fact, did what he did to me.
>
> So, they kind of offered up a few situations and—like, being in my car or his car, and I was like that's not really an option, because we are not friends. So, it would be awkward if we were all of a sudden in one another's car.
>
> And then, I brought up, well you know something that's easy for me to get him over is DDRP, because I do it every day. Like, he could be selected at any time. So, they initially didn't want to do that because I think they didn't know, like, how could we get him over there at a specific time. And, so, I thought it was dropped. And then, I think it was like a week or two later, they were like we're going to roll with that idea. I said, okay.
>
> So, they had a couple of dates set up, if I remember correctly. But just different situations came about. I think it was with other, like, cases and stuff. So, then, once the date was actually set, they came

> over, they put audio and video in my office and that's when I made the call to—I believe, I called [TSgt AE], who's the CATM NCOIC, to have him come over. And then, he came over and we started talking.

(R. at 56-57.) JK said she did not formally notify TSgt AE, Appellant's supervisor, that Appellant had been selected for a random urinalysis, but instead told TSgt AE "the standard, 'Hey, we need to see [Appellant].' And [TSgt AE] was like 'Okay.'" (R. at 58, 63.)

Once Appellant arrived at the CSS, JK said she never told Appellant that he had been selected for DDRP testing, she never asked for his Common Access Card, and never presented him with the normal DDRP testing paperwork. (R. at 59.) JK said only she and Appellant were in the room when they had their conversation and that the door to the room was closed. (R. at 75.) When asked "Was the conversation that you had with [Appellant] on January 20th, 2021 anything like any conversation that you had when [Appellant] showed up at your CSS office, on prior occasions?," JK responded, "No." (R. at 76.)

JK said AFOSI did not provide her any training on how to interrogate or question Appellant, but instead told her to "[t]ry not to, like, lead him into anything." (R. at 57.)

- *The Pretext Conversation*

The video of the pretext conversation between Appellant and JK is at Prosecution Exhibit 7. (R. at 1117.) The conversation, which lasted a little over 16 minutes, occurred in a room containing multiple cubicles. When Appellant entered the room, JK asked Appellant, "Can you close the door," to which Appellant replied, "Of course." (Id.) JK then began the conversation by stating that Appellant previously told her he was in a "Do Not Arm" status and that she then found out his DEROS had been extended. (R. at 1117; Pros. Ex. 7.) Appellant and JK were both standing near a cubicle and Appellant sat his beret on the top counter of the

cubicle and casually leans on top of it. Appellant did not report into JK and was not standing at attention or in any formal manner at any portion of their conversation. The conversation continued as follows:

> JK: [Sigh.] So, I, for my own, like, self—
>
> Appellant: Mm-hm.
>
> JK: —I need to, like, get this out of the way, because I've been, like—like, I'm shaking, because I've been, like, holding this in and, like, I didn't want to do it at work— but, I mean, we don't hang out outside of work.
>
> Appellant: Yeah.
>
> JK: But, like, I just need to know if it was involving another female, like, what happened with you and me?
>
> Appellant: No.
>
> JK: It didn't?
>
> Appellant: But, it involved another female.
>
> JK: Okay. So, it wasn't like what happened with you and me?
>
> Appellant: No.
>
> JK: At all?
>
> Appellant: Not even close.
>
> JK: Okay.

(R. at 1119; Pros. Ex. 7.) Appellant then looked around the room and laughingly asked if there were microphones in the room. The conversation continued:

> Appellant: With what happened with us that one time was worse, than what's going on right now. Like, you and I—
>
> JK: Yeah.

Appellant: —was worse.

JK: Yeah.

Appellant: What's going on right now is fucking bullshit.

JK: Okay.

Appellant: It's total, like, false not—it sucks. It's stupid. Nobody knows. Like, I haven't told anybody besides Sergeant [E] and Sergeant [S].

(R. at 1121; Pros. Ex. 7.) By this point, Appellant, who initially was wearing a cloth mask across his mouth, removed the mask from covering his mouth by unhooking one strap of the mask behind one of his ears, leaving the mask hanging from one ear and not covering his mouth, and continued casually leaning against the counter. The conversation continued:

JK: And so I was, like—

Appellant: For—

JK: —for my peace of mind, and so I can, like, finally, like, forgive you—

Appellant: Yeah.

JK: —and move on. Because, like, I've been holding on to this.

Appellant: No. And so, like, I fucked up. Right? And felt really bad, and I never really apologized. And, I haven't done anything—I've hung with two females, since we've hung out.

JK: Yeah.

(R. at 1120-21; Pros. Ex. 7.) As he was speaking, Appellant had a smile on his face, was openly talking with his hands as he leans against the counter, and showed no sign of duress or intimidation. The conversation continued:

Appellant: —One of them is that person.

JK: So, promise me that you did not, like, wrestle with her.

Appellant: We didn't—we didn't even kiss.

JK: Okay. So, she nev—did she say no—

Appellant: No.

JK: —like I said no?

Appellant: No. No.

JK: All right. You mean, you didn't hold her down—

Appellant: No. No.

JK: —like you held me down?

Appellant: No.

JK: Or choke me like—or choke her like you choked me?

Appellant: No.

JK: Do you promise?

Appellant: Yes.

JK: Because, if I fucking find out—

Appellant: —Did OSI talk to you?

JK: No.

Appellant: Oh.

JK: But I, like—I've been, like, shaking because—

Appellant: Yeah.

JK: —ever since the ATSO Rodeo—

Appellant: Mm-hm.

JK: —like, I've been trying. And, like, last week I was finally, like, "Oh my God, I can't find fucking anything." So, like, I've been wanting to talk to you, like, but, I haven't had an opportunity.

Appellant: Yeah.

JK: And, like—like, last night I was lying in bed and I was, like, tossing and turning, because I've been thinking about it and I'm, like, Oh, my God, like, I've been praying about this for a week and a half.

Appellant : Mm-mm.

JK: And I was, like, I can't have this in my body anymore. Like, I have to release it. Like, I have to get my feelings out. And, I'm, like, what you did to me was wrong.

Appellant: Yeah. No, I a hundred percent agree.

JK: [Exhaled.]

Appellant: So, I never formally apologized for that.

JK: No, you didn't.

Appellant: Sorry.

JK: But you did say you'd never do it again.

Appellant: And I—I haven't.

(R. at 1123-1124; Pros. Ex. 6.) Again, throughout this portion of the conversation, Appellant continually smiled at JK while he talked, sometimes laughed, and casually leaned against the countertop.

Later in the conversation, Appellant told JK about being brought in for questioning regarding the allegation against him by a separate female airman. Appellant told JK he initially thought he was being brought in based on what he had done to JK, stating, "Like, in all honesty, I was, like, what — your situ — that thing, like, with—was worse. I thought it

was for that. And I was like . . . wow, this took a while." (R. at 1127; Pros. Ex. 6.) Appellant continued to smile while speaking, and the two laughed when Appellant said he thought he was being brought into AFOSI because of his encounter with JK.

Appellant also continued to casually lean on, and sometimes lean across, the countertop when talking. JK was also standing but casually leaning back against another cubicle. Appellant then began volunteering additional information regarding the allegation involving the other female airman, including that they wrestled and that his son was present. (R. at 1129-30; Pros. Ex. 6.) At various points, Appellant again chuckles during the conversation. (R. at 1131-34.)

Appellant also offered to JK that the other female airman had sent him nudes, adding that he had not told AFOSI about those and had only told his Area Defense Counsel. (R. at 1131, 1144; Pros. Ex. 6.)

At one point when JK said, "Yea, I don't – yeah, I don't fucking trust you," Appellant said, "Yeah. Which is fine. But just know I've been better." (R. at 1134; Pros. Ex. 6.) Again, Appellant was smiling when he made this comment and was completely leaning on top of the countertop with his elbows, forearms, and wrists.

After more conversation about not being able to PCS, the conversation continued as follows:

JK: Well, I feel better.

Appellant: I'm glad.

JK: It only took two years.

Appellant: Yeah, I know. I know.

JK: I mean, I still fucking hate you, but—

Appellant: That's fine.

JK: —I feel better.

Appellant: Okay.

JK: You really don't have to pee.

Appellant: Oh, really?

JK: Yeah.

Appellant: Oh, son-of-a-bitch.

JK: I just needed you to come over here.

Appellant: Because I was so pissed. I was, like, this is the third time in two fucking months.

(R. at 1138-39; Pros. Ex. 6.) When JK told Appellant he did not have to pee, Appellant immediately smiled and laughed as he responded about being "pissed." When JK continued, "But, I was, like, 'I cannot go another fucking day,'" Appellant responded, "I'm surprised you took this long." (R. at 1139; Pros. Ex. 6.)

At that point, the conversation between Appellant and JK had lasted approximately 12 minutes, 50 seconds. After JK told Appellant he did not have to pee, the conversation continued for another three-and-a-half minutes. During that time, Appellant attitude, posture, and overall demeanor continued to remain the same as he smiled while talking to JK and leaning on top of the countertop.

After additional talk, Appellant again told JK, "I'm sorry," and "I never formally apologized to you either." (R. at 1142; Pros. Ex. 6.) Appellant then, without provocation or request, offered his fist to JK for a fist bump, all while smiling and chuckling. (R. at 1143;

Pros. Ex. 6.) Appellant then said, "You're literally the first person I've told," before talking about how anything sexual assault related gets sent "to the top." (Id.)

At the end of the conversation, Appellant did not report out, come to attention, or make any formal gestures. Appellant asked JK if she wanted the door to be open, and said, "Okay," "Cool," and "Bye." (R. at 1146; Pros. Ex. 6.)

- *The Military Judge's Ruling*

The military judge, in his ruling, found the following as fact:

- JK submitted an AFOSI application sometime in 2020, but knew she had not been selected by December 2020
- JK, not AFOSI, suggested meeting in her office in the CSS section
- JK did not serve in a law enforcement role even though she was assigned to the SFS; instead, she performed administrative duties including assisting members with in-processing and out-processing, managing the UIF program, and serving as a trusted-agent for the Drug Demand Reduction Program
- JK and Appellant held the same rank
- JK contacted Appellant's supervisor on 20 January 2021 with the intent to convey that Appellant had been randomly selected to provide a urine sample
- When Appellant arrived to JK's office, Appellant closed the door to JK's office and JK told Appellant about the research she had done about his DEROS being involuntarily extended and asked Appellant about allegations involving another female, CG
- Appellant denied any wrongdoing related to CG but did make "statements regarding his involvement with [JK] that may be incriminating
- JK later told Appellant that he "really don't have to pee," to which Appellant "expressed surprise and mock anger, but continued to speak to [JK] regarding matters" about JK and CG
- Appellant also discussed personal issues, such as his pending PCS and purchasing a house, both before and after being told he did not have to provide a urine sample

(R. at 173-176.)

The military judge cited to applicable law and evidentiary rules, including Article 31, UCMJ, and Mil. R. Evid. 304(f)(6) and (7). In citing to Article 31, UCMJ, the military judge noted rights must be given when an individual acting in an official capacity interrogates a suspect, adding that "official capacity" meant military persons knowingly acting in an official law enforcement or disciplinary capacity, or in a position of authority over a suspect." (R. at 177-78.) Citing United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014), the military judge stated the test for when Article 31 rights advisement was required included answering: (1) Was the questioner acting in an official capacity or through personal motivation; and (2) Would a reasonable person consider the questioner to be acting in an official law enforcement or disciplinary capacity. (R. at 178.)

The military judge concluded Appellant's statements to JK were not involuntary because JK was not required to advise Appellant of his Article 31 rights. The military judge first noted a footnote in Jones where our superior Court stated that actions of an undercover agent are not within the scope of the warning requirement of Article 31. (R. at 179.)

Turning to the two-prong test, the military judge concluded that JK was participating in an official law enforcement investigation. The military judge stated, "While there may have been some personal motivation behind her decision to assist OSI, with the pretext conversation, the evidence before the Court demonstrates that she was participating in an official investigation, being conducted by OSI." (R. at 180.)

As to the second prong, the military judge concluded that a reasonable person in the Appellant's position would not have concluded that JK was acting in an official law enforcement or disciplinary capacity. The military judge noted that JK was "an admin troop with no law enforcement training," did not perform law enforcement duties at Misawa Air

Base, and that Appellant was aware JK's duties were administrative in nature and did not include law enforcement. (R. at 181.)

Additionally, the military judge found that JK did not hold herself out to be a law enforcement agent and that Appellant was unaware that JK was participating with OSI in the investigation, was unaware of the presence of audio and visual recording equipment in JK's office, and that JK told Appellant she had not spoke to AFOSI. The military judge noted that while this was not true, "it did not affect the voluntariness of the accused's statements." (Id.)

The military judge further held that a reasonable person in Appellant's position would not have concluded that JK was acting in a disciplinary capacity during the conversation, adding that while JK used her position in the CSS and her role as a DDRP trusted agent to get Appellant to visit her office, the DDRP is "not a disciplinary program," and JK was not a superior to Appellant in the chain of command. (Id.)

Additionally, the military judge found there was no indication in the tone or tenor of JK's questions to Appellant that was intimate that she was involved in a disciplinary capacity. The judge stated that a reasonable person would not have felt as if he was compelled to speak with JK in exchange for being allowed to leave the CSS office as JK "did not connect in any way the need for [Appellant] to answer questions, prior to being allowed to depart the office to provide a urine sample." (R. at 182.)

The military judge then turned to United States v. Rios, 48 M.J. 261 (C.A.A.F. 1998), where the appellant's commander told him he needed to call his daughter. At trial, the appellant said he interpreted the commander's statement as an order, but when asked if he thought he would be disciplined if he did not call his daughter, the appellant said the commander was not on

his mind when he spoke to who he thought was his daughter. Our superior Court found the appellant thought he was talking to his daughter, not an interrogator or military superior, and that to the extent the appellant interpreted the commander's directive as an order, it had no effect on the appellant's subsequent conversation with who he thought was his daughter. (R. at 182-83.)

Drawing a comparison to Rios, the military judge concluded, "Similarly, in this case, while a reasonable person may have concluded that the reason for reporting to the CSS was related to providing a urine sample ordered by the accused's commander, it had no effect on [Appellant's] subsequent conversation with [JK]." (R. at 183.) The military judge also cited to United States v. Parillo, 31 M.J. 886 (A.F.C.M.R. 1990), where this Court's predecessor found a questioner was acting in an official capacity by virtue of participating in a pretext conversation, but found no Article 31 rights were required as part of a routine and permissible undercover technique. The military judge also noted the appellant in that case had a prior relationship with the questioner and the nature of the conversation was of one between friends. (Id.)

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014). "When there is a motion to suppress a statement on the ground that rights' warnings were not given, we review the military judge's findings of fact on a clearly-erroneous standard, and we review conclusions of law de novo." Id. Whether a questioner was acting or could reasonably be considered to be acting in a law enforcement or disciplinary capacity is a question of law requiring de novo review. Id. at 361.

Law

The voluntariness of a confession is a question of law this court reviews de novo for an abuse of discretion. United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008). "A confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.'" Id. (*quoting* Mil. R. Evid. 304(a)(1)(A)). "We examine 'the totality of the surrounding circumstances' to determine 'whether the confession is the product of an essentially free and unconstrained choice by its maker.'" Id. (*quoting* United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996)).

Article 31, UCMJ, 10 U.S.C. § 831, states in pertinent part:

> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> . . .
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in [**33] a trial by court-martial.

"Thus, Article 31(b), UCMJ, warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." Jones, 73 M.J. at 361.

Our superior Court has repeated held that the warning requirement of Article 31(b) "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981); *see also* Rios, 48 M.J at 264.

Additionally, as this Court noted in United States v. Bishop, 76 M.J. 627, 642 (A.F. Cr. Crim. App. 2017), "In Jones, however, our superior court noted that cases involving undercover officials and informants involve unique considerations." There, our superior Court stated, "Because undercover officials and informants do not usually place the accused in a position where a reasonable person in the accused's position would feel compelled to reply to questions, . . . logic dictates that Article 31(b), UCMJ, would not apply in those situations." Jones, 73 M.J. at 361, n.5. The Court then adopted a two-prong test for determining whether statements by an accused to informants and undercover officials must be suppressed. The first prong is whether the person who conducted the questioning was "'participating in an official law enforcement or disciplinary investigation or inquiry,' as opposed to having a personal motivation for the inquiry." Id. at 361 (*quoting* United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000)). The second prong applies an objective standard of a reasonable person in the suspect's position to determine whether that person would have concluded that the questioner was acting in an official law enforcement or disciplinary capacity.[2] Id. at 362.

[2] This second prong modified our superior Court's holding in Duga, 10 M.J. at 209, which included a subjective standard for the second prong, namely that "the person questioned perceived that the inquiry involved more than a casual conversation." Duga, 10 M.J. at 210.

Analysis

The military judge did not err in denying Appellant's motion to suppress his statements to JK as Appellant failed to show that a reasonable person in Appellant's position would have concluded that JK was acting in an official law enforcement or disciplinary capacity. This Court's review should come to the same conclusion and deny Appellant's claim.

Here, no reasonable person in Appellant's position would conclude JK was acting in in an official law enforcement or disciplinary capacity. To begin, even though she was assigned to the SFS, everyone, including Appellant, knew JK was a personnelist assigned to the SFS purely to perform administrative tasks and that she did not wear a beret. Thus, there was no basis for a reasonable person to believe JK was acting in an official law enforcement capacity when she and Appellant had their pretext conversation.

Moreover, as a personnelist, no reasonable person would conclude that JK had any official disciplinary capacity on 20 January 2021. JK was not a commander or first sergeant, and no one was present when Appellant arrived to speak with JK. JK did not outrank Appellant or hold any sort of superior position in Appellant's chain of command. Further, the record shows JK had no disciplinary capacity with regard to the DDRP, but instead was simply the trusted agent who notified members of their order to provide a urine sample.

Moreover, once Appellant arrived to JK's office, which included multiple cubicles, JK did not require Appellant to report in, stand at attention, or do anything indicative of someone possessing official disciplinary capacity. JK also never told Appellant that he had been selected for DDRP testing, never asked for his Common Access Card, and never presented

him with the normal DDRP testing paperwork, all things she stated she normally did "immediately or nearly immediately" when someone would arrive at her office. (R. at 55.)

Additionally, while the Jones test is based on a reasonable person standard, Appellant's demeanor is indicative of how a reasonable person would have acted that day in that situation. In the video, Appellant is smiling, laughing, and casually leaning against and over a cubicle countertop. Appellant shows no duress, coercion, or "subtle pressure" when he arrives at JK's workstation or throughout the ensuing 16-minute conversation. *See* Duga, 10 M.J. at 210. Further, even after being told he did not actually have to provide a urine sample, Appellant's demeanor did not change, as he remained smiling, laughing, and leaning on the countertop as he had done throughout the conversation.

No doubt recognizing the casualness of the entire conversation, with both Appellant and JK laughing and speaking back-and-forth throughout, the military judge did not err when finding there no indication in the tone or tenor of JK's questions to Appellant that would intimate that she was involved in a disciplinary capacity. Further, the military judge did not err when concluding that a reasonable person would not have felt as if he was compelled to speak with JK in exchange for being allowed to leave the CSS office, especially since JK "did not connect in any way the need for [Appellant] to answer questions, prior to being allowed to depart the office to provide a urine sample." (R. at 182.)

In short, no reasonable person in Appellant's position would have believed JK possessed, let alone acted in, an official disciplinary capacity when Appellant came to her workstation on 20 January 2021. Moreover, the record shows there was no "military rank, duty, or other similar relationship," which would have caused "subtle pressure" on Appellant to respond to an inquiry. *See* Duga, 10 M.J. at 210.

Still, Appellant finds fault for various reasons, all of which are unpersuasive. First, Appellant states, "The circumstances reasonably created the perception that [JK] was using her command staff position to compel [Appellant's] participation." (App. Br. at 13.) Appellant believes the "conversation was not casual, which might have precluded the need for a rights advisement." (Id.) However, a review of the video shows the conversation between Appellant and JK was remarkably casual, as Appellant continually laughed and smiled throughout the 16-minute conversation, all while casually resting his lower arms on a countertop. Further, though JK used her position as a trusted agent to get Appellant to her workstation, nothing about the DDRP or providing a urine sample was mentioned once Appellant arrived. Certainly, as the military judge noted, JK did not threaten to withhold DDRP paperwork or threaten anything DDRP related in exchange for Appellant either having to talk, being able to leave, or to obtain required DDRP documentation. Moreover, JK's tone and manner, including casually leaning against a separate cubicle while laughing and talking to Appellant, provided no perception to either Appellant, or a reasonable person, that JK was using her administrative position "to compel" Appellant's participation.

Next, Appellant claims JK performed an "interrogation" of Appellant. (App. Br. at 13.) Here, Appellant attempts to create a circumstance where JK mercilessly barraged Appellant with questions to the point he felt "compelled to answer questions." (Id.) Appellant began to set this scenario in the Facts section of his brief by stating JK "instructed" Appellant to close the door when he first arrived. (App. Br. at 8, 14.) However, the video shows JK simply asked Appellant, "Can you close the door," to which Appellant replied, "Of course." (Pros. Ex. 6.) Appellant also says the "entire meeting consisted of [JK] questioning [Appellant]." (App. Br. at 9.) However, a review of the entire 16-minute

conversation on video shows a relaxed, back-and-forth conversation where Appellant and JK talked about a variety of topics, many of which are voluntarily raised by Appellant. The video plainly shows this was no "interrogation" as Appellant claims, and shows no signs of coercion, duress, or pressure on the part of JK to somehow "compel" Appellant to speak.

Next, citing Swift, Appellant attempts to equate JK with a unit first sergeant. In Swift, an Air Force Master Sergeant, who was a first sergeant, ordered the appellant, a Staff Sergeant, to his office to respond to accusations made by the appellant's ex-wife. The first sergeant then interrogated the appellant with no rights advisement. Swift, 53 M.J. at 447. Our superior Court noted the "strong presumption" that questioning by a military superior in the "chain of command" is part of a "disciplinary" investigation. Id. at 448, *citing* United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991). The Court held the "Government failed to rebut the strong presumption that MSgt Vernoski's interrogation was part of an investigation that included disciplinary purposes" and that Article 31 rights were warranted.

Appellant's case is vastly different since JK did not outrank Appellant, was not a superior member of Appellant's chain of command, and held no special duty within the unit equivalent to a first sergeant. Still, Appellant attempts to connect this first sergeant and JK by claiming the Swift decision was made due to the first sergeant's "membership on the command staff." (App. Br. at 13.)

Appellant is mistaken. First, the term "command staff" is never used in the Swift decision. The term "chain of command," however, is mentioned multiple times. Undoubtedly, simply being on a commander's support staff as a personnelist is not what our superior Court had in mind in its Swift decision. There is a plain difference between a personnelist assigned to a CSS and the first sergeant of a unit. Instead, the Swift decision, and its multiple citations to

Good, focuses on leadership positions and those in the chain of command of an accused. Moreover, the Swift decision specifically highlights actions taken by the first sergeant and the commander, including joint visits to the base legal office to discuss the investigation. In short, to the extent that Appellant believes Swift applies equally to a personnelist as it does to a first sergeant, Appellant is incorrect. Thus, there is no presumption that JK was acting in an official disciplinary capacity.

Still, Appellant argues that the military judge "acknowledged that [JK] functioned in 'support of the commander.'" (App. Br. at 14, *citing* R. at 175.) However, Appellant fails to provide the context of the military judge's statement, which in full reads, "She performed administrative duties in support of the commander, to include assisting members with in-processing and out-processing, managing the UIF program, and serving as a trusted-agent for the Drug Demand Reduction Program, in addition to other administrative duties." (R. at 175.) Thus, while JK did provide purely administrative duties for the unit, she certainly did not provide the same leadership and disciplinary support provided to the commander by the unit's first sergeant that is at issue in Swift.

Finally on his "command presumption" argument, Appellant again claims JK "instructed" him to close the door," and "interrogat[ed]" him, which "created the reasonable appearance that [Appellant] was being questioned under the weight of [JK's] command staff position." (App. Br. at 14.) Again, a review of the video shows Appellant was not "interrogated" and, considering his smiling, laughing, and overly casual demeanor, was under no "weight" of Appellant's administrative position.

Appellant next argues that a "reasonable person would have concluded that [JK's] interrogation of [Appellant] was done in an official capacity." (App. Br. at 14.) Appellant yet

again argues the "coercive environment that [JK] questions [Appellant] in was underscored by the interrogative manner that she questioned him." (Id.) Again, however, this supposed coercive environment where JK is mercilessly barraging Appellant with questions simply does not exist. Instead, the video shows Appellant laughing and smiling at JK while Appellant is casually standing and leaning on a cubicle countertop and JK is leaning back on a cubicle. Further, the video shows a back-and-forth, casual, and non-adversarial conversation where, again, Appellant is smiling and laughing the entire time.

Appellant next cites United States v. Johnstone, 5 M.J. 744, 747 (A.F.C.M.R. 1978). However, that case occurred prior to the two-prong test initiated by our superior Court in Dugas and modified in Jones. In Johnstone, this Court only dealt with the first prong, stating, "The ultimate inquiry in every case is whether the individual, in line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to question one whom he suspects of an offense. If the former is true, then the interrogation is clearly official and a preliminary warning is necessitated." Jonestone, 5 M.J. at 746, *quoting* United States v. Beck, 15 U.S.C.M.A. 333, 335 (1965). The Court held that the informant's conduct was "official" for Article 31 purposes and deemed any statements made as inadmissible.

Yet, as Appellant notes, the military judge already held in Appellant's favor regarding the first prong of Jones, which was the sole focus in Jonestone. The issue before this Court is the second prong since, as stated in Duga, "Unless both prerequisistes are met, Article 31(b) does not apply." Duga, 10 M.J. at 210. As the second prong did not exist when Jonestone was decided, Appellant's reliance on that case is misplaced.

Next, Appellant states a "valid pretext requires far more casual interaction to circumvent Article 31's requirement." However, as stated earlier and shown in the video at Prosecution

Exhibit 6, the interaction between Appellant and JK could not be more casual than what took place. While the conversation may have occurred behind a closed door in JK's workplace, Appellant and JK laughed during multiple portions of the interaction, Appellant smiled throughout, and both stood in an overly casual manner by the surrounding cubicles.

Still, Appellant seemingly takes issue with the military judge who, according to Appellant, "agreed that [Appellant] and [JK] did not have a friendly relationship, yet paradoxically found that their conversation was somehow casual in nature." (App. Br. at 15.) Instead of continually belaboring this point, the Government maintains that this Court's independent viewing of Prosecution Exhibit 6 will show a very casual conversation between JK and Appellant, not one that involves intrusive or coercive "interrogative methods" as Appellant contends. (*See* App. Br. at 15)

Next, Appellant claims all of JK's actions were "under the direction of AFOSI." (Id.) Appellant is again wrong. First, AFOSI only asked JK if she would like to engage in a pretext conversation with Appellant. They did not order her or require her to do anything. Next, AFOSI did not pick the location of the encounter – JK is the person who suggested the meeting place. Finally, JK testified that AFOSI did not provide her any training on how to interrogate or question Appellant, but instead told her to "[t]ry not to, like, lead him into anything." (R. at 57.) Here, JK was not under the direction of AFOSI.

Appellant then places a great deal of reliance on our superior Court's decision in United States v. Gilbreath, 74 M.J. 11 (C.A.A.F. 2014). (App. Br. at 16.) However, the facts of Gilbreath differ greatly from this case. There, a superior officer ordered the questioner, a sergeant, to question the appellant. Additionally, the questioner outranked the appellant, who was a corporal. The questioner also referred to himself as the appellant's "superior." The

questioning also involved the whereabouts of a missing weapon in the Marines Corps. Our superior Court held as follows:

> An individual member of the Ready Reserve equipped with this cultural knowledge might feel compelled to respond to questions asked by a more senior NCO. That fact is particularly evident here, where Appellant incriminated himself in response to Sgt Muratori's questioning and invocation of military duty. Sgt Muratori's questioning therefore falls within the scope of Article 31(b), UCMJ, and demonstrates the reason why Congress legislated in this area. *See* Swift, 53 M.J. at 445 ("In such an environment, a question from a superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination."). Once Sgt Muratori suspected Appellant of committing larceny, he was required under Article 31(b), UCMJ, to advise him of his privilege against self-incrimination before pursuing further questioning.

Gilbreath, 74 M.J. at 22.

The same conditions are not in play in this case. No one ordered JK to question Appellant. Importantly, considering the Court's reference to Swift and the focus on questioning from a superior, JK did not outrank Appellant and was not Appellant's "superior."

Still, Appellant believes Gilbreath is illustrative because he believes JK "employed elicitation tactics when questioning [Appellant] at the direction of AFOSI. (App. Br. at 16.) Again, however, a review of the video shows JK used no such "elicitation tactics" during her conversation with Appellant. Moreover, as previously discussed, JK did not question Appellant at the direction of AFOSI.

Finally, Appellant claims the military judge's reliance on Rios was misplaced. (App. Br. at 17.) Appellant claims, "Like Rios, [Appellant] was ordered by his supervisor to speak to [JK]," and that "her position as CSS reasonably created pressure for [Appellant] to talk." (Id.) He also says JK's "use of her official position, and her trapping of command

authority, relegated her beyond that of an informant with no appearance of law enforcement capacity." (Id.)

Appellant is again mistaken. First, while Appellant's supervisor may have told Appellant to go to see JK, he never ordered Appellant to speak to her about his investigation or engage in a 16-minute conversation about a variety of topics. Further, Appellant has failed to show how JK's CSS position somehow created pressure for him to talk. A review of the video shows Appellant was under no pressure, stress, duress, or coercion as he laughed, smiled, and openly chatted with JK throughout their 16-minute conversation. Finally, nothing about JK's actions or demeanor in the video indicates any appearance of a, as Appellant states it, "law enforcement capacity."

All told, Appellant has failed to show the military judge abused his discretion by finding that no reasonable person would consider JK to be acting in an official law enforcement or disciplinary capacity when she and Appellant spoke on 20 January 2021. Therefore, Appellant's claim must fail.

Yet, even if this Court were to agree with Appellant that the military judge abused his discretion in admitting the evidence, this Court must still address prejudice. Whether prejudice results in the context of an erroneous evidentiary ruling is determined by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999), *citing* United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

Here, the Government's case was very strong without Prosecution Exhibit 6. As detailed in Issues III and IV, JK testimony alone provided powerful direct evidence of Appellant's actions against her. Her further text conversations with Appellant, as well as conversations with

SSgt AR, corroborated that testimony. The strength of the defense's case, on the other hand, was very weak as it relies on unpersuasive arguments about JK's credibility and Appellant's unsupported mistake of face defense.

All told, the military judge did not err in admitting Prosecution Exhibit 6 as no reasonable person in Appellant's position would consider JK to be acting in an official law enforcement or disciplinary capacity when she and Appellant spoke on 20 January 2021. Moreover, even if the military judge did abuse his discretion, Appellant has failed to show prejudice in this case. As such, this Court should deny Appellant's claim.

II.

APPELLANT'S COURT-MARTIAL DID NOT LACK JURISDICTION.

Standard of Review

Whether a court-martial is properly constituted is an issue of law reviewed de novo. *See* United States v. Colon, 6 M.J. 73, 74-75 (C.M.A. 1978).

Additional Facts

After the selection of members, Appellant moved for a stay of proceedings, arguing the panel had an invalid quorum because four of the selected members were from the United States Space Force and four were from the United States Air Force. (R. at 776.) Appellant's counsel stated Appellant was a member of the United States Air Force and, citing to the discussion of R.C.M. 503(a)(3), argued that "the members now selected are not a majority of the same armed force of [Appellant]." (Id.) The discussion of R.C.M. 503(a)(3) then states:

> Members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent

> circumstances make it impractical to do so without manifest injury to the Service.

R.C.M. 503(a)(3), Discussion. When the military judge asked about case law concerning his motion, Appellant's counsel stated, "I'm not aware of anything that answers that question," and "If I find Something I will gladly provide it, but I'm not currently aware of anything." (R. at 811.)

In his ruling denying the motion, the military judge noted the procedural history of the case involving member detailing and selection. (R. at 820.) Originally, Appellant's court-martial was set to convene at Misawa Air Base with 16 detailed members. (Id.) However, after a change of venue moved the trial to Buckley Space Force Base, which Appellant admits in his brief was consented to by Appellant's counsel,[3] the 16 original members were excused from Appellant's panel and, after subsequent excusal and addition of other members, a total of 15 new members were detailed, including 10 from the United States Air Force and five from the United States Space Force. (Id.)

Following an initial round of *voir dire*, Appellant's panel fell below the eight-member quorum requirement and six more members were detailed to the panel, including three from the United States Air Force and three from the United States Space Force. (Id.) In total, 21 members were detailed to Appellant's panel, including 13 from the United States Air Force and eight from the United States Space Force. (R. at 821.) After another round of *voir dire*, the panel consisted of eight members, four from each service.

The military judge cited R.C.M. 503(a)(3), which states as follows:

> *Members from another command or armed force.* A convening authority may detail as members of general and special courts-

[3] *See* App. Br. at 18.

> martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

(R. at 824.)

The military judge also cited R.C.M. 201, which discusses reciprocal jurisdiction and states that each armed force has court-martial jurisdiction over all persons subject to the UCMJ, before stating the following:

> Nowhere in this R.C.M. are concerns raised with the composition of the court in which the convening authority and the accused are from the same armed service.
>
> This is just one instance where conspicuous by its absence is any statutory or regulatory right for an accused to have a court composed of a majority of members from his or her own armed service. It is not required by the text of R.C.M. 501, 502, 503, 903, or 912(A).
>
> This is in contrast to the rules implemented to ensure an enlisted accused's right to a court composed in accordance with his statutory right to select a panel composed of either all officer members or one composed of at least one-third enlisted members. The rules also contemplate a variety of circumstances affecting court composition, including falling below quorum, falling below quorum as it relates to enlisted representation, excusal of members following impanelment, and the detailing of new members, if a court falls below quorum after impanelment.
>
> The absence of procedures for a situation such as the one currently before This Court further demonstrates that an accused, in this situation, has no entitlement to a court composed of a majority of members of his same service at the time of impanelment.

(R. at 827-28.)

As to the R.C.M. 503(a)(3) discussion itself, the military judge stated, "To the extent that the 'discussion' section following R.C.M. 503(a)(3) confers any type of right upon an accused, This Court concludes the convening authority satisfied the accused's right by detailing a majority

of members from the Air Force, prior to assembly. Further, even after detailing additional members following the court falling below quorum, the total number of members constituted a majority of United States Air Force officers." (R. at 828.)

The military judge reasoned, "A close reading of the language used, for example, words such 'detailing' and 'selection' are consistently used in the Manual for Courts-Martial to refer to the pre-assembly process, rather than post-challenges impanelment step, and takes into consideration the practical difficulties that might be confronted." (R. at 832.) Ultimately, the military judge "conclude[d] the best reading of the rules is that the requirements are tested at selection. If the combined convening orders reflect at least the majority of the members when the court-martial is assembled and they come from the accused's armed force, the intent of the 'discussion' section is satisfied." (Id.)

Law and Analysis

Appellant claims his court-martial "lacked jurisdiction because the panel was improperly constituted" since the "panel lacked a majority of members from [Appellant's] own armed force-the Air Force." (App. Br. at 20.) Appellant claims the "non-majority panel was noncompliant with R.C.M. 503(a)(3)" and the "military judge failed to correctly apply R.C.M. 503(a)(3)." (Id. at 21.) Appellant is incorrect.

- *The Space Force, as it relates to military justice matters, is considered one armed force with the Air Force, rendering R.C.M. 503(a)(3) inapplicable.*

While an independent armed force, the United States Space Force is organized under the Department of the Air Force along with the United States Air Force. (App. Ex. XXXV.) On 20 October 2020, the Secretary of the Air Force, the Service Secretary for both the United States Space Force and United States Air Force, issued guidance stating the following:

> It is further my intent that while the United States Space Force is an independent armed force, the United States Air Force and United States Space Force shall be considered as one armed force for purposes of policies, procedures, and authorities for all military justice, administrative matters, and legal support matters. This includes the exercise of control and disciplinary authority over personnel assigned or attached to either armed force for matters pertaining to military justice, administrative matters, and separations outlined in the attachments.

(App. Ex. XXXV.) Thus, as directed by the Service Secretary for the United States Space Force, the United States Space Force and the United States Air Force are considered one armed force for military justice purposes. Accordingly, R.C.M. 503(a)(3) is inapplicable to this case.

- *R.C.M. 503(a)(3) relates to the detailing of a members and a majority of members detailed to Appellant's court-martial where from his service.*

R.C.M. 503 is titled "Detailing members, military judge, and counsel, and designating military magistrates." *See* R.C.M. 503. The language of R.C.M. 503(a)(3) also uses the word "detail." As the military judge concluded at trial, the specific words of both R.C.M. 503 and R.C.M. 503(a)(3) relates to the detailing of court members. Here, the convening authority detailed a total of 21 members to Appellant's court-martial including 13 Air Force members. This constituted a majority from Appellant's service. Thus, as the military judge found as trial, the "the intent of the 'discussion' section [for R.C.M. 503(a)(3)] is satisfied." (R. at 832.)[4]

[4] Appellant is silent in his brief with regard to this portion of the military judge's ruling that the intent of R.C.M. 503(a)(3)'s discussion dealt with the "detailing" of members and, thus, was satisfied. Instead, Appellant states the military judge "failed to correctly apply R.C.M. 503(a)(3)" because he did not address the "exigent circumstances" or "manifest injury" portions of the discussion language. (App. Br. at 25.) However, Appellant fails to note the military judge did not address those areas because he had already found the discussion's intent was met by the detailing of a majority of Air Force members to the court-martial, rendering further analysis irrelevant.

- *The Discussion to R.C.M. 503(a)(3) is neither required nor binding.*

Assuming R.C.M. 503(a)(3) is applicable in this case and that the convening authorities detailing of a majority of Air Force members to Appellant's court-martial does not meet the intent of R.C.M. 503(a)(3)'s discussion, Appellant's claim still fails. First, Appellant claims R.C.M. 503(a)(3) "*requires* that the majority of the panel be composed of members of the same armed service as the accused unless "exigent circumstances make it impractical to do so without manifest injury to the service." (App. Br. at 21, *citing* R.C.M. 503(a)(3), Discussion.) (emphasis added.) However, the discussion of R.C.M. 503(a)(3) requires no such thing. Notably, the discussion does not use the words "must" or "shall," but instead uses the word "should" and the phrase "should ordinarily."

Yet, even if the discussion language did use the words "must" or "shall," the language is not binding. As the drafters of the Manual for Courts-Martial (MCM) state in Appendix 15:

> The Discussion is intended by the drafters to serve as a treatise. To the extent that the Discussion uses terms such as "must" or "will," it is solely for the purpose of alerting the user to important legal consequences that may result from binding requirements in the Executive Order, judicial decisions, or other sources of binding law. The Discussion itself, however, *does not have the force of law*, even though it may describe legal requirements derived from other sources.

See MCM at App. 15, A15-2. In essence, "The provisions of a discussion section to the R.C.M. are not binding but instead serve as guidance." United States v. Chandler, 80 M.J. 425, 429 (C.A.A.F. 2021) (*citing* United States v. New, 55 M.J. 95, 113 (C.A.A.F. 2001) (Effron, J., concurring) (referring to an R.C.M. Discussion section as "non-binding"); MCM, pt. 1, para. 4, Discussion ("These supplementary materials . . . do not constitute rules [or] are binding.").

Still, Appellant claims the discussion language should be binding because "the longstanding nature of R.C.M. 503(a)(3)'s discussion section is reflected in the fact that the same language was codified in the revised version of the 1969 Manual for Courts-Martial." (App. Br. at 22.) However, even when the language was included in the rule itself, our superior Court's predecessor, questioned whether the rule was a requirement. In United States v. Hooper, 5 U.S.C.M.A. 291, 399-400 (C.M.A. 1955), our superior Court's predecessor stated:

> Careful reading of these provisions discloses a curious absence of words of command. The primary word is "should," a word usually understood as indicating action desired, but not required. *See* United States v. Voorhees, 4 USCMA 509, 527, 16 CMR 83. That guidance, not command, may be the intention of the regulation is further suggested by the phrase, "subject to this policy" appearing in paragraph 13, and the like phrase set out in paragraph 4g. A policy declaration does not necessarily impose a legal restriction on the exercise of a right vested under the Uniform Code.

Id.

Furthermore, as the military judge noted in his ruling, no statutory UCMJ article or rules provide an accused the right to have a court composed of a majority of members from his or her own armed service and no such requirement exists in the text of R.C.M. 501, 502, 503, 903, or 912(A). Thus, while a majority of the same service members as an accused may be preferrable, no requirement or legal right exists for Appellant.

- *Appellant's "fairness" argument is unsupported by law or the facts of this case.*

Appellant then turns to an argument of "fundamental fairness" by citing to an over 120-year-old Supreme Court case where a militia member was convicted by a panel of regular officers. (App. Br. at 22, *citing* McClaughry v. Deming, 186 U.S. 24 (1902).) Yet, Appellant fails to explain how a panel consisting of four members from the Air Force and four members

from the Space Force creates a realm of unfairness that is similar to a militia member being tried by regular officers over 100 years ago.[5]

Appellant, though, continues his fairness argument by citing to our sister Court's 1984 decision in United States v. Negron, 19 M.J. 629 (N.M.C.M.R. 1984) where a Navy officer was convicted by a panel consisting only of Marine officers. (App. Br. at 23.) There, noting that 155 naval officers were assigned to the appellant's command and that a "large concentration of naval personnel" were within driving distance to the site of the court-martial, the NMCMR found that "under the circumstances, such actions present an image of unfairness and an attitude of unnecessary inflexibility by the convening authority." Negron, 19 M.J. at 239.

However, the circumstances of Appellant's case are much different. Here, Appellant was not convicted by all Space Force officers, but instead by an eight-person panel that consisted of four Air Force officers and at least one, but likely three, members who were previous Air Force officers just a couple of years prior to Appellant's court-martial.[6] Moreover, 13 of the total 21 members detailed to Appellant's panel once moved to Buckley were Air Force members.

Appellant then cites to United States v. Van Steenwyk, 21 M.J. 792, 811-812 (N.M.C.M.R. 1985), which actually detracts from his fairness argument. (App. Br. at 24.) There, our sister Court found no fairness issue when a Naval officer who requested an all-Navy officer panel instead ended up with a panel consisting of one Navy officer and eight Marine

[5] Notably, at least one of the Space Force members, Capt BL, stated on the record that he commissioned into the Air Force prior to re-commissioning into the Space Force. (R. at 407.) Considering the infancy of the Space Force, it is likely that at least two other Space Force members, Capt TB and Capt AO, where also members of the Air Force prior to re-commissioning into the Space Force.

[6] Appellant's court-martial took place in April 2022. The Space Force was founded on 20 December 2019.

officers. Van Steenwyk, 21 M.J. at 811. Moreover, the NMCMR seemed to take issue with its own Negron opinion when it stated, "The gratuitous suggestion in Negron that Marine commanders assign Navy officers to cases with Navy defendants is not necessarily logically or factually sound, nor does it have any support in law." Id. at 812.

Appellant's fairness argument is also unsupported by the law. Notably in Van Steenwyk, the NMCMR highlighted why the appellant there had failed to show any "unfairness" between having Navy versus Marine members, stating, "The premise of the argument, regarding the relatively more severe fraternization standard of the Marine Corps, is rejected. As previously noted, there is no meaningful distinction between the Navy and Marine Corps regarding fraternization nor is there any evidence that the convening authority used improper criteria in selecting court members."[7] Id. at 811-12.

Likewise, Appellant has failed to demonstrate how having a panel equally constituted of Air Force and Space Force members somehow resulted in unfairness. Appellant does not attempt to say that Space Force members some treat sexual assault and assault charges more severely than Air Force members, which would be completely unfounded. Nor does he claim the convening authority deliberately selected Space Force members instead of Air Force members, which would also be unfounded considering over 60% of the members detailed to Appellant's court-martial were Air Force members.

Undeterred, however, Appellant claims the "member selection process is more fraught than Negron," because the "convening authority changed the venue from Misawa AB to a Space

[7] In that case, the appellant, charged with fraternization, argued the Marine Corps standard regarding fraternization was stricter and the convening authority used inappropriate standards to deliberately select Marine members.

Force installation," and that this "create[d] the appearance of unfairness and lack of impartiality." (App. Br. at 24.) However, Appellant openly admits in his brief that Appellant's "trial defense counsel consented [to] the change of venue." (Id. at 18.) Appellant also brought no issue regarding the change of venue before the trial court or to this Honorable Court. Moreover, even after changing the venue, the convening authority still detailed 20% more Air Force members than Space Force members. And, again, Appellant fails to explain why having an equal amount of Air Force and Space Force members on his panel somehow created an appearance of "unfairness" or "lack of impartiality."

In sum, R.C.M. 503(a)(3) is inapplicable in this case because the Service Secretary of both the United States Space Force and the United States Air Force has deemed the two services as one armed force for military justice purposes. Moreover, R.C.M. 503 and R.C.M. 503(a)(3) involve the detailing of court members and the majority of members detailed to Appellant's court-martial where members of his own service. Further, even if R.C.M. 503(a)(3) applies in this case and the intention of the discussion was not met by the detailing of a majority of Air Force members to Appellant's court-martial, the discussion of R.C.M. 503(a)(3) is neither binding (based on it being a discussion versus the text of the actual rule) or required (because of its used of the words "should" and "should ordinarily"). Finally, Appellant has failed to show his "fairness" argument is supported by law or by fact, as he has not demonstrated how a panel consisting of four Air Force officers and four Space Force officers (most of whom who were likely former Air Force officers) created an appearance of unfairness or lack of impartiality.

III.

APPELLANT'S CONVICTION FOR AGGRAVATED ASSAULT BY STRANGULATION IS LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Additional Facts[8]

MSgt DV was JK's section chief at Misawa AB when JK worked at the base's Military Personnel Flight (MPF) until JK moved to the Misawa AB Security Forces Squadron (SFS) to perform personnel functions. (R. at 1037-38.) MSgt DV and JK hung out two to three times off duty and outside of work.

On 28 September 2019, MSgt DV had a going away event due to her pending deployment . (R. at 1039.) That night, MSgt DV met up with JK around 2000 hours and they went to an offbase hookah lounge for a few hours before going to a karaoke bar. (R. at 1040-41.) Prosecution Exhibit 3 is a picture of the group MSgt DV and JK were with that night which was taken outside of the karaoke bar. (R. at 1043.)

MSgt DV was drinking that night but did not recall JK drinking. (R. at 1044.) MSgt DV saw no signs of intoxication from JK such as slurring words or trouble maintaining balance. (Id.) MSgt DV said Appellant was not part of the group that night and that she did not accompany JK home that night. (R. at 1045.)

[8] This section will detail facts which are pertinent for both Issues III and IV.

JK testified that she had two jobs when stationed at Misawa AB from September 2018 through February 2021. (R. at 1069.) She first worked at the MPF before moving to the SFS between March and May 2019 to the squadron's Commander's Support Staff (CSS). (R. at 1070.) Both positions involved personnelist functions.

JK first met Appellant a few months after moving to the SFS. (R. at 1071.) JK said she saw Appellant a few times afterwards, including while she was working out, and that on one occasion Appellant told her about his recent divorce. (R. at 1073.) When asked if there was any flirting between her and Appellant, JK said, "Not in my eyes. He was just another Security Forces member to me." (Id.) The two never went on any dates or ever hung out at bars or clubs.

On 28 September 2019, JK said she met up with MSgt DV for a going away party. (R. at 1074.) JK said she parked her car outside the main gate of Misawa AB. (Id.) JK said she wore a flannel, gray t-shirt, skinny jeans, and Converse shows. (R. at 1076.) After having one or two drinks at a hookah bar, their group went to a karaoke bar where she had another one or two drinks. (R. at 1074-75.) By the end of the evening, the group had dispersed and JK was looking for a way home. JK did not feel intoxicated but knew Japanese law was very strict on drinking and driving so she did not want to drive her car. (R. at 1075.) She was also not comfortable getting a taxi because of Japanese language issues and because she had never taken an off-base taxi either by herself or with a group. (R. at 1075, 1078.)

As she was contemplating her options, Appellant walked by with another Airman. (R. at 1076-77.) JK asked Appellant about his plans and Appellant told her "he was getting ready to go back to base." (R. at 1077.) JK asked Appellant if it would be alright to stay on his couch and Appellant said yes. (Id.) When asked why she did not drive her car or sleep in her

car, JK said, "I'd rather be safe and at least get on base. And I thought, you know, a trustworthy defender would-would be okay." (R. at 1079.)

JK testified Appellant told her he was walking to the enlisted club where the Airmen Against Drunk Driving program was picking people up. (R. at 1077-78.) During the one-mile walk to the club, JK said she and Appellant talked about Appellant's upcoming TDY and that the conversation was casual, adding there "was nothing flirtatious about it." (R. at 1079.)

Just outside the gates of Misawa AB, Appellant told JK he needed to run into a nightclub to talk to someone. (R. at 1087.) JK waiting in her car, which was parked in the parking lot of the offbase nightclub, while Appellant went inside. In a Facebook message conversation between JK and Appellant, JK told Appellant, "I'm sitting in my car." (Pros. Ex. 4.)

Once at the enlisted club, JK and Appellant had to wait a while for a ride. (R. at 1081.) When the two arrived at Appellant's residence, JK asked for a pillow, blanket and some toothpaste. (R. at 1088.) JK fixed the couch and was getting ready to lay down when Appellant asked, "Are you really going to stay on the couch," to which JK responded, "Well, I guess not." (Id.)

The two then went into Appellant's bedroom. JK testified she had not been with a guy for a while, adding, "And I was, like, yeah, we could probably just make out. In my head I'm thinking, you know, I'll just go in there to kiss, like, that was it." (Id.)

JK said the two talked for a short time and then Appellant went to kiss her. (R. at 1089.) JK continued:

> JK: We kissed, and then he went straight for my pants right away. The first kiss was consensual. And then when he went for my pants, I knew I was in a bad situation because I told him to stop. I told him that I was not here to have sex. I was here for the purpose of not having to drive home, and he laughed at me.
>
> TC: Then what happened?
>
> JK: He continued to try to get into my pants; began to wrestle with me in the bed, rolling me back and forth to try to get me to straddle him, which, with skinny pants, the mobility is lessened, so I couldn't really straddle him. So my legs—
>
> TC: —Skinny pants or skinny jeans?
>
> JK: Skinny jeans.
>
> TC: Skinny jeans. Okay.
>
> JK: So, he was unable to get me to straddle him, so my legs were able to stay straight. I had my—my hand on my—my button and my zipper, so he could not get into my pants. I kept telling him to stop. I kept telling him, "Scott, stop," and he kept laughing.

(Id.)

When asked how long after the first kiss did Appellant reach to take off her pants, JK responded, "Seconds." (R. at 1093.) JK said the two continued to wrestle in the bed for a while and that Appellant "kept kissing me." (R. at 1090.) JK said she was going through every scenario in her head during this time trying to figure out how to get out of the situation. Eventually, Appellant got hot and JK testified that "Appellant was like 'okay, I'm tired,' like, 'Let's go to bed.'" (Id.) Appellant got up, went to the bathroom and then asked JK to put on a pair of shorts. Since she was very hot because she was in jeans, she put the shorts on.

JK testified she was thinking, "'Great, he's going to go to bed.' Let me just put these shorts on, so-until he goes to bed, and then I'll just leave." (Id.) JK also stated she put on the shorts because, "At that point, [Appellant] told me he was done. And, at the time, I thought—I

thought that if I could just get him to go to sleep and then I could get out; that was my main objective." (R. at 1095.)

However, once Appellant got back in the bd, he told JK "something along the lines of having a second wind." (R. at 1090.) JK continued:

> And I just remember him grabbing me and putting me on top of him and, like, like, my body went limp, because I was, like, I'm no longer going to just, you know, let this happen.
>
> So, from what I recall is I stopped allowing him to kiss me, because I was still trying to figure out how to get out of the situation. And, of course, I had his shorts on, which they were much larger on me than they would have been on anybody like his size.
>
> So, it made it a lot easier for him to get me on top of him and straddle him. And I-I couldn't really stop him from doing anything at that point.
>
> And then he started—or he put his hand on my throat and he started squeezing. And it was—it was getting tighter. I didn't lose consciousness, but it was definitely getting tighter. And I just remember thinking in my mind, like, "He's going to kill me." "He's going to rape me."
>
> . . .
>
> I put my forearm into his chest to push him away and then he used his other arm to pull me down. And then, when he let go of my throat, he inserted his finger into my vagina. And I couldn't move because he was holding me down with his other arm. And somehow, I got my opposite knee into his gut and I pushed away. And then, like, at that point, I was just really mad and I knew it was going to probably get worse. So, the only other way I could think of him to not—
>
> . . .
>
> The only way I could think of making sure he couldn't do any sort of penetration again was, at the time, I had really strong legs because, like I said, I had been training for cycling. So, I wrapped my legs around him and I interlocked my ankles. And he continued

> to roll me back and forth. And it tired him out a lot faster than it had the first round when I was still in my skinny jeans and my shirt.
>
> And so he—he said, "Fine, I guess, I won't rape you." And I was just-I was taken aback. And I was, like, "Gee, thanks." And that was my exact reaction, was, like, he really was trying to rape me. And so he was, like—after I said that, he said "But we will have sex in the morning." And I knew I had to get out of there.
>
> But he was tired, so he finally left me alone. He rolled to his side of the bed. I rolled to the other side and I just laid there until his—his breathing slowed and—and once I felt confident that he was sleeping, I went into the bathroom. And I—I locked the door and I had my phone on me.

(R. at 1091-92.)

In additional to telling Appellant "No" and "Stop," JK detailed the other physical actions she took to show Appellant she did not want to have sex, stating, "I gripped my zipper and my pants buttons, so he could not get into my pants. But he was trying to move my hand away trying to get in. But I had a death-grip on my pants." (R. at 1093.) JK said Appellant also tried to take off her shirt but she would not let him. (R. at 1094.)

JK agreed that the kiss between her and Appellant was consensual up until the point where Appellant began pulling on her pants, adding, "I started to tell him, 'Stop, Scott; no' multiple times." (R. at 1219.) When asked, "did you use those same words and phrases, 'Scott, stop;' 'Stop Scott;' and, 'No,' later during the assault," JK replied, "I did it the entire time." (Id.)

JK said when Appellant had her throat, that he was using one hand, and he was progressively squeezing tighter. (R. at 1096.) While JK said Appellant's grip did not completely restrict her breathing, JK agreed that Appellant's grip made it more difficult to

breathe. (R. at 1221.) JK said Appellant had his finger inside of her vagina for five to 10 seconds and only ended with her "putting my knee into his gut." (R. at 1098.)

JK said she contemplated yelling out because Appellant lived in a four-plex, but she was concerned no one would hear her and that the situation "would get worse, because it would make him mad." (R. at 1094.) When asked, "Apart from the kissing at the beginning, were you consenting to any of this behavior," JK replied, "No." (R. at 1098.)

After JK felt that Appellant had fallen asleep, she grabbed her phone, went to the bathroom, and locked the door. (R. at 1099.) JK sent a text message to her best friend, SSgt AR, with Appellant's name and told her friend to "remember the name." (Id.; Pros. Ex. 6.)

JK said she used the phrase "remember the name" because "he had already tried choking me, and I don't know if—if what if I open this door and he was going to be standing right there," adding, "I didn't know if he was actually going to hurt me even more. And I didn't know what was going to happen, so I wanted to make sure, like, if anything did happen to me, she would know who did it." (R. at 1100.) JK also said she attempted to call Lt DL.[9] (Id.)

JK said she waited another 10 to 15 minutes before leaving the bathroom because she was scared Appellant would be standing there. (R. at 1101.) After gathering her courage to open the door, JK saw that Appellant was still sleeping, so she grabbed her things and went to the living room to change back into her clothes. (R. at 1101-02.) JK said, "I didn't even care about putting my shoes on. I just grabbed them and I got out of the house." (R. at 1102.) SSgt JK said she started walking towards the main part of the base while constantly looking back behind her. After a couple of blocks, JK finally stopped to put her shoes on. (Id.)

[9] At the time of the incident, Capt DL was Lt DL. However, by the time of Appellant's court-martial, Capt DL had promoted to captain. (R. at 1241.)

JK said it was approximately a four-mile walk back to the main area of the base and it was the middle of the night. (R. at 1103.) At some point, a van driven by a young airman stopped and gave her a ride back to the Base Exchange parking lot, which was next to the main gate. (R. at 1104.) From there, JK walked out of the gate to her car and drove home.

JK said she never went to bed that night because "every time I closed my eyes I had flashbacks of what he did to me." (R. at 1106.) Around 0654 that morning, Appellant sent JK a Facebook message. (R. at 1104; Pros. Ex. 4.) The messages read as follows:

> Appellant: You good
>
> JK: You're an ass hole. I'll be fine.
>
> Appellant: Whoa whoa. Explain
>
> JK: You got too intense and I even told you that and to stop. That was scary as fuck to me.
>
> Appellant: I'm really sorry, I wasn't trying to be too intense
>
> JK: I really didn't go home with you expecting to hook up at all. I thought I could trust you bc you're a great guy. And I know it was my decision and my decision to get in your bed. But you didn't listen.
>
> Appellant: Yeah I guess I might have read different signs last night. You can trust me but I guess I was on a different page. I didn't mean to hurt you.
>
> JK: I know
>
> Appellant: How are you getting to your car? Of have you already cause I can start getting that figured out if you need
>
> JK: I took my car last night and came home
>
> Appellant: What can I do I guess to make it up to you? Try to prove I'm not a bad guy

JK: Never do that to anyone again

(Pros. Ex. 4.)

JK said she used the word "asshole" because "I was still very upset about what happened a couple of hours earlier. I was furious that he reached out to me and asked me if I was good. Yeah, I was just very, very angry." (R. at 1105.)

Later that morning, SSgt AR responded to Appellant's messages with Appellant's name and the phrase "remember that name." (Pros. Ex. 6.) JK initially told SSgt AR to "[j]ust ignore" the text. When SSgt AR texted, "Nah you better tell meeee," JK responded, "No it's really nothing." However, when SSgt AR persisted, JK said it was about a "dude I went home with," adding, "But I also got into a not so good situation. But I'm home and safe." (Id.) when SSgt AR asked, "Was he trying to push himself onto you," JK responded, "To put it mildly. Don't say anything to anyone please." (Id.)

When asked why she did not tell SSgt AR more about what happened, JK explained that SSgt AR would feel guilty and "she would blame herself for not protecting me." (R. at 1109.) JK continued, "Because that's what we do, is we protect each other. And, I didn't want to hurt her." (Id.) When asked by Appellant's trial defense counsel if "You told [SSgt AR] that your interaction with [Appellant] was basically a 'Netflix and chill,'" JK replied, "No." (R. at 1185.)

JK also testified she did not tell Lt DL or her First Sergeant because she had just gotten to SFS a few months prior and did not want to be pulled from her job or for "people to look at me in a certain way." (R. at 1110.)

However, by the end of 2020, JK suspected Appellant had done something similar to someone else. (R. at 1111.) At one point, she found out Appellant could not touch guns,

which "caught me off guard because you're CATM, now you're telling me you can't touch a gun." (R. at 1112.) JK eventually learned from a friend that Appellant was under investigation. (R. at 1113.) When the friend confirmed that the investigation involved another female, JK told the friend, "Well, I believe her." When the friend inquired as to why, JK told the friend what had happened to her. (Id.)

The friend told JK that she should go talk to her Chief. JK said the Chief "relayed me over to OSI." (R. at 1114.) At that point, JK did not know who the other person was, had never met her, and did not know the details of the allegations. (Id.)

After speaking with AFOSI, JK was asked if she would be willing to talk to Appellant. JK agreed "because, at that point, I took a lot of shame and guilt with not coming forward sooner, and I could have protected the other victim." (Id.) JK said she did not think meeting up with Appellant at a car or something along those lines would work because "we weren't friend, so us being in each other's car would be odd." (R. at 1115.) Instead, JK brought up her DDRP duties as a way to initiate the conversation with Appellant.

The Facts section in Issue I above provides an overview of the pretext conversation between Appellant and JK.

Capt DL was a Force Support Officer and the Services Flight Chief at Misawa at the time of the incident. (R. at 1242.) He and JK worked together before she moved to SFS and remained in contact after she moved. (R. at 1243.) In the Fall of 2019, Capt DL missed a call one night from JK. When he called her back the next morning, Capt DL said JK was "[m]asking some type of duress or concern," and "she wasn't herself." (R. at 1254.)

SrA AJ testified that he picked up a woman walking in the north base housing area in the Fall of 2019. (R. at 1261-65.) SrA AJ said he used his van to go to and from work but also to

give rides to friends who had been out drinking, which is why he was out on the night in question. (Id.) SrA AJ said it was not normal for him to see someone walking in that area during that time of night. (R. at 1265.) SrA AJ said he dropped the woman off at the main gate. (R. at 1262.)

SSgt AR testified that she and JK were best friends and had known each other since basic training. (R. at 1273.) SSgt AR said she did not see JK's messages in the middle of the night in question but instead saw them the following morning when she woke up. (R. at 1276.) She said the message "Remember the name" was a red flag to her and she began pestering JK to provide information on what happened. (R. at 1277.) When asked if JK provided more details about what happened after that day, SSgt AR replied, "Just a little bit. She explained that she was in a troubled situation. The only detail she really gave me at that time was that he put his hand around her neck, but I didn't want to bother her anymore with any questions," adding that it was "a sensitive subject." (R. at 1278.)

When asked what she meant by it being a "sensitive subject," SSgt AR said, "Personally, it's—one of my biggest fears, especially, if anything bad happened to her, I feel like I'm pretty protective of her, so anything bad—I'm just afraid of what would have happened if she would have told me more." (Id.) SSgt AR said JK tried to "play it off like nothing serious" because JK had "a habit of keeping things to herself to not bother anyone else." (R. at 1279.)

However, at some point in the future, JK opened up more to SSgt AR about what happened. SSgt AR testified as follows as to what JK told her:

> That she was hanging out with [Appellant] at his house. I think they were watching TV—I'm not sure. But they started off with making out and then leading to the bedroom.

> . . .
>
> I think, they were kissing some more, but then he wanted to go further. She said, no, multiple times. And that he got angry and put his hands around her neck and she froze. I remember her telling me that she was afraid for her life and that she would die here. And she ex—she was telling me more that he put his hands in her pants—and put his fingers inside.
>
> . . .
>
> Inside her body, in her—the vagina, and she froze. But the only way she was able to get out was to say that she was going to throw up, I guess, he finally got off of her. And he said, "I guess I won't rape you this time" and she left.

(R. at 1279-80.) When later asked what stood out about this conversation, SSgt AR said, "Mainly, the choking. And, him touching her," adding, "her vagina." (R. at 1302.)

On cross-examination, SSgt AR agreed that when she saw that SSgt JK had sent Appellant's name in a text message, she initially thought JK had sent the text message before JK had gone out that evening, not after, and that it meant she was going to hang out with Appellant that night. (R. at 1289-90.) Appellant's trial defense counsel then asked the following questions:

> DC: But [your] impression when she sent you Lucas Scott was that she was going out with him that evening, correct?
>
> SSgt AR: Yes.
>
> DC: And your impression, based on the information that she provided you was that this was, effectively, kind of a Netflix and chill?
>
> SSgt AR: Yes.

(R. at 1290.) However, on re-direct examination, the trial counsel asked, "Do you know what gave you—what led you to think that she may have been going out later in the day—you

answered the defense's question in that way. I'm just trying to understand what—what could have given you that impression?" (R. at 1301.) SSgt AR responded, "Well, I don't think I was really looking at them." (R. at 1302.)

However, once SSgt AR actually spoke to JK about the incident, SSgt AR realized the texts were sent after the events of the evening. Additionally, when asked, "During that conversation, was [JK] telling you about a consensual sexual encounter," SSgt AR responded, "No." (R. at 1303.)

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

The elements of Specification 2 of Charge II, under Article 128, UCMJ, were instructed as follows:

> 1. That on or about 29 September 2019, at or near Misawa Air Base, Japan, [Appellant] assaulted [JK];

2. That [Appellant] did so by strangulation; and,

3. That the strangulation was done with unlawful force or violence.

(R. at 1370.) The military judge defined "strangulation" as "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." (R. at 1372.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of aggravated assault by strangulation, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction.

JK testified that during the incident on or about 29 September 2019 at Appellant's on-base residence on Misawa AB, Appellant "put his hand on my throat and he started squeezing." (R. at 1091.) JK said when Appellant had her throat, that he was using one hand and he was progressively squeezing tighter. (R. at 1096.) While JK said Appellant's grip did not completely restrict her breathing, JK agreed that Appellant's grip made it more difficult to breathe. (R. at 1221.) JK's testimony meets the definition of "strangulation," as her testimony shows Appellant "imped[ed] the normal breathing" of JK "by applying pressure to the throat." (*See* R. at 1370.)

Still, Appellant finds fault, arguing that "there was no evidence establishing that [JK's] breathing or circulation was impeded." (App. Br. at 26.) Appellant claims that because JK testified that Appellant's actions did not prevent her from breathing or obstruct her

airway, did not cause her to black out or lose consciousness, and because she was still able to talk, that he is not guilty of the offense. (Id. at 27.)[10]

However, losing consciousness, an inability to talk, or a complete inability to breath is not the definition of "strangulation." Instead, the definition requires only "impeding the normal breathing," which JK testified occurred when she agreed that Appellant's grip on her throat made it more difficult to breath. (R. at 1221.) Notably, Appellant fails to cite this portion of JK's testimony in his brief and, due to this omission, does not explain why this testimony does not meet the legal definition of "strangulation." Instead, Appellant claims that JK's "testimony gave no indication of how her breathing may have been made more difficult," which, as shown, is incorrect. (*See* App. Br. at 28.)

This is not the first time Appellant has mistaken JK's testimony on this point. At trial. Appellant's trial defense counsel raised an R.C.M. 917 Motion to Dismiss this specification and argued that JK "was asked did it make it harder to breathe than normal, and she answered, no." (R. at 1505.) However, the trial counsel corrected Appellant's counsel, stating, "But in contrast to the defense's recollection of [JK's] answer to the question did it make it harder for you to breathe than normal, [JK] said, yes, to that question. That was her answer, and so there is sufficient evidence to overcome a 917 motion." (R. at 1506.) The military judge, in his oral ruling denying the R.C.M. 917 motion, agreed with the Government's recollection, stating, "There was testimony before This Court from [JK] that the actions of the accused, by applying pressure to her neck, did—did make it more difficult to breathe than normal." (R. at 1507.)

[10] Notably, where Appellant cites to JK still being able to talk despite the strangulation, JK was pleading to Appellant, "Scott, stop." (R. at 1096.)

Finally, Appellant's citation to this Court's unpublished opinion in United States v. Webb. No. ACM 39904, 2021 CCA Lexis 607 (A.F. Ct. Crim. App. 18 Nov. 2021), does not benefit Appellant's argument. While in that case, there was testimony from the victim of becoming "dizzy," seeing stars, and thinking that she might pass out, this Court did not declare those additional circumstances were required in all strangulation cases to meet the legal definition, but instead was simply detailing the evidence at issue in that case to show strangulation occurred.

In sum, JK testified that Appellant placed his hand on her throat, began squeezing, the squeezing progressively became tighter, and agreed that Appellant's grip made it more difficult for her to breathe. (R. at 1091, 1096, 1221.) Indeed, as the trial counsel argued to the members at trial:

> And simply put, strangulation means impeding the normal breathing by applying pressure to the throat or neck. Like [JK] explained, her breathing was impeded. She wasn't able to breathe like normal, even though, she admitted that her breathing was not completely restricted. That still meets the definition of strangulation. And that is true regardless of whether it resulted in any visible injury or whether there was an intent to kill or protractedly injure the victim. What she described to you is credible and meets the definition of strangulation.

(R. at 1416.) Even the military judge, in his motion to dismiss ruling, stated the members heard testimony that Appellant applied pressure to JK's neck and made it more difficult to breathe than normal. This evidence meets the legal definition of "strangulation" and shows Appellant committed aggravated assault by strangulation against JK. The record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the

evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

IV.

APPELLANT'S CONVICTIONS FOR SEXUAL ASSAULT, ASSAULT CONSUMMATED BY BATTERY AND AGGRAVATED ASSAULT ARE FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews issues of factual sufficiency de novo. Washington, 57 M.J. at 399.

Law

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

The elements of Specification 1 of Charge I, under Article 120, UCMJ, as instructed to the members, are as follows:

1. That on or about 29 September 2019, at or near Misawa Air Base, Japan, [Appellant] committed a sexual act upon [JK], by penetrating [JK's] vulva with his finger, with an intent to gratify his sexual desire; and

2. That [Appellant] did so without the consent of [JK].

(R. at 1365.)

The elements of Specification 1 of Charge II, under Article 128, UCMJ, as instructed to the members, are as follows:

1. That on or about 29 September 2019, at or near Misawa Air Base, Japan, [Appellant] did bodily harm to [JK], by grabbing [JK] on the body with his hands;
2. That the bodily harm was done unlawfully; and,
3. That the bodily harm was done with force or violence.

(R. at 1369.)

The elements of Specification 2 of Charge II are listed in Issue III above.

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." Id. Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to sexual assault and abusive sexual contact. *See* e.g., United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019).

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual assault, assault consummated by battery, and aggravated assault and abusive sexual contact, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence.

Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

- ***Appellant had no reasonable or honest mistake of fact***

As detailed in Issue III above, after some initial consensual kissing, JK testified that Appellant began repeatedly grabbing her body, wrestling around with her, and trying to get inside her pants. At that point, JK stated that any consensual activity ended and that she expressed her disapproval by repeatedly telling Appellant "no" and "stop" and pushing his hands away from her shirt and pants. (R. at 1089-1094.) Then, after a brief break when JK thought Appellant would just go to sleep, Appellant instead got his "second wind" and again attacked JK, grabbing her, wrestling with her, and then grabbing her throat with his hand and squeezing. (R. at 1091-92.) Finally, JK testified that Appellant placed his finger inside her vulva, again all while JK was trying to get away, push him off, and telling him "no." (Id.) JK testified she continued to tell Appellant "stop Scott" and "no" "the entire time." (R. at 1219.) JK's testimony provides this Court with substantial evidence of Appellant's guilt.

Still, Appellant finds fault by first claiming that he "had a reasonable mistake of fact for all specifications that he was convicted of." (App. Br. at 29.) To start, Appellant's counsel only requested a mistake of fact defense instruction for the sexual assault offense in Charge I; thus, a mistake of fact defense as to the two assault charges in Charge II was never requested by Appellant at trial, never raised by Appellant's trial defense counsel, and never instructed to the members. (*See* R. at 1317-22.) Considering Appellant never requested the instruction, Appellant's counsel's affirmative statement of no objection to the instructions for Specifications

1 and 2 of Charge II,[11] and Appellant not raising to this Court a separate assignment of error claiming the military judge erred in not *sua sponte* instructing the members on a mistake of fact defense as it relates to Specifications 1 and 2 of Charge II, this Court should consider Appellant's arguments regarding a mistake of fact defense relating to Charge II waived. *See* United States v. Davis, 79 M.J. 329, 331-32 (C.A.A.F. 2020) (holding where appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions).

Yet, even if the defense applied to all specifications, the evidence shows Appellant had neither a reasonable nor honest mistake of fact. Appellant's brief listed multiple reasons why this Court should find he had a mistake of fact that evening. Noticeably missing, however, is any mention of JK's testimony where she told Appellant "no" and "stop" throughout "the entire time" that Appellant was attacking her that night or her numerous attempts to shield her clothes from his hands, wrestle away from him, or push him off of her.

Instead, Appellant focuses on other details. For instance, he claims that JK "immediately asked if she could stay with him that night." (App. Br. at 29.) However, Appellant fails to mention that JK actually asked if she could "stay on his couch" or explain the circumstances of why she would make such a request. (R. at 1077.) As noted above, JK was concerned about driving on base and also had never taken an off-base taxi anywhere so was concerned for her safety. (R. at 1077-79.) JK also stated she asked Appellant to stay

[11] *See* R. at 1352-53.

on his couch simply because she though he was a "trustworthy defender." (R. at 1079.) Appellant details none of this testimony in his brief.

Instead, Appellant intimates that JK did not actually have any safety concerns, stating, "[JK] went with [Appellant] despite the availability of taxis that could have taken her home, had she been concerned about driving with alcohol in her system." (App. Br. at 30.) A full reading of JK's testimony shows she was very much concerned about driving with alcohol in her system as well as her overall safety. Appellant's argument on this point is unpersuasive and does not provide the full context of JK's testimony or her reasoning in asking who she thought was a "trustworthy defender" to simply crash on his couch for a night.

Next, Appellant claims that JK "declined to sleep on the couch." (Id. at 5, 30.) Yet, Appellant completely omits JK's testimony that her not sleeping on the couch was at Appellant's request when he looked at her and asked, "Are you really going to stay on the couch." (R. at 1088.) JK never declined to sleep on the couch.

Appellant next argues that JK "testified that she 'wasn't trying to stop him from kissing me' throughout the encounter." (App. Br. at 30, *citing* R. at 1181.) However, Appellant, in citing to JK's testimony, fails to quote her entire answer that explains exactly why JK was not stopping Appellant from kissing her at one point during his attack. Her full answer states, "I wasn't trying to stop him from kissing me, because I was trying to figure out a way out. I was allowing it so I didn't get him upset, because at that point I realized I didn't know who I was in bed with." (Id.)

This added context, unmentioned by Appellant, explains JK's actions in terms of how she reacted to Appellant kissing on her. Further, at this point, Appellant kissing on her was the least of JK's problems as JK was in the midst of fending off Appellant's other

actions against her, including him wrestling with her for position, grabbing her body, and trying to undo her pants. JK testified that at this point she was busy pushing him away, keeping her hands on her pants zipper, and repeatedly telling Appellant "no" and "stop." In short, considering all that was occurring at this point, JK expressly and physically showed her lack of consent to Appellant who should have well known that JK did not want or consent to any actions being taken against her, especially the insertion of his finger into JK's vulva. There was no reasonable or honest mistake of fact.

Next, Appellant misconstrues SSgt AR's testimony when he states that SSgt AR "described the event as a 'Netflix and chill' type situation." (App. Br. at 30.) From the beginning at trial, it was Appellant's trial defense counsel, not SSgt AR or JK, who repeatedly introduced and used the phrase "Netflix and chill." (*See* R. at 1185, 1290, 1446-47, 1454.) Appellant's counsel's use of this phrase repeatedly in cross-examination and closing argument was a failed attempt to paint this encounter as one JK invited and welcomed.

However, the testimony refutes such an insinuation. JK flatly denied the insinuation by answering, "No," when Appellant's counsel asked, "You told [SSgt AR] that your interaction with [Appellant] was basically a 'Netflix and chill.'" (R. at 1185.) Further, while SSgt AR said, "Yes," when Appellant's counsel asked, "And your impression, based on the information that she provided you was that this was, effectively, kind of a Netflix and chill?," SSgt AR's further testimony shows this initial impression was based on SSgt AR's own mistaken interpretation of JK's text message and was never based on anything JK actually told her.

As detailed above, SSgt AR initially thought JK's text message with Appellant's name was sent *before* JK went out that night, not in the hours *after* going out. SSgt AR said her initial impression that the texts were sent by JK prior to the evening's events was

because she was not "really looking at them." (R. at 1302.) However, once SSgt AR actually spoke to JK, she realized her initial interpretation of the message was incorrect.

In short, contrary to Appellant's claim, SSgt AR never described the event as a "Netflix and chill" encounter and the evidence shows JK never told SSgt AR the event was some sort a "Netflix and chill" encounter. Instead, SSgt AR testified that her initial interpretation of when JK's text was sent and the meaning of the text was incorrect and was also not based on anything told to her by JK.

Appellant then claims that when JK "apparently protested while the two were in bed, [Appellant] ceased to make further advances." (App. Br. at 30, *citing* R. at 1090.) Here, Appellant seems to be referring to when Appellant, during the first round of his attacks, got up and went to the bathroom. However, Appellant fails to mention that it took JK repeatedly telling him to stop, telling him she was not there to have sex, holding her hands over her pants zipper, and wrestling with him to finally get him to stop.[12] (R. at 1089-90.) All of these actions are clear indicators that JK did not consent to anything sexual or anything beyond kissing. Appellant's claim here also discounts his further actions during the second round of attacks when he again began grabbing her, but this time adding in the addition of choking her and placing his finger into her vulva. Despite his claim, Appellant certainly did not "cease[] to make further advances" when JK protested. (*See* App. Br. at 30.)

Appellant next again claims he continued to have a "reasonable . . . belief that [JK] was a willing participate in the encounter." (App. Br. at 30.) His claim, however, is quite

[12] Notably, while she was telling Appellant she was not there to have sex and repeatedly telling him to stop, JK testified that Appellant "laughed at me," and then "kept laughing." (R. at 1089.0

unreasonable considering JK's testimony that she had just been telling him "no" and "stop" repeatedly.

Still, Appellant claims mistake on this second round of attacks because JK put on "gym shorts to appease him" and that the two "continued to kiss." (App. Br. at 30, *citing* R. at 1180-81, 1188-89.) Appellant argues that it was "in this context that [Appellant] digitally penetrated [JK]." (Id.) Appellant is again mistaken.

First, JK did not put on the shorts to appease Appellant in the sexual way in which Appellant's brief insinuates. Instead, she put them on because she thought he would going to go to sleep, which is what he had told her was about to happen, and then she would be able to leave. Second, the two did not "continue to kiss" as Appellant claims. (App. Br. at 30, *citing* R. at 1181, 1188-89.) The record at page 1181 shows JK's testimony, discussed above, detailing when Appellant was kissing on her. The record at pages 1188-89 does not mention kissing at all.

Noticeably absent from Appellant's brief on this point, however, is JK's testimony that during this time *after* she put on his shorts and *before* Appellant placed his finger in to his vulva, JK testified that Appellant grabbed her throat and began squeezing and that JK put her forearm on Appellant's chest to push him away. (R. at 1091.) Appellant again also fails to mention JK's testimony that she was telling Appellant "stop" and "no" "the entire time." (R. at 1219.)

Next, Appellant claims his mistake of fact was shown based on the text messages he sent JK the following day. (App. Br. at 31, *citing* Pros. Ex. 4.) Self-serving as they may be considering Appellant sent them the day after his attacks to potentially cover his tracks, Appellant's statements in those messages are also telling. For instance, he begins the conversation by stating, "You good," which, as the trial counsel argued to the members, is "not a

typical message one has to send after a consensual sexual encounter." (R. at 1391.) Further, when JK tells Appellant that he "got too intense," that she was scared, and that she "even told you to stop that," Appellant did not respond by asking what she was talking about or why she was scared. He also did not deny he was being too intense or refute that JK told him to stop.

To this point, Appellant also admitted during the pretext conversation with JK that he "fucked up," "felt really bad," and "never really apologized." (Pros. Ex. 6.) When JK told Appellant that "what you did to me was wrong," Appellant replied, "Yeah. No, I a hundred percent agree." (Id.) Moreover, when JK asked whether he had held down the other girl or choked the other girl like he had done her, Appellant never denied either holding JK down or choking her, or even acted surprised by anything JK said. Instead, Appellant only denied doing those things to the other girl. (Id.) Then, in the latter part of their conversation, Appellant admits that JK's situation "was worse" than that of the second female airman and that Appellant actually thought he was getting called into AFOSI for questioning about what he had done to JK, not the second woman. Appellant's statements to JK the morning after the incident and then later during the pretext conversation show he knew from the beginning what he had done to JK was wrong and that he never had either an honest or reasonable mistake of fact.

Finally, Appellant argues the "Government conceded that [Appellant's] belief was sincere." (App. Br. at 32, *citing* R. at 1393.) However, a review of the transcript at page 1393, or anywhere else in the trial counsel's closing argument, shows no such concession by the Government. In fact, on that very page, the trial counsel argues, "But, Members, it is not

reasonable to think that just because a girl agrees to go into a bedroom with you that she is consenting to have sex." (R. at 1393.)

In sum, Appellant presented no evidence that Appellant actually believed JK was consenting to sexual activity beyond kissing with him on the night in question. While not required to raise the defense, Appellant did not testify in this case. Moreover, Appellant provided no evidence, whether in the form of pretrial statements or otherwise, affirmatively showing that he held an honest belief that JK consented to his sexual act or assaults against her.

Likewise, the evidence shows any belief on the part of Appellant would have been objectively unreasonable as well. Here, JK repeatedly told Appellant "no" and "stop," and pushed and wrestled with Appellant throughout the ordeal. JK did nothing to make Appellant believe he had consent to have any sexual activity with her beyond kissing and her physical and vocal responses to him are more than enough to show any mistake of fact in this case is unreasonable. As our superior Court in McDonald held, "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." McDonald, 78 M.J. at 381. Here, JK did everything in her power to manifest a lack of consent while Appellant did nothing to obtain consent for anything more than kissing.

- ***JK's testimony was credible***

Appellant next turns to attacking JK's credibility. First, he claims JK "expressed an apparent vendetta against [Appellant]" by telling SSgt AR that she wanted to "nail this motherfucker." (App. Br. at 31.) Here, Appellant is referencing Prosecution Exhibit 10, which is a Skype conversation between JK and SSgt AR that occurred soon after JK learned of another potential victim. (R. at 1234.) A review of Prosecution Exhibit 10, however,

shows JK had no personal vendetta against Appellant but, instead, was upset with herself for not coming forward sooner with her allegations against Appellant. As she stated, " I feel so guilty that I didn't report mine. This chick is way more brave than me. Maybe one day I can apologize to her." (App. Ex. 10.)

Next, Appellant attempts to discount JK's testimony because she did not report her allegations for over a year and a half and only after she learned that Appellant was under investigation for assault another female airman. (App. Br. at 31.) Appellant claims JK met with a member of the base legal office who "gave her details of that investigation," and then insinuates JK made up the story by stating that details of the second investigation "curiously resembled the same allegations [JK] made towards [Appellant]." (Id.) Appellant recollection of the facts is again incorrect.

First, while JK did talk to a member of the legal office, she also testified that following the conversation she only knew that Appellant was under investigation. JK testified she knew "very little detail" about the allegations, adding that she knew they met at the gym and that Appellant had invited the victim over to allow her dog to play with Appellant's son. (R. at 1114.) JK said she did not know the other female's name, had never met her, and did not know when the incident allegedly occurred. (Id.)

Mostly important, contrary that what Appellant claims now, the other allegation did not "curiously resemble" JK's allegation at all as it did not involve meeting at a gym, a dog, or Appellant's son. Appellant's insinuation here that JK made up her allegations against

Appellant only after she learned of the other investigation and that her allegations resembled the other allegations are unsupported by the record.[13]

Next, Appellant claims JK's testimony was "inconsistent and illogical," and argues JK "included fuzzy details about the time frame between when she first encountered [Appellant] and then ended up at his apartment." (App. Br. at 32.) This argument appears to reference a section in Appellant's Statement of Facts section where he claims JK "provided a different sequence of events" between her direct examination and cross-examination regarding when she encountered Appellant that evening. (*See* App. Br. at 4.) Appellant claims JK testified on direct examination that Appellant stopped at the enlisted club to get a car ride and that JK waited for Appellant while sitting in her car. (Id. *citing* R. at 1078, 1087.) However, Appellant then claims that on cross-examination JK stated that Appellant went inside an off-base restaurant called Tubes, then an off-base bar while JK waited for him in her car. (Id., *citing* R. at 1078, 1087 (direct examination testimony) and R. at 1161, 1163 (cross-examination testimony).)

However, Appellant's contentions do not show a "different sequence of events," but instead show one complete sequence of events from when JK first saw Appellant to when they eventually arrived at this residence. JK testified that after initially encountering Appellant outside of the off-base restaurant called Tubes, the two then began walking toward the enlisted club to get a ride. (R. at 1077-78, 1163.) Then, along the way when they were just

[13] Appellant's brief also fails to mention that JK's testimony that she called Capt DL and texted SSgt AR in the middle of the night after Appellant attacked her was corroborated by both Capt DL and SSgt AR. (R. at 1254, 1277, Pros. Ex. 6.) While JK did not relay the details of what occurred to her to either Capt DL or SSgt AR the following day when she spoke to them, it is clear something occurred that evening that was serious enough to warrant her middle-of-the-night phone call and text message.

outside the base gate, Appellant told JK he needed to run into a nightclub to talk to someone. (R. at 1087, 1163.) At that point, JK waited in her car, which was parked in the parking lot of the off-base nightclub, while Appellant went inside. In a Facebook message conversation between JK and Appellant, JK told Appellant, "I'm sitting in my car." (Pros. Ex. 4.) Then, once on base and at the enlisted club, JK and Appellant had to wait a while for a ride. (R. at 1081.)

As shown, there is no conflict between JK's direct and cross-examination testimonies or her recollection of events from when she first encountered Appellant to when they arrived on base. In fact, the only error on this point is Appellant's contention that JK testified that she waited in her car while Appellant was at the enlisted club waiting on a ride from the Airmen Against Drunk Driving Program. (App. Br. at 4, *citing* R. at 1078.) Such testimony never occurred. Instead, on both direct and cross-examination, JK always stated her car was parked off-base that night and that she waiting in her car while Appellant was in the off-base club. (R. at 1074, 1087, 1104, 1163, 1177.)

Next, Appellant claims JK's testimony was illogical because she "testified that while in bed with [Appellant], she was on top of him." (App. Br. at 32, *citing* R. at 1095, 1089.) Appellant contends this "positioning belies the notion that [Appellant] was being forceful with her or physically positioned to over overcome her lack of consent." (Id.)

However, Appellant misreads JK's testimony again. A review of page 1095 shows JK had just been asked, "You talked about some wrestling and him moving you on top of him. Can you describe, I guess, what positions your bodies were in as the wrestling continued?"

(R. at 1095.)[14] JK responded, "It was he was on top, then I was on top, he was on top, then I was on top." (Id.)

Here, when read in context, JK is explaining how Appellant placed JK on top of him while he was wrestling her around and details exactly how, contrary to his assertions, Appellant "was being forceful with her" and "physically position[ing]" her.[15] JK provided similar testimony during other portions of her examination, stating, "And I just remember him grabbing me and putting me on top of him," and "He had me on top of him." (R. at 1090, 1096.) Appellant's argument here is again unpersuasive.

Finally, Appellant turns to Specification 2 of Charge II and simply reiterates his argument from Issue III that "the Government did not prove that [Appellant] had impeded [JK's] breath or circulation." (App. Br. at 32.) As shown in Issue III above, Appellant's claim is incorrect.

In sum, the evidence adduced at trial shows Appellant commit sexual assault, assault consummated by battery, and assault by strangulation upon JK. The record shows that each specification is factually sufficient. The members at Appellant's court-martial rightfully found Appellant guilty of each specification beyond a reasonable doubt. This Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt and deny Appellant's claim.

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[14] A review of page 1089, the other page cited by Appellant, shows no testimony regarding JK being on top of Appellant.

[15] As JK testified, Appellant was "bigger than me. He's stronger than me as a man." (R. at 1236.) To this point, a review of the video at Prosecution Exhibit 6 highlights the size difference between Appellant and JK.

V.

APPELLANT HAS NOT DEMONSTRATED PLAIN ERROR IN TRIAL COUNSEL'S FINDINGS ARGUMENT.

Standard of Review and Law

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (*citing* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018), where our superior Court stated it will "continue to review unobjected to prosecutorial misconduct and improper argument for plain error.). Id. The burden of proof under a plain error review is on the appellant. Id.

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005).

Notably, a plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

For improper argument, a court must determine under a plain error analysis, (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been

different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Additionally, trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

Analysis

Here, Appellant has cherry-picked one line from the trial counsel's argument that spanned 50 pages of transcript, a line which garnered no objection at trial, and now declares that the trial counsel "committed prosecutorial error." (App. Br. at 33-38.) Such a tactic is a classic

example of "surgically carving" out a portion of an argument without regard for context, a tactic frowned upon by our superior Court, and should be dismissed by this Court.

When viewed within the context of the entire court-martial, or simply just within the context of the findings argument itself, the trial counsel did not commit prosecutorial misconduct. The trial counsel's closing argument spanned 50 pages of transcript and lasted approximately over an hour.[16] (R. at 1525-38.) Appellant's trial defense counsel did not object to the one statement Appellant now claims amounts to prosecutorial misconduct. The overwhelming majority of the trial counsel's closing argument, 29 of 30 pages, is never cited by Appellant in this issue and Appellant cites to only a few lines from the one small portion of the one page he does mention in his brief. In the 29 pages not cited by Appellant in his brief, the trial counsel explained the evidence of the case and tied it to the elements of each offense.

Still, Appellant finds fault with one small portion of the trial counsel's closing argument, stating, "During closing argument, trial counsel asserted to the panel that, 'the burden is on . . . the accused . . . in that moment to obtain consent . . . to act as reasonable diligence . . . he simply failed to do that.'" (App. Br. at 33, *citing* R. at 1394.) However, to properly discuss Appellant's concerns, this Court should first look to the overall context of the trial counsel's argument. In that portion, trial counsel argued as follows:

> But, Members, it is not reasonable to think that just because a girl agrees to go into a bedroom with you that she is consenting to having sex. There are a variety of forms of activity and these are unfamiliar sexual partners. Right. It's not like they've been in a relationship or flirting or romance has been building and building. No. These people know each other through work, have a professional relationship.

[16] Appellant's court-martial convened at 0808 on 2 May 2022 and the military judge immediately read the findings instructions. (R. at 1361.) The trial counsel's argument began immediately thereafter and continued until and ended at 0946 when the court recessed. (R. at 1431.)

> She is, "Thinking boy, he is the Security Forces member, a law enforcement person, someone that can be trusted, another NCO, someone that can be a good wingman to me and let me crash on the couch."
>
> And he is thinking, "Oh, here is this girl that I'm going to score with, that I get to hook-up with that night." He is thinking with that one-track mind. And so, when—after they begin kissing when she starts to fight his hand away with that death-grip on her pants, when he is trying to pull the hand away when she is saying, "no," he is ignoring every sign. He's thinking, "Oh, come on. You came back with me. We're going to have sex. We're going to have sex." He's laughing at her physical resistance and her verbal signs of stop.
>
> Members, there's no mistake in that moment. But the accused is thinking with that liquid-courage leading to impulsive risky behavior. That alcohol is fueling his desire for sex, and he's thinking with that one-track mind ignoring every other sign that a reasonable person would know there is no consent.
>
> Make no mistake about it, alcohol is no excuse, but it simply explains what was going through is mind and fueling his desires in that moment. He thinks it's go time, but going into someone's bedroom is not consent to have someone strangle you, be flipped around on the bed, to have someone stick a finger in your vagina.
>
> Kissing someone is not consent to be strangled, flipped around, or to have someone place a finger in your vagina. With these unfamiliar sexual partners ***the burden is on*** the sexual actor, ***the accused***, ***in that moment to obtain consent***.
>
> ***To act as reasonable diligence*** like a normal human being, and ***he simply failed to do that***. He thought with his one-track mind trying to have sex with her in spite of all the barriers and everything else that she was saying to the contrary.

(R. at 1393-94.) (emphasis on portions of the argument cited by Appellant in his brief.)

Here, when read in context, the trial counsel is not "asserting to the panel that [Appellant] had the burden of proving consent" at the trial as Appellant claims,[17] but instead was explaining

[17] *See* App. Br. at 33.)

to the members why Appellant had no honest or reasonable mistake of fact as to consent on that night. Certainly, the trial counsel never told the members that Appellant had the *burden to prove* the element of consent or anything else at his court-martial.

Instead, what the trial counsel stated was that Appellant had the burden, at the time of his actions against JK, to "obtain consent" from JK before placing his finger into her vagina. (R. at 1394.) The trial counsel's language here, namely "obtain consent," is consistent with our superior Court's published and established precedent in McDonald where CAAF held, "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." McDonald, 78 M.J. at 381. The Court reasoned, "Appellant's actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent." The issue of reasonable belief, as shown above, is exactly what the trial counsel was referencing when he spoke about Appellant "obtain[ing] consent" and follows exactly the reasoning of our superior Court in McDonald.

Also in McDonald, our superior Court highlighted that the Government, once the mistake of fact defense was raised, "bore the burden to prove beyond a reasonable doubt that the defense did not exist." Id. at 379 (*citing* R.C.M. 916(b)(1)). In other words, the Government had to disprove the defense. Which is exactly what the trial counsel told the panel when he argued, "The mistake of fact of instruction is going to be on the bottom of page 2 leading into page 3. And keep in mind there are two components, two components for mistake of fact as to consent to apply. It must have genuinely and truly existed in the mind of the accused in that moment. And second, it must have been reasonable under the circumstances. If either one of those has been proved, or *disproved* beyond a reasonable doubt, then you find the accused guilty." (R. at 1414.) (emphasis added.)

Moreover, Appellant's own trial defense counsel reinforced the Government's burden in his own closing argument, stating, "The government must prove beyond a reasonable doubt that this defense, this idea of reasonable mistake of fact as to consent did not exist; that this reasonable circumstance in which the accused, given all the signs of her behavior that evening was not mistaken as to her consent." (R. at 1459.)

Finally, the military judge instructed the members multiple times on the burden of proof, including specifically on the mistake of fact defense, as follows:

> The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist.
>
> . . .
>
> The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt.
>
> . . .
>
> Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense.
>
> . . .
>
> As the government has the burden of proof, trial counsel may open and close.

(R. at 1367, 1378, 1381.)

Recently this Court faced a similar scenario in United States v. McCoy, ACM 40119 (f rev), 2024 CCA LEXIS 105, *37-38 (A.F. Ct. Crim. App. 12 March 2024). There, the appellant contended that the trial counsel improperly shifted the burden of proof to Appellant when he argued, "[c]onsent means [Appellant] needed to ask [CS], get permission from [CS], 'Hey, you said no already. Do you want me to do this?' And had to have done it with someone, right,

where in [Appellant's] mind it's obvious that everyone is on the same page." Id. Noting the military judge's instruction that it was the Government burden to prove that the sexual acts occurred without consent (the same instruction that was used in this case), this Court found the appellant had failed to demonstrate how the burden was shifted by the trial counsel's argument.

The same is true in this case. Wherein McCoy, the trial counsel argued that consent meant that the appellant needed to ask his victim and get permission, the trial counsel in this case essentially stated the same thing when he stated Appellant need to obtain consent from JK. Likewise, the military judge gave the same instruction regarding the Government's burden of proof, and both the trial counsel and Appellant's own trial defense counsel argued it was the Government's burden to disprove the mistake of fact defense. Hence, like in McCoy, no burden shifting occurred.

Still, Appellant finds fault because he believes our superior Court's statement that "the burden is on the actor to obtain consent" is merely *dicta* in its McDonald opinion. Yet, Appellant fails to note this language from McDonald has been quoted in over 10 cases before this Honorable Court. *See* United States v. Davis, ACM 40370, 2024 CCA LEXIS 37, *11-12 (A.F. Ct. Crim. App. 26 January 2024); United States v. Casillas, ACM 40302, 2023 CCA LEXIS 527, *25 (A.F. Ct. Crim. App. 15 December 2023); United States v. Salamanca, ACM S32695, 2022 CCA LEXIS 635, *23-24 (A.F. Ct. Crim. App. 4 November 2022); United States v. Lattin, ACM 39859, 2022 CCA LEXIS 226, *16 (A.F. Ct. Crim. App. 20 April 2022); United States v. Westcott, ACM 39936, 2022 CCA LEXIS 156, *17 (A.F. Ct. Crim. App. 17 March 2022); United States v. Rodela, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021); United States v. King, ACM 39583, 2021 CCA LEXIS 415, *64 (A.F. Ct. Crim. App. 16 August 2021); United States v. Horne, ACM 39717, 2021 CCA LEXIS 261, *82 (A.F. Ct. Crim. App. 27 May 2021);

United States v. Palacios Cueto, ACM 39815, 2021 CCA LEXIS 239, *15 (A.F. Ct. Crim. App. 18 May 2021); United States v. Hickman, ACM 39811, 2021 CCA LEXIS 16, *13 (A.F. Ct. Crim. App. 22 January 2021); United States v. Crump, ACM 39628, 2020 CCA LEXIS 405, *44 (A.F. Ct. Crim. App. 10 November 2020).

Here, the trial counsel did not shift any burden of proof to Appellant. Instead, the trial counsel used language used by our superior Court and language continually relied upon by this Honorable Court to prove Appellant had no reasonable belief that he had obtained consent from JK before committing his criminal acts against her. There was no error here, let alone plain error.

Appellant has also failed to show prejudice as he has not demonstrated a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

While Appellant does cite Fletcher and its prejudice test, Appellant's justification that he was actually prejudiced is lacking. Looking at those factors, any "severity" of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to Appellant's newfound complaint in his brief.[18] Further, as noted above, Appellant complains of only one statement made by the trial counsel that is confined to only a few lines from a 30-page closing argument. Further, Appellant's conjecture that the panel's deliberation time was somehow impacted by the quaint portion of the trial

[18] Appellant has not raised an ineffective assistance of counsel claim against his trial defense counsel.

counsel's argument that Appellant now complains is also pure speculation.[19] Finally, as shown in the factual and legal sufficiency issue within this brief, the "weight of the evidence supporting the conviction" was very strong. Accordingly, even if the trial counsel's arguments were in plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

Next, while Appellant complains the military judge "provided no specific instructions" or "remedial measures," Appellant is forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel to which Appellant now takes issue. Further, Appellant fails to note the military judge instructed the members on multiple occasions that the Government had the burden of proving the defense of mistake of fact did not exist, the burden to prove each and every element of each offense beyond a reasonable doubt, and that the burden never shifted to the accused. (R. at 1367, 1378.) Court members are presumed to follow the military judge's instructions absent evidence to the contrary. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

Finally, as shown in the factual and legal sufficiency issue above within this brief, the "weight of the evidence supporting" Appellant's convictions involving JK were very

[19] Here, Appellant claims that United States v. Andrews, 77 M.J. 393 (C.A.A.F. 2018) involves a "finding that deliberations lasting three hours for [sic] five day trial indicative of severe misconduct." (App. Br. at 37.) However, Appellant fails to provide any context to that case. In Andrews, the trial counsel was accused of (1) repeatedly and consistently making inflammatory and disparaging statements (including calling the appellant a liar 25 times), (2) stated that the appellant's trial defense counsel did not believe the appellant's version of events; (3) misstated the law; and (4) quoted or referred to wholly fabricated evidence three times. Id. at 402. While CAAF did include the length of deliberations as one of the five Fletcher factors reviewed, the panel also stated the trial counsel's misconduct was severe because "it occurred with alarming frequency" and "it persisted throughout the entirety of trial counsel's closing argument, including through the rebuttal." Id. As shown above, none of these pervasive factors, which overwhelming led to CAAF's conclusion that severe misconduct occurred in Andrews, are present in this case.

strong. While Appellant claims "the Government's evidence was tenuous at best to support the conviction," Appellant simply renews the same unpersuasive arguments he raised in Issues III and IV above. For the same reasons discussed in those issues, Appellant fails to show prejudice here. Accordingly, even if the trial counsel's arguments were in plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

VI.

APPELLANT IS ENTITLED TO NO RELIEF FOR ANY POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced at his court-martial on 3 May 2022. Appellant's case was docketed with this Honorable Court on 6 February 2023, 279 days later. Appellant never asserted a right to speedy post-trial processing during this time.

On appeal, Appellant's counsel submitted eleven enlargement of time motions. In is eleventh motion, Appellant's counsel wrote, "Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time." (App. Mot., dated 23 February 2024.)

When Appellant filed his Assignments of Error brief on 11 March 2024, 399 days (over 13 months) had elapsed since the case was docketed with this Court.

Standard of Review

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

Law

When evaluating post-trial constitutional due process complaints of delay, our superior Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). Moreno, 63 M.J. at 135. The four factors set forth in Barker are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

In Moreno, our superior Court established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

This Court now applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id. W

Absent a showing of prejudice, a due process violation warranting relief only occurs when, "in balancing the other three factors [for analyzing post-trial delays], the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), our superior Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(d)

power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Additionally, this Court is guided by the following factors, with no single factor being dispositive:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Keeping in mind that our goal under Tardif is not to analyze for prejudice, whether there is nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and
>
> (6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Relief under Article 66(d), UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Tardif, 57 M.J. at 225.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied.

a. Moreno Analysis

The first factor, the length of delay, weighs slightly in Appellant's favor since this case exceeded the Livak standard of sentence to action by 129 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, also weighs slightly in the Appellant's favor. A review of the timeline of Appellant's post-trial processing shows that nearly 60% of the processing time was filled by transcribing the record. The record was certified on 13 October 2022, 163 days after Appellant was sentenced. The court reporter's chronology shows the court report had multiple week-long trials during this timeframe. Still, the court reporter attempted to mitigate the delay by assigning portions of Appellant's transcribe to at least five other court reporters.

Further, once the transcript was certified, the chronology within the ROT, as well as the declaration from SSgt KV, show Appellant's record was continually worked upon once the transcript was complete. Notably, SSgt KV's declaration discusses difficulty in obtaining

various documents to complete the ROT and provides of timeline of efforts to ensure the ROT was complete.

Moreover, the final transcript and record of trial accounted for 1,599 pages of transcript, 14 Prosecution Exhibits, 14 Defense Exhibits, 55 Appellate Exhibits, one Court Exhibit and involved the work of no less than five court reporters. Simply put, the transcript of Appellant's case did not languish during this time but, as shown by both the court reporter's chronology and SSgt KV's declaration, that Appellant's case was worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing.

The third factor, whether Appellant asserted his right to speedy post-trial processing, weighs heavily in the Government's favor. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (*quoting* Barker, 407 U.S. at 528).

As he concedes in his brief, Appellant asserted his right to timely appellate review for the first time on 11 March 2024 when he filed his brief with this Court. Appellant never asserted this right during the 279 days between his sentence and this Court's docketing, and never asserted it during the 13 months in which his counsel was preparing to file his brief to this Court. Further, while Appellant' brief states these delays were "no fault of [Appellant]," Appellant fails to highlight that he had been advised of his right to a timely appeal and still specifically agreed to eleven enlargement of time totaling 399 days.

Regarding prejudice because of this delay, our superior Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

In his declaration to this Court filed with is brief, Appellant raised only one type of prejudice—anxiety. (App. Dec. at 1.) Appellant claims the delay has "affected me physically, mentally, socially, and hindered my ability to move on with my life." (Id.) He claims he has been diagnosed with anxiety and attention deficit issues and been prescribed medicine "to deal with the anxiety." (Id.)

Appellant's assertions of anxiety are quite similar to raised by the appellant in United States v. Lampkins, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *13-14 (A.F. Ct. Crim. App. 2 November 2023). There, the appellant used the exact same language as Appellant here, stating the delay had affected him "physically, mentally, socially, and hindered [his] ability to move on with [his] life." Id. That appellant also claimed he had been diagnosed with depression and post-traumatic stress disorder, his issues had increased due to the post-trial delay, and he could not sleep without medication. However, this Court did not agree that the appellant's "concern and anxiety are distinguishable from the normal concern and anxiety of an appeal" and found no prejudice." Id. Considering Appellant's declaration, dated 11 March 2024, exactly mirrors language used by the appellant in Lampkins and complains of similar reasons for anxiety, this Court should likewise find no prejudice in Appellant's case.

Notably, despite Appellant's declaration being dated 11 March 2024, the day on which his brief was filed with this Court, Appellant does not mention his own 11 enlargements of time, which he specifically approved and which accounted for 399 days, and is silent on how that timeframe has affected his claimed anxiety.

Though not mentioned in his declaration, Appellant states in his brief that he also suffered prejudice because he faced "impairment of [his] grounds for appeal." (App. Br. at 42, *citing* Moreno 63 M.J. at 138-9.) Appellant claims that because of the "129 days of presumptive, unreasonable delay . . . [Appellant] was unable to petition this Court for relief sooner." Yet, Appellant fails to state how the delay rendered him "unable to petition this Court," what type of petition he has been unable to file, or how his ability to exercise his post-trial rights have been impeded. If Appellant is referencing his current brief, Appellant again fails to account for his own 399-day delay in filing his brief or the 11 enlargements of time he requested from this Court. Further, considering his lengthy brief with multiple issues raised, Appellant has failed to show any impairment to his grounds for appeal.

All told, Appellant has faced no prejudice due to the delay between his sentencing and docketing with this Court. As such, Appellant's Moreno claim for relief should be denied.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[20] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in

[20] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

The same can be said in this case. Here, there is no indication of bad faith on the part of any Government actor and there is no indication of prejudice. Further, the delay in this case, 279 total days, is over 200 days less than the delay in Anderson. Moreover, where the record of trial in Anderson consisted of a 635-page transcript with 60 total exhibits, the record in this case included a 1,599-page transcript and 84 exhibits. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

Additionally, this case differs from Lampkins, where this Court granted Toohey relief and found a due process violation due to an overall 353-day delay in docketing the case, more than double the 150-day standard established in Livak. Lampkins, 2023 CCA LEXIS 465, at *14-15. This Court also noted no justification was provided for the delay, that "Most troubling, though, is the fact that even after this case was over the 150-day standard Appellant's record was

left untouched, in a cubicle at the base legal office" for a period of 77 days. Id. This Court also highlighted that the Numbered Air Force took two months to identify errors for the base legal office to correct.

Those circumstances are not present in this case. Here, the length of delay is shorter and the Government has provided multiple chronologies explaining the causes of the delay. Most importantly, as opposed to what this Court found most troubling in Lampkins, the chronologies show no extended periods of inaction in the processing of Appellant's case. For these reasons, this Court should find no due process violations occurred in this case and grant no Toohey relief.

b. Tardif Analysis

Notably, Appellant does not cite to either Tardif or Gay in his brief or ask for relief pursuant to those cases. Yet, even under Tardif and this Court's Gay factors, Appellant's case does not warrant relief for the same reasons detailed above.

VII.

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

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court recently denied certiorari in Anderson. *See* Order List, 601 U.S. __ (Feb. 20, 2024) (available at https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf); *see also* United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), Supreme Court certiorari denied by Cunningham v. United States, 2024 U.S. LEXIS 1430 (U.S., Mar. 25, 2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict and Appellant's claim must fail.

VIII.[21]

APPELLANT'S APPROVED SENTENCE IS ENTIRELY APPROPRIATE.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

[21] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Law

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This Court should affirm sentences it finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(d), UCMJ. This Court also has the power to disapprove a mandatory minimum sentence. United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

In order to determine the appropriateness of the sentence, this Court must consider: (1) the particular appellant, (2) the nature and seriousness of the offense, (3) the appellant's record of service, and (4) all matters contained in the record of trial. United States v. Amador, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005) (*citing* United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); United States v. Alis, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998)).

This determination is separate from an act of clemency, i.e., treating an accused with less rigor than he deserves due to a consideration of mercy. The service appeals courts are not authorized to engage in exercises of clemency. Healy, 26 M.J. at 396; *see also* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Analysis

Convicted of sexually assault, assault consummated by battery, and aggravated assault by strangulation, Appellant claims his rightfully-deserved sentence is "excessive." (App. Grostefon Br. at 1.) Appellant believes his offenses do not warrant his sentence because of his "exemplary career in the Air Force," "difficulties that come with being a single father," and "difficulties arising simply by virtue of the investigation," adding that his permanent change of station was cancelled." (Id. at 1-2.) Appellant again also raises his failed mistake of fact defense. (Id.)

Appellant is mistaken. To start, Appellant's sentence is entirely appropriate. Looking at the facts and circumstances of his crime, as well as Appellant personally, a sentence that includes 30 months confinement and a dishonorable discharge is deserved. As described throughout this brief, Appellant turned a consensual kissing encounter with JK into repeated violence against her. Appellant repeatedly grabbed JK's body, wrestled around with her, and tried to get inside her pants, all while JK repeatedly told Appellant "no" and "stop" and pushed his hands away from her shirt and pants. (R. at 1089-1094.) Undeterred, Appellant then got his "second wind" and again attacked JK by grabbing her, wrestling with her, and then grabbing her throat with his hand and squeezing. (R. at 1091-92.) Finally, Appellant placed his finger inside JK's vulva, again all while JK was trying to get away, push him off, and telling him "no." (Id.)

Here, the maximum sentence faced by Appellant highlights the seriousness of this offense as Appellant faced a maximum confinement sentence of 35 years, six months. However, the military judge sentenced Appellant to only 30-months confinement, a 93-percent reprieve from the maximum allowed. (R. at 1598.) Moreover, the sentence was 50-percent less than the five-year confinement sentence the trial counsel argued for during sentencing. (R. at 1572.)

Yet, Appellant comes to this Court asking for even more relief in the form of sentence relief because he was a single father and because his permanent change of station was cancelled. However, the United States Air Force has many single parents who face difficulties raising their children in the face of their military duties who do not turn to sexually assaulting and strangling a fellow Airman. Moreover, Appellant's permanent change of station being cancelled, as well as any other negative impact on Appellant's life due to the investigation of this case, was due to his

own violent actions against JK. Neither of these excuses warrant sentence reduction in this case.

Finally, Appellant again raises his failed mistake of fact defense and claims this shows he was not a "predatory aggressor." (App. Grostefon Br. at 2.) However, a review of the facts, which again involve Appellant choking and digitally penetrating JK against her will while she attempted to fight Appellant off and repeated told him "no" and "stop," show Appellant rightfully deserved the full sentence adjudged against him.

Overall, Appellant's record shows he has received awards, decorations and performance reviews consistent with an Airman who had served seven years at the time of his court-martial, yet shows nothing exceedingly remarkable or stellar that would warrant overlooking his repeatedly violent acts against JK in September 2019.

All things considered, Appellant's sentence amounts to a lawful and legally supportable sentence. Evaluating the facts and circumstances in the record of Appellant's case, the seriousness of his offenses, his service record, his particular character and rehabilitative potential, and in consideration of the entire record, this Honorable Court should leave his sentence undisturbed.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 10 April 2024 via electronic filing.

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

10 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) LUKE A. SCOTT, USAF *Appellant.*	))))))))	MOTION TO ATTACH DOCUMENT ACM 40411 Panel No. 2

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following document in support of the government's Answer to Appellant's Supplemental Assignment of Error brief in the above referenced case:

Declaration of SSgt KV, dated 8 April 2024, 1 page.

This document provides additional information and context outside the record but are relevant and necessary for the United States to answer Appellant's brief. Specifically, SSgt KV's declaration provides this Court necessary background and context regarding Appellant's claim that he is entitled to relief due to post-trial processing delay. SSgt KV's declaration provides needed context necessary to address Appellant's claims.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here, Appellant's claim of post-trial delay is directly raised by materials in the record. This

declaration is relevant to address Appellant's claims of prejudice due to post-trial processing delay. Thus, this Court may consider them under Jessie.

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 10 April 2024 via electronic filing.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke A. SCOTT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 10 April 2024, the Government submitted a Motion to Attach the declaration of SSgt KV, dated 8 April 2024 (1 page). Appellant did not oppose the motion.

The court has considered the Government's motion, this court's Rules of Practice and Procedure, and the applicable law. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law, to the attachment(s) until it completes its Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 18th day of April 2024,

ORDERED:

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

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

10 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40411
Staff Sergeant (E-5) LUKE A. SCOTT, USAF *Appellant.*	)	Panel No. 2

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Supplemental Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his Assignments of Error brief. Appellant raises a total of eight issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 10 April 2024 via electronic filing.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40411**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Luke A. SCOTT	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of April, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to Panel 1 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	)	**REPLY BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	No. ACM 40411
LUKE A. SCOTT	)	
United States Air Force	)	17 April 2024
Appellant	)	

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

Appellant, Staff Sergeant (SSgt) Luke A. Scott, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to Appellee's Answer, dated 10 April 2024 (Ans.). In addition to the arguments in his opening brief, filed on 11 March 2024, SSgt Scott submits the following arguments for the issues listed below.

I.

THE GOVERNMENT'S EMPHASIS ON SSGT SCOTT'S DEAMNNOR WHEN QUESITONED BY JK DOES NOT ABSOLVE THE NECESSITY OF A RIGHTS ADVISMENT.

The Government's Answer makes clear that its entire case rests on laughter, smiling, and leaning in. (Ans. at 21.) The Government paradoxically acknowledges the reasonable person standard outlined in *United States v. Jones*, 73 M.J. 357 (C.A.A.F. 2014), while placing upon SSgt Scott the burden of showing signs of "duress, coercion, or 'subtle pressure' when he arrives" at JK's office after receiving an order to appear before her. (*Id.*) Yet, the Government cites no case or authority to explain why SSgt Scott's physical reaction is enough to circumvent Article 31.

While the Government acknowledges that "subtle pressure" can originate from "military rank, duty or other similar relationship," they give no treatment for how JK's duty position influenced her interrogation of SSgt Scott. Instead, the Government attempts to minimize her

official capacity as a member of the command staff. (Ans. at 19.) Her official capacity effectuated the conversation. The two did not enjoy a friendship or casual relationship. (R. at 56.) Despite this, the Government insists that SSgt Scott could not have reasonably believed that the encounter in JK's office was involuntary. (Ans. at 21)

The Government failed to address whether a reasonable person would have felt free to disengage from the conversation. Where would such a reasonable belief come from? It certainly did not come from the order that SSgt Scott was given by his immediate supervisor to go to JK's office. Nor did it come from JK's instruction for SSgt Scott to close the door to her office after he arrived. Nor did it originate from JK's immediate use of her command staff position to justify the questions that she asked SSgt Scott, which had only one clear purpose: to evoke incriminating responses. Instead, a reasonable person under these circumstances would have understood that leaving JK's office would have carried negative consequences. (R. at 60.) Regardless, the Government asks this Court to disregard Article 31's requirements based on their description of SSgt Scott's demeanor while questioned.

The Government's characterization of the encounter as a "pretext" is misplaced. A pretext may obviate the need for a rights advisement where the conversation is carried out by an undercover official or informant, such that the accused is not a placed in a position where a reasonable person would feel compelled to answer questions. *Jones*, 73 M.J. at n.5. There was no pretext here. JK used her duty position to order SSgt Scott's presence, she used it to shut him into a closed-door environment, and she used it to preface her questioning of him. The interrogative nature of the encounter is made more apparent by the manner of JK's questioning. (R. at 1117.) Here, the Government misstates the legal standard, trying to persuade this Court that it must find that SSgt Scott was "mercilessly barraged." (Ans. 22.) However, that is incorrect. The law

requires only that SSgt Scott experienced *subtle* pressure as a result of the questioner's "superior rank or official position." *United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954).

Similarly, the Government attempts to minimize the coercive environment that SSgt Scott experienced by speculating how the drug demand reduction program (DDRP) may have influenced SSgt Scott's perception. Importantly, while DDRP was a discussion point during the motion hearing, the record is devoid of any evidence showing that urinalysis or DDRP was the subject of JK's order for SSgt Scott's appearance. The Government seemingly concedes this by emphasizing that no DDRP procedures or paperwork were employed upon SSgt Scott's arrival. (Ans. at 20-21.) What a reasonable person would have perceived, being limited to the facts in the record, is that they were ordered to appear for a command staff member, without having requested any such appointment, instructed to close the door, and asked direct questions, with no explanation that they did not have to answer.

Finally, the Government's reference to *United States v. Bishop*, 76 M.J. 627 (A.F. Ct. Crim App. 2017) offers no support for their argument. (Ans. 19.) In *Bishop*, a crime victim of subordinate rank to the accused texted him "asking questions about events she could not remember and expressing sadness at what occurred." *Bishop*, 76 M.J. at 643. Although investigators observed the exchange take place, the conversation remained personal and informal. *Id.* By contrast, the conversation between SSgt Scott and JK was driven by her official position as a command staff member. Moreover, the Air Force Office of Special Investigations (AFOSI) was more than a mere bystander. Contrary to the Government's assertion, AFOSI was actively involved in the location of the questioning, and suggested methods for securing the information that they wanted. Unlike *Bishop*, this fell within the boundaries of Article 31 by way of JK's use of her official position and AFOSI's involvement.

WHEREFORE, SSgt Scott respectfully requests that this Court set aside the findings and sentence for Charge I, Specification 1, and Charge II, Specifications 1 & 2.

II.

THE AUTHORITIES CITED BY THE GOVERNMENT DO NOT CIRCUMVENT THE NEED FOR EXIGENT CIRCUMSTANCES TO JUSTIFY A MAJORITY OF PANEL MEMBERS NOT BEING FROM THE SAME ARMED FORCE AS SSGT SCOTT.

The Government with one hand describes the United States Space Force as "an independent armed force," while on the other hand, it attempts to absolve the legal significance of this by explaining that the Space Force is organized under the Department of the Air Force. (Ans. at 32.) The Space Force's designation as an independent and distinct armed force is a product of federal statute. *See* 10 U.S.C. § 9081. Legal designation of separate branches into a single armed force is a product of federal statute. *See* 10 U.S.C. § 801 (UCMJ provision mandating that the Navy and Marine Corps, are designated as a single armed force.) No such federal statute exists to give the Air Force and Space Force the same combined status. In the face of this, the Government relies on a publication from the Secretary of the Air Force. (Ans. at 33.) But if this publication can serve as authority on this topic amid Congressional mandates, it cuts against the Government's broader argument that R.C.M. 503(a)(3)'s discussion is non-binding. What is included within a discussion section of the R.C.M. is explicitly dictated by the service secretary in the memorandum relied upon by the Government:

> Consistent with Rule for Courts-Martial 503(a)(3), Air Force convening authorities and Space Force convening authorities may detail as members of general or special courts-martial person under that convening authority's command or made available by their commander, even if those person are of an armed force different from that of the convening authority or accused. *When court-martial is composed of members of different armed forces at least a majority of the members should be of the same armed force as the*

> *accused unless exigent circumstances make it impractical to do so without manifest injury to the Service.*

(App. Ex. XXXV at 6) (emphasis added.)

The Government's reliance on *United States v. Hooper* to minimize the principle behind R.C.M. 503(a)(3)'s discussion section is inapposite. (Ans. at 35.) Crucially, that case did not address the question of cross-service panel composition, but rather dealt with the ability of a commander of one armed service to convene courts-martial against a member of another. 5 U.S.C.M.A. 391. The Government's assertion that *Hooper* highlights R.C.M. 503(a)(3) as wholly discretionary is misplaced. Even assuming the term "should" means non-binding, use of the word "should" in R.C.M. 503(a)(3)'s discussion section is accompanied by the firm declaration that non-majority panels only be employed when "exigent circumstances make it impractical to do so without manifest injury to the service." Here, the military judge provided no justification for the non-majority panel, if not for the simple fact that there was none. Nor is this miscalculation justified by the notion that the member selection before impanelment was a majority of Air Force members. Aside from the discussion section's plain use of the term "composition," which elsewhere in the Rules for Courts-Martial refers to the actual panel that sits and makes findings,[1] this does nothing to overcome the fairness concerns raised where a member of one armed force is convicted by members of another.

Finally, in their attempts to diminish the fundamental fairness principles underlying R.C.M. 503(a)(3), the Government appears to shift the burden of showing unfairness to SSgt Scott while completely overlooking the major flaw in the military judge's resolution. Discussion of fairness

[1] "If the accused elected to be tried by a court-martial *composed* of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members." R.C.M. 912A(b)(1) (emphasis added.)

in this case is truncated by the absence of any findings regarding exigent circumstances that would justify the non-majority panel. This leaves SSgt Scott without any means of addressing whether the military judge correctly made such a determination.

WHEREFORE, SSgt Scott respectfully requests that this Court set aside the findings and sentence for Charge I, Specification 1, and Charge II, Specifications 1 & 2.

III.

THE GOVERNMENT'S DISCUSSION OF FACTUAL SUFFICIENCY IMPERMISSIBLY SHIFTS THE BURDEN TO SSGT SCOTT.

The Government commits the same error on appeal that it did during SSgt Scott's court-martial, shifting the burden and demanding that he prove his own innocence. On the issue of mistake of fact, the Government submits the following:

> In sum, Appellant presented no evidence that Appellant actually believed [JK] was consenting to sexual activity beyond kissing with him on the night in question. While not required to raise the defense, Appellant did not testify in this case. Moreover, Appellant provided no evidence, whether in the form of pretrial statements or otherwise, affirmatively showing that he held an honest belief that [JK] consented to his sexual act or assaults against her.

(Ans. at 64.) SSgt Scott had no burden to prove anything, and the Government's continued insistence to the contrary is alarming.

In similar fashion, the Government seeks to use SSgt Scott's recorded statements from JK against him, not for what he said, but rather for what he did not. According to the Government, "Appellant never denied either holding JK down or choking her, or even acted surprised by anything JK said. Instead, Appellant only denied doing those things to the other girl." (Ans. at 63.)

What the Government overlooks, however, is the impropriety of using SSgt Scott's statement in this manner. "Failure to deny an accusation of wrongdoing is not an admission of the

truth of the accusation if at the time of the alleged failure the person was under investigation . . . for the alleged wrongdoing." Mil. R. Evid. 304. SSgt Scott had no duty to affirmatively deny JK's accusations against him during the interrogation, and it is inappropriate for the Government to now comment on that.

The Government further tried to discount the applicability of the mistake of fact defense in the context of Article 128, UCMJ, on the basis that trial defense counsel waived the issue by declining to request an instruction. (Ans. at 57-58.) This position is contrary to this Court's vested authority under Article 66, UCMJ, to review the findings anew to determine independently whether the evidence supports the conviction beyond a reasonable doubt.

WHEREFORE, SSgt Scott respectfully request that this Court set aside the findings and sentence for Charge I, Specification 1, and Charge II, Specifications 1 & 2.

IV.

CHARGE II, SPECIFICATION 2 WAS LEGALLY AND FACTUALLY INSUFFICIENT DUE THE ABSENSE OF TESTIMONY ARTICULATING HOW JK'S BREATHING MAY HAVE BEEN AFFECTED.

JK unequivocally testified that SSgt Scott's hand did not obstruct her airway. (R. at 1174.) While the Government tries to emphasize JK's facially contradictory testimony when being redirected by trial counsel, they overlook the complete lack of details of how her breathing was made more difficult, and how this was connected to SSgt Scott's actions. The testimony that the Government relies on is limited to the following:

TC: Did he make it more difficult for you to breathe than normal?

JK: Yes.

(R. at 1221.)

Considering JK's earlier testimony that her airway was not obstructed, this raises the question of precisely what JK meant. How was her breathing made more difficult and what were the physical manifestations of it? Absent this additional testimony, the record does not show that "difficulty breathing" was the same as the legal concept of having her breathing impeded. Trial counsel could have asked additional questions which may have clarified this, but chose not to, for whatever reason. Instead, this Court is left to guess how this squares with JK's testimony that her airway was not obstructed.

WHEREFORE, SSgt Scott respectfully requests that this Court set aside the findings and sentence for Charge II, Specification 2.

V.

APPELLANT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL BEFORE DOCKETING BEFORE THIS COURT.

Despite continual delays solely attributable to the Government long before this case was ever docketed with this Court, the Government tries to absolve itself by blaming SSgt Scott. (Ans. at 78.) In particular, the Government focuses on SSgt Scott's request for enlargements of time. (*Id.*) However, this gives no accounting for the delays in post-trial processing. Furthermore, the Government continues to give no explanation for SSgt Scott's delay in receiving a copy of his record of trial.

The Government's insistence on blaming SSgt Scott for the delay in his appeal is unsupported by the law. "[R]esponsibility for [the Appellate Defense delay] and the burden placed upon appellate defense counsel initially rests with the Government . . . Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals." *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006)

(citation omitted); *see also United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013) ("In considering this factor, we have declined to attribute to individual appellants the periods of appellate delay resulting from military appellate defense counsels' requests for enlargements of time where the basis for the request is excessive workload."); *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) ("[T]he responsibility for providing the necessary resources for the proper functioning of the appellate system . . . lies with the Judge Advocates General.").

If the Government does not think that the Appellate Defense Division is identifying its errors quickly enough, then it should "provide adequate staffing" so we can provide more "timely representation." *Moreno*, 63 M.J. at 137. From SSgt Scott's' perspective, it was not "his choice" to wait in confinement while the Government struggled to get his case docketed. Nor was it his choice to wait to raise issues while counsel had to balance review of other cases. The solution is not for an appellant to find errors more quickly, but for the Government to timely docket a complete ROT.

WHEREFORE, SSgt Scott respectfully request that this Court set aside the findings and sentence for Charge I, Specification 1, and Charge II, Specifications 1 & 2, or by reducing his sentence to include disapproving the punitive discharge and reducing his confinement.

Respectfully submitted,

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Counsel for Appellant

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on 17 April 2024.

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