IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Senior Master Sergeant (E-8)	)	No. ACM 40501
MARK L. MARTELL	)	
United States Air Force	)	25 September 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **1 December 2023**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 September 2023.

Respectfully submitted,

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

27 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) WILLIAM M. HILTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 20 November 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 December 2023**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

22 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) WILLIAM M. HILTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 20 December 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 January 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) WILLIAM M. HILTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 23 January 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 February 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 3 in this case, undersigned counsel filed the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF).

Undersigned counsel also spent around 9 hours preparing for and assisting in moots.

This is undersigned counsel's third priority case before this Court following:

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Undersigned counsel has reviewed the record of trial. Both undersigned counsel and civilian appellate defense counsel are working to complete the AOE for the deadline of 1 February 2024. Of note, after filing the AOE in *Hennessy*, undersigned counsel has three, potentially four, Petitions and Supplements to the Petitions currently due to the CAAF in February.

2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

24 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 19 February 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 March 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 4 in this case, undersigned counsel filed the Brief on Behalf of Appellant in *United States v. Hennessy* (ACM 40439) with this Court and the Supplement to the Petition for Grant of Review in *United States v. Edwards* (ACM 40349) with the Court of Appeals for the Armed Forces (CAAF). Undersigned counsel also spent around 12 hours preparing for moots, assisting in moots, and attending oral arguments. Undersigned counsel was second chair at the oral argument before the CAAF on 7 February 2024 in *United States v. Guihama* (ACM 40039).

This is undersigned counsel's fourth priority case before this Court following:

1. *United States v. Arroyo* (ACM 40321 (f rev)): On 9 February 2024, undersigned counsel submitted a post-remand Motion for Enlargement of Time (First) for the amount of 60 days to end on 19 April 2024. On 15 February 2024, this Court granted the motion in part requiring undersigned counsel to file any additional AOEs no later than 20 March 2024. As such, this case has now been re-prioritized by this Court. Also on 15 February 2024, this Court ordered an outreach oral argument for one issue in this case scheduled for 10 April 2024. Undersigned counsel will turn to any additional AOEs in this case once the Petitions and

Supplements to the Petitions for *United States v. Greene-Watson* (ACM 40293) and *United States v. Emerson* (ACM 40297) are filed with the CAAF.

2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes.
3. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

22 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Senior Master Sergeant (E-8) **MARK L. MARTELL,** United States Air Force, *Appellant.*	**NOTICE OF APPEARANCE** Before Panel No. 1 Case No. ACM 40501 Filed on: 22 February 2024

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

COMES NOW, Frank J. Spinner, pursuant to Rule 12 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court of the following:

(1) Business mailing address is: 1420 Golden Hills Road, Colorado Springs, CO 80919;

(2) Phone number is: 719-233-7192

(3) Business email is: lawspin@aol.com; and

(5) I am member of this Court's bar.

Respectfully submitted,

FRANK SPINNER
Appellate Defense Counsel

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 February 2024.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 20 March 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 April 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 5 in this case, undersigned counsel filed the Petition and Supplement to Petition for Grant of Review in *United States v. Greene-Watson* (ACM 40293) with the Court of Appeals for the Armed Forces (CAAF); the Petition and Supplement to Petition for Grant of Review in *United States v. Emerson* (ACM 40297) with the CAAF; and the Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court. Undersigned counsel also spent around 8 hours preparing for moots, assisting in moots, and attending oral arguments.

In the last four weeks, civilian appellate defense counsel has prepped and traveled to Fort Knox, Kentucky, for a general court-martial—*United States v. Tyler*. This period also included preparation and travel to Camp Mabry, Texas, for a Texas Army National Guard elimination board. Civilian appellate defense counsel's number one priority is drafting the Supplement to Petition for Grant of Review in *United States v. Adams* to be filed with the CAAF. His second priority is working on the AOE in *United States v. Serjak*, which is a 1,481 page record with multiple issues now due to this Court on 13 April 2024. This is civilian appellate defense counsel's third priority case.

This is undersigned counsel's third priority case before this Court following:

1. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes. Undersigned counsel has reviewed the record of trial and is finalizing the Appellee's Answer, which is due today with this Court. Undersigned counsel next has any potential Reply Brief in *United States v. Hennessy* (ACM 40439) due to this Court on 21 March 2024.
2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Undersigned counsel has not begun review of this record. Of note, this Court has ordered an outreach oral argument in *Arroyo* currently scheduled for 10 April 2024, so undersigned counsel will also have to prepare for that prior to being able to finish review and drafting of the AOE in this case (*Sherman*).

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 March 2024.

Respectfully submitted,

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

22 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 March 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*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 19 April 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 May 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 21 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 6 in this case, undersigned counsel filed the Appellee's Answer in *United States v. Holmes* (Misc. Dkt. No. 2024-1); the Reply Brief in *United States v. Hennessy* (ACM 40439); the Reply Brief in *United States v. Arroyo* (ACM 40321 (f rev)); and an Opposition to Government's Motion to Cite Supplemental Authorities in *Arroyo* with this Court. Undersigned counsel planned and orchestrated the all-day Human Trafficking Training Event held at the Smart Center

. Undersigned counsel also argued on behalf of SrA Arroyo at the outreach oral argument on 10 April 2024 with this Court. Additionally, undersigned counsel spent around 5 hours preparing for another colleague's moots, assisting in moots, and attending oral argument.

In the last three weeks, civilian appellate defense counsel has been working on four cases with inmates seeking parole. The United States Disciplinary Barracks (USDB) does not allow delays in submitting matters, so these are high priority cases all due this month. Civilian appellate defense counsel's priorities are drafting the Supplement to Petition for Grant of Review in *United States v. Adams* to be filed with the CAAF in the next two weeks; the Assignments of Error in *United States v. Serjak* (ACM 40392); and the Assignments of Error in *United States v.*

Baumgartner (ACM 40413). He anticipates not needing another EOT in *Serjak*. This is civilian appellate defense counsel's third priority case before this Court.

This is undersigned counsel's third priority case before this Court following:

1. *United States v. Douglas* (ACM 40324 (f rev)): On 22 March 2024, this Court granted in part the appellant's motion for an enlargement of time. As such, any additional AOE must be filed by 2 May 2024. Undersigned counsel does not anticipate waiting until 2 May 2024 to file the additional AOE.
2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Undersigned counsel anticipates beginning review of this record on 22 April 2024. Depending on timing, undersigned counsel may need to prepare for oral argument in *United States v. Holmes* (Misc. Dkt. No. 2024-1) currently scheduled for 31 May 2024 prior to filing the Brief on Behalf of Appellant in *Martell*.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

19 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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 a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

J. 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 19 April 2024.

J. 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 40501**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark L. MARTELL	)	
Senior Master Sergeant (E-8)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 19 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **29 May 2024**.

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 provided an update of the status of counsel's progress on Appellant's case*, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 20 May 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 June 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 19 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 7 in this case, undersigned counsel filed the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324 (f rev)) with this Court; an Opposition to the Government's Motion for Reconsideration: Citation of Supplemental Authorities in *Arroyo* with this Court; and Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Johnson* (ACM S32774), *United States v. Willems* (ACM 40562), and *United States v. Brockington* (ACM S32768) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed. Additionally, undersigned counsel spent around 5 hours preparing for another colleague's moots, assisting in moots, and attending oral argument.

Additionally on 7 May 2024, the CAAF granted review of one issue in *United States v. Greene-Watson* (ACM 40293), in which undersigned counsel is the detailed military appellate defense counsel, with the Grant Brief currently due 26 June 2024.

In the last three weeks, civilian appellate defense counsel filed the Supplement to Petition for Grant of Review in *United States v. Adams* with the CAAF, the AOE in *United States v. Serjak* (ACM 40392); and worked on the AOE in *United States v. Baumgartner* (ACM 40413). With respect to appellants Serjak and Baumgartner, civilian counsel traveled to the Miramar Brig in California to provide them copies of their draft briefs and to go over the issues with them as they requested. While *Serjak* was filed, work remains to be completed in *Baumgartner*. The AOE in *Baumgartner* is currently due on 2 June 2024. This is civilian appellate defense counsel's next priority case before this Court.

Undersigned counsel provided civilian appellate defense counsel the draft Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) and is awaiting review by the lead counsel. After an issue on confinement coordination, a Declaration was signed by the Client and provided to civilian appellate defense counsel. As such, this is undersigned counsel's third priority case before this Court following:

1. *United States v. Holmes* (Misc. Dkt. No. 2024-1): On 5 April 2024, this Court ordered oral argument scheduled for 31 May 2024. Undersigned counsel is currently preparing for oral argument in *Holmes*.
2. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit. Of note, this case moved up in priority for undersigned counsel to attempt to get review done prior to going on leave at the end of June. Given the Grant Brief and Joint

Appendix in *Greene-Watson* will be due to the CAAF before the end of June and takes priority, it is highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Duthu*.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellate defense counsel are in compliance with their ethical obligations as it relates to communications with our client. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 May 2024.

Respectfully submitted,

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

21 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40501**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark L. MARTELL	)	
Senior Master Sergeant (E-8)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 20 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 June 2024**.

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

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 18 June 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 July 2024**. The record of trial was docketed with this Court on 3 August 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 1 April 2023, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, one specification of Article 120, Uniform Code of Military Justice (UCMJ); and not guilty, consistent with his pleas, of one specification of Article 120, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 22 May 2023. The military judge sentenced Appellant to reduction to the rank of E-1, 18 months' confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 April 2023. The convening authority suspended the reduction in rank for a period of six months from 15 April 2023 for the benefit of Appellant's spouse and dependents via the waiver of all automatic forfeitures of pay for a period of six months. *Id.*

The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Appellant is no longer confined.

Undersigned counsel is currently assigned 21 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 8 in this case, undersigned counsel sent the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) to civilian appellate defense counsel for review; conducted oral argument in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court; filed the Reply Brief in *United States v. Douglas* (ACM 40324 (f rev)) with this Court; and filed the Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Duthu* (ACM 40512) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed.

Military appellate defense counsel is currently working on the Joint Appendix and Grant Brief in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293), which are currently due to the Court of Appeals for the Armed Forces (CAAF) on 26 June 2024.

Since filing EOT 8, civilian appellate defense counsel filed a motion in *United States v. Adams* with the CAAF and the AOE in *United States v. Baumgartner* (ACM 40392). Civilian appellate defense counsel is working on a Reply Brief in *United States v. Serjak* (ACM 40413); reviewing the drafted AOE in *United States v. Sherman* (ACM 40486) due to this Court on 22 June 2024; and the AOE in *United Staes v. Amos* for the Navy-Marine Court of Criminal Appeals.

Civilian appellate defense counsel also prepared for and appeared at a Board of Inquiry (BOI) held at Fort Carson, CO; raised issues in a post-BOI filing in the same case; and worked on parole and clemency submissions in three Army cases. Additionally, he had an unanticipated demand for assistance last week in the case of an Air Force Academy cadet (class of 2024).

This is military appellate defense counsel's second priority case before this Court following:

1. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Military appellate defense counsel has begun review of the record of trial and identified several potential issues. The AOE is currently due to this court on 8 July 2024.

Appellant was advised of his right to a timely appeal. Appellant consented to the limited disclosure of confidential communications that he was updated on the status of his counsels'

progress on the case, the need for this request for an enlargement of time, and that he consented to this request for an enlargement of time.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 June 2024.

Respectfully submitted,

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

18 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Master Sergeant (E-8) MARK L. MARTELL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40501 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 18 June 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	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL AND TRANSMIT**
	)	**TO CIVILIAN COUNSEL**
v.	)	
	)	Before Panel No. 1
Senior Master Sergeant (E-8)	)	
MARK L. MARTELL	)	No. ACM 40501
United States Air Force	)	
Appellant	)	15 July 2024

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

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

1) Prosecution Exhibit 5 – Photographs from sexual assault nurse examination.
2) Defense Exhibits E-I – Photographs/diagrams from SANE report.
3) Appellate Exhibit X-XVII – Mil. R. Evid. 412 motions and attachments.
4) Appellate Exhibits XVIII-XXII – Mil. R. Evid. 513 motions and attachments.
5) Appellate Exhibit XXV – Order – Redacted record of LN (named victim).
6) Appellate Exhibits XXVII-XXX – Mil. R. Evid. 412 updates and emails regarding requests for reconsideration or clarification regarding the Mil. R. Evid. 412 ruling.
7) Appellate Exhibit XLIII – Redacted mental health records.
8) Audio recording of closed sessions.
9) Sealed transcript pages of closed sessions.

The Appellant also requests permission for undersigned counsel to transmit the sealed material to Mr. Frank Spinner, his civilian appellate defense counsel. Mr. Spinner's office is in

Colorado Springs, CO and he is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed the above listed materials.[1]

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

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

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

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

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant.

---

[1] The Appellant is not requesting, via this motion, to view the sealed material in Appellate Exhibit XLIV—unredacted mental health records—which was not viewed by all parties.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40501**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark L. MARTELL	)	
Senior Master Sergeant (E-8)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 15 July 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibit 5; Defense Exhibits E–I; Appellate Exhibits X–XVII, XVIII–XXII, XXV, XXVII–XXX, and XLIII; the audio recording of closed sessions; and the sealed transcript pages of closed sessions. All requested items were reviewed by trial and defense counsel at Appellant's court-martial. We note Appellant is not seeking to review Appellate Exhibit XIV, which was not reviewed by counsel at trial.

Additionally, Appellant's military counsel request permission to create and transmit digital copies of all sealed materials listed above to Appellant's civilian defense counsel, Mr. Frank Spinner, to facilitate counsel's preparation of Appellant's assignments of error brief.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of requested sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the requested sealed materials and to transmit them to civilian appellate defense counsel. Additionally, given that Appellant's civilian defense counsel is not local, Appellant's request to create and transmit digital copies of the requested materials to send to Appellant's civilian defense counsel is reasonable and will be permitted by this court.

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

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 5, Defense Exhibits E–I, Appellate Exhibits X–XVII, XVIII–XXII, XXV, XXVII–XXX, and XLIII, the audio recording of closed sessions, and the sealed transcript pages of closed sessions**.

It is further ordered:

Appellant's request to create and transmit digital copies of the sealed materials to Appellant's civilian defense counsel is **GRANTED.**

Appellant's military counsel is permitted to scan a hardcopy of the requested sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by civilian appellate defense counsel, Mr. Frank Spinner; and transmit files containing sealed materials encrypted or password-protected to Mr. Spinner via DoD SAFE. Appellant's military counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "CUI – sealed materials under R.C.M. 1113" and place it in a sealed envelope containing the same identifying information. Appellant's military counsel is also permitted to send sealed materials to Mr. Spinner via U.S. mail, Federal Express, or by similar secure means of shipment.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel 1
	)	
Senior Master Sergeant (E-8)	)	No. ACM 40501
MARK L. MARTELL	)	
United States Air Force	)	30 July 2024
Appellant	)	

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

Assignment of Error

WHETHER SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Statement of the Case

On 1 April 2023, at a general court-martial consisting of officer and enlisted members convened at Travis Air Force Base, California, SMSgt Mark L. Martell was found guilty, contrary to his pleas, of one charge and one specification of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; and was found not guilty, consistent with his pleas, of one specification of Article 120, UCMJ.[1] Entry of Judgment [EOJ]. The military judge sentenced SMSgt Martell to reduction to the rank of E-1, confinement for 18 months, and a dishonorable discharge. *Id.*, R. at 1031. On 24 April 2023, the convening authority denied SMSgt Martell's request for deferment of the portion of the sentence reducing him to E-1, as well as any automatic forfeitures until the date the military judge signed the entry of judgment, which was 22 May 2023. *Id.*; Convening Authority Decision on Action [CADA]. On 24 April 2023, the convening authority waived all

[1] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.) [2019 *MCM*].

automatic forfeitures, beginning on 15 April 2023, for a period of six months to be paid to his spouse for the benefit of his spouse and three dependent children. *Id.*

Statement of the Facts

1. SMSgt Martell testified—he did not sexually assault L.N.

SMSgt Martell and his wife, L.M., were stationed at Travis Air Force Base, CA, where both served on active duty. R. at 815. He served as a Mission Support Group executive and prior to that the flight superintendent. *Id*. L.N., a urology technician, served under L.M., the flight chief of the Surgical Specialties Clinic at David Grant Medical Center. R.at 530, 623, 816. L.N. and L.M. had become "[v]ery close" friends and socialized regularly, often at the Martell's off-base residence in Fairfield, CA. R. at 817. Because of the social relationship between his wife and L.N., SMSgt Martell had come to know L.N. relatively well. R. at 814. L.N. testified, "I considered him a good friend shortly after becoming a good friend to [MSgt L.M.]. R. at 532.

On 17 July 2021, L.N. and another friend, MSgt A.A. (hereinafter A.A.), went over to "hang out" at the Martell's home, which included swimming in the pool and drinking alcoholic beverages. R.at 623-24, 816. The plan was for L.N. and A.A. to spend the night. R. at 634-35. SMSgt Martell was not initially interacting with the multiple guests (besides L.N. and A.A.) who came over because he was taking a nap and then left to pick up his daughter from work. R. at 827. He arrived home "around 5-ish." R. at 829.

After returning home, SMSgt Martell's initial noteworthy interaction with L.N. occurred when he saw her lying on a couch. R. at 830. In a roughhousing fashion, he picked her up attempting to throw her in the pool. *Id*. She struggled with him, but denied that he picked her up, testifying that he only grabbed her by the arms. R. at 579. She effectively told him "No" although

she could not remember the exact words she used. *Id*. E.H., one of the female guests at the party, confirmed that SMSgt picked L.N. up "kind of like a groom would be carrying a bride" and that L.N. "was resisting." R. at 618.

At the end of the evening after all the guests had departed, except L.N. and A.A., SMSgt Martell was in the "kitchen . . . starting to clean up." R. at 830-31. He was aware that L.N. headed to the guest bedroom, while L.M. and A.A. were sitting at the kitchen island talking. *Id*. He headed to the bathroom, when "[L.N.] saw [him from the bedroom] and she called [him saying] 'Hey Mark, come here.'" R. at 831. SMSgt Martell then testified as follows:

> So, then I asked if everything's okay. She grabbed my hand and she started to lay on the bed—or sit on the bed—and she put my hand on her vagina and said, "Do you feel how smooth this is? I got a wax today. It's smooth as a dolphin."
>
> * * *
>
> And then she proceeded to do a back-and-forth motion with my hand and her hand masturbating herself.
>
> * * *
>
> And then she starts to moan and I continue to masturbate her. And then she reaches over to my penis and proceeds to jerk me off, I—with one hand—I'm still masturbating her and with the other hand I grabbed her breast. And at that point, I told her we need to stop, it's—this is getting out of control—it's wrong.
>
> * * *
>
> So, when I said, "We got to stop, this is wrong" she just started saying, "No, no, no," shook her head and got in the fetal position on the bed, and she just started, like whimpering. I walked out.

R. at 831-32. He added that he "did not lick her face." R. at 833. He returned to the bathroom, where he was originally headed, at which point his son "just walks in barking something out, so [he] shooed him away. [He was] like, 'I'm about to pee, get out of here.'" *Id*. SMSgt Martell then went back to the kitchen and "proceeded to do dishes." *Id*.

SMSgt Martell and L.N.'s descriptions of this encounter inside the guest bedroom differ completely as L.N. claimed SMSgt Martell sexually assaulted her as described below, contrary to his testimony. SMSgt Martell testified under oath, "[L.N.'s] allegations are a hundred percent false." R. at 813. Neither one of them claimed to be excessively intoxicated. In other words, each of them were aware what was happening when it happened. Both testified on the merits at trial. Although SMSgt Martell repeatedly denied sexually assaulting L.N. and was acquitted of the allegation in Specification 2 of the Charge, he was convicted of the allegation that he inserted his finger in L.N.'s vagina without her consent, as alleged in Specification 1. R. at 959, 962.

2. L.N. testified that SMSgt Martell sexually assaulted her.

L.N. testified that after she had retired to the guest bedroom, while still in the swimsuit loaned to her by L.M., someone came into the room uninvited. R. 535, 538-40. She was dozing, but not fully asleep. R. at 540. She "felt hands coming from underneath the comforter" moving up her "leg and up to the bathing suit and trying to pull the bathing suit to the side." R. at 541. Then "[f]ingers entered [her] vagina." *Id*. She determined that it was SMSgt Martell, based upon his smell, as it was dark so she could not see him. *Id.*, R. at 546. She "did not say anything" even though she heard "voices outside of the room." R. at 542. One of the touches she felt was someone licking her cheek. R. at 543, 545.

At the same approximate time, A.A. and L.M. were downstairs in the kitchen talking when one of the Martell children came in and asked for permission to get some ice cream. R. at 625-26. A.A. testified that L.M. sent the child to the bathroom to get permission from SMSgt Martell. When the child returned and said that his Dad told him to "'Shhh,' to 'Shhh'", A.A. decided to go to the bedroom, thinking "that something was wrong." R.at 627. It is not clear from her testimony whether she saw SMSgt Martell leave the guest bedroom and go the bathroom or

whether she "assumed" he left the bedroom and go into the bathroom, even though according to her, his child had already said that SMSgt Martell was in the bathroom. R. at 628.

A.A. entered the guest bedroom. She testified that she found L.N. under the covers in the bed, not on the floor. R. at 630. A.A. testified L.N. was not on the floor in a ball, as L.N. had claimed. R. at 588-89, 641. Instead, A.A. purportedly found L.N. "cowering under the covers" with a "red face" and "crying." R. at 630-31. L.M. did not testify on the merits, so what happened next was only described by L.N. and A.A. A.A. called to L.M. to come to the room. R. at 631. A.A. then went to look for L.N.'s car keys. *Id.* When A.A. returned to the room, L.N. and L.M. were not there, even though L.N. testified that A.A. and L.M. were present when L.N. went outside through a bedroom window. R. at 564-65. A.A. found them outside the house, whereupon A.A. drove L.N. to L.N.'s apartment. R. at 632. When they woke up that morning, A.A. took L.N. "to the ER." R. at 633.

Approximately 14 hours later, a California Forensic Medical Report (FMR) documented that a Sexual Assault Examination was conducted.

Both the Government and the Defense made multiple references to the FMR prepared by K.C., the sexual assault nurse examiner who was called to testify for the prosecution, identifying points that supported their respective claims. R. at 650, Pros. Ex. 4. The examination was conducted approximately 14 hours after the alleged assault. R. at 671. No references to physical findings found in the FMR established whether L.N. consented to the sexual encounter. R. at 672, 674, 678-79. To be clear, K.C. had no opinion whether L.N. consented or not. R. at 674.

Of note was the fact that although L.N. claimed that she experienced vaginal bleeding and that she found dried blood on the swimsuit, the swimsuit was not presented, examined, or otherwise taken into evidence by anyone, including K.C. Pros. Ex. 4, Block L, Item 1. Regardless, it was not placed in evidence at trial by either party. L.N. testified she left the swimsuit on the bathroom floor

at her apartment. R. at 567-68. While L.N. reported some bleeding, K.C. did not observe any active bleeding. R. at 683, Pros. Ex. 4, Block E, Item 5. Also of note is that as part of the examination, L.N. was asked if she experienced any loss of memory or lapse of consciousness and she said she did not. R. at 682-83. The specific points raised by each side regarding the FMR, along with other evidence admitted at trial, will be addressed in the argument below.

DNA results established that SMSgt Martell was not the source of DNA found on L.N.'s cheek obtained as reported.

The FMR stated that a swab was taken from L.N.'s cheek because she claimed that SMSgt Martell licked her cheek during the alleged sexual assault. Pros. Ex. 4, Block I, Item 2, Diagram C. R.F., a forensic biologist, was called by the Government to address DNA testing that was conducted on the swabs collected as reported in the FMR. R. at 701, 706. It was determined that SMSgt Martell was not the source of the DNA found on L.N.'s cheek, even though saliva is "a rich source of DNA." R. at 706-07, 710. R.F. testified that the DNA on the cheek came from an "unknown male [DNA] profile." R. at 706, 710.

3. L.N. wanted to be transferred to Nellis AFB to be near her boyfriend.

L.N.'s desire to be transferred to Nellis was a "frequent" topic of conversation with her and the Martells, which also came up the night of the alleged assault. R. at 820. That same evening, "[L.N.] Facetimed" her boyfriend. R. at 821. L.N.'s desire to be transferred to Nellis was well known by numerous individuals. R. at 597-00. In fact, because of her sexual assault claim, L.N. was transferred to Las Vegas after asking for an "expedited transfer." R. at 570, 572.

Argument

SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

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

Law and Analysis

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, the UCMJ specifies this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[2] Article 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii) (2024 *MCM*). Thus, to set aside a conviction for factual insufficiency, the Court "must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." *Csiti*, 2024 CCA LEXIS 160, at *25.

Even applying the new standard for reviewing claims of factual insufficiency of the

[2] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024). Contrary to the approach of another service court of criminal appeals, this Court does not apply a rebuttable presumption of guilt when assessing factual sufficiency. *Compare id.* at *22, *with United States v. Harvey*, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 2023), *rev. granted*, 2024 CAAF LEXIS 13, *1 (C.A.A.F. 2024) (Granting the issue of whether the lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.).

evidence, the Government did not prove beyond a reasonable doubt that "on or about 17 July 2021" SMSgt Martell committed a "sexual act upon" L.N. "by penetrating her vulva with his finger, with an intent to gratify his sexual desire, without her consent." *See* Charge Sheet. Before going through very specific reasons based on the facts of this case it is important to observe that regardless of the military ranks and relationships between the individuals involved, the context of what happened here is universal and consistent with knowledge of human nature and the ways of the world, a somewhat overwrought phrase.

It is not out of the ordinary and beyond human experience for individuals who are coworkers or close friends, in the midst of a party centered around the consumption of alcohol, to lose their inhibitions and make a bad choice to act out in a sexual way even where one individual is married to a close friend and coworker. That is what stopped SMSgt Martell as he was caught up in the moment, i.e., he came to his senses, realized what he was doing was wrong and brought to an end the encounter. L.N. became a proverbial "woman scorned" in that same moment. The Government did not prove beyond a reasonable doubt that this is not what happened.

For the following additional reasons, Specification 1 of the Charge is not legally and factually sufficient.

1. ***Specification 1 of the Charge is legally and factually insufficient due to the contradictions of and inconsistent statements made by L.N.***

The most glaring contradiction can be found in A.A.'s description of where L.N. was when A.A. entered the guest bedroom immediately after the alleged assault. L.N. testified she was on the floor in a ball. A.A. testified L.N. was in bed under the covers A.A. then testified that after L.M. came into the room, A.A. departed to look for keys. R. at 631. L.N. testified that both L.M. and A.A. were there when L.N. departed through the window. R. at 565. A.A. said that when she returned to the bedroom, she did not know where L.N. and L.M were. R. at 632.

L.N. was also contradicted by E.H.'s testimony that earlier in the party SMSgt Martell picked L.N. up from a couch like a groom would pick up a bride and that L.N. resisted. R. at 618. L.N. testified that he only "grabbed" her arms and did not pick her up. R. at 579.

Another contradiction occurred when K.C., the sexual assault nurse examiner, testified that L.N. did not tell her about the wax treatment L.N. received the day of the party. R. at 687. L.N. testified that she did tell K.C., but it was never noted by K.C. anywhere in the F.M.R. Pros. Ex. 4.

L.N. denied that she ever had SMSgt Martell's phone number. R. at 581. She told this to the OSI and to A.A. R. at 584. In fact, she communicated with him by texting on numerous occasions as reflected in multiple screen shots as confirmed by SMSgt Martell. R. at 821, Def. Ex. B (consisting of five pages).

L.N. was asked by defense counsel, "At one point you texted [A.A.] that pretty soon you were going to be able to get the defense's submissions in the case and know their arguments; correct?" L.N. replied, "I don't recall that." R. at 582. Defense counsel explicitly told her what the text message said and asked if reading it would refresh her recollection. She said, "No." The text message was then offered and admitted into evidence as a prior inconsistent statement. R. at 583. It states that A.A. was going to get a subpoena and that L.N. "will gain access to [SMSgt Martell's] evidence." *Id*., Def. Ex. A.

2. Specification 1 of the Charge is legally and factually insufficient due to L.N.'s motives to misrepresent.

L.N. held several motives to misrepresent what happened. First and foremost, that night when L.M., her boss, close friend and spouse of SMSgt Martell, and A.A., another close friend, came into the guest bedroom, she could not confess that she just initiated a sexual act with SMSgt Martell and that he was the one who stopped it.

Second, the evidence unequivocally shows that she wanted to be at Nellis AFB with her

boyfriend. There were major issues in their relationship that had made and were making it difficult to maintain and preserve. R. at 600-01. When L.N. was asked if her boyfriend learned that she engaged in consensual sexual activity with SMSgt Martell it would have "ended things," L.N. replied, "Absolutely." R. at 602. The Defense did not argue that she planned this event in advance, creating a way to get transferred by false pretenses. On the other hand, when events played out the way they did, she seized the opportunity to use a claim of sexual assault to achieve her goal and protect her relationship with her boyfriend.

Third, her unprofessional consensual sexual conduct was prejudicial to good order and discipline and of a nature to bring discredit to the armed forces. SMSgt Martell recognized as much, given his rank and the context in which all the participants were subordinate members of the Air Force. By engaging in a consensual sexual encounter with her, he put his own career at stake, but her career and her reputation were also in jeopardy. Once her false claim was made, the stakes only became higher for her. In other words, she could not admit that she lied without the potential adverse consequences increasing from having made a false official statement.

Her first misjudgment was engaging in the consensual sexual acts. Her second was using the sexual assault complaint processes to gain the transfer to Nellis. Her third was lying about what happened. The Defense had no burden of proof. Given all the evidence they presented, however, they successfully established that SMSgt Martell is truly innocent of the claim of sexual assault. It is now time for the Court to recognize this truth. SMSgt Martell has made a specific showing of deficiency of proof.

In reaching this conclusion, the Court should remember that it has something the court members did not have, a verbatim record of trial. As an illustration, during the trial counsel's rebuttal closing argument, the Defense objected to an argument as not being based upon facts in

evidence, when the testimony of A.A. was referenced with respect to corroborate L.N. about bleeding from the sexual assault. R. at 943. The judge overruled the objection with the standard instruction that arguments of counsel are not evidence and the members should rely on their own recollection of the evidence. *Id*. This is a case where such an instruction does not result in justice.

It can be unequivocally shown via the transcript that the Defense was correct and the trial counsel was wrong. R. at 621-49. Should the Court presume that the members were able to correctly assess the evidence in the absence of a verbatim transcript? Additionally, the Defense had no opportunity to engage in surrebuttal on this point.

3. ***Specification 1 of the Charge is legally and factually insufficient due to L.N.'s inability to explain how SMSgt Martell knew that she received a brazilian wax treatment that day.***

As reported above, SMSgt Martell described a statement L.N. made at the beginning of the sexual encounter to the effect that her skin in the vaginal area felt like a "dolphin" because she received a wax treatment that same day. Under cross-examination, L.N. admitted that she received a Brazilian wax treatment before she came to the Martell residence. At no point did L.N. explain how SMSgt Martell could have known this fact that night without her sharing it with him during the sexual encounter.

For all the reasons stated above, Specification 1 of the Charge is not legally and factually sufficient and this Court should not affirm the finding of guilty.

WHEREFORE, SMSgt Martell respectfully requests that this Honorable Court set aside and dismiss Specification 1 of the Charge and the Charge and set aside the sentence.

Respectfully submitted,

FRANK J. SPINNER
Attorney at Law

HEATHER M. BRUHA, 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 Government Trial and Appellate Operations Division on 30 July 2024.

Respectfully submitted,

FRANK J. SPINNER
Attorney at Law

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel No. 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant.*	)	No. ACM 40501 28 August 2024

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

ISSUE PRESENTED

SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant's wife, LM, introduced him to LN (LN), when LN moved to Travis Air Force Base (AFB), CA in February of 2020, and was placed under LM in the unit. (R. at 531.) The three became good friends by July 2021. (R. at 531-532.) On 17 July 2021, LM invited LN to a small get together at her home with Appellant. (R. at 533.) LN arrived at Appellant's house in the mid-afternoon. (R. at 534.) Because she intended to drink alcohol at Appellant's house, she and another coworker, AA, planned to spend the night in Appellant's guest bedroom. Id. LN drank alcohol while at Appellant's residence. (R. at 535.)

At some point in the evening when LN was lying on a couch, Appellant grabbed her by the arms to take her off the couch as though he was going to throw her into the pool outside.

(R. at 579.) LN struggled against him and told him "no" or "something along those lines." Id. AA and EH also witnessed this incident. (R. at 618, 647.) EH stated Appellant "picked [LN] up off the couch" "kind of like a groom would be carrying a bride" and that LN was "resisting" Appellant as he carried her toward the pool. (R. at 618.) AA also testified that she saw Appellant "pick [LN] up from the couch" and that LN "fought against that." (R. at 647.)

When LN began to feel tired, she left the party and slept in the guest bedroom. (R. at 538.) LN wore a one-piece bathing suit she borrowed from LM. (R. at 535, 539, 540.) LN began "dozing" in the guest bed. (R. at 539, 540.) She then realized someone was in the room because they were "messing" with her comforter. (R. at 540.) Another person's hand went underneath the comforter and touched LN's leg. Id. The hand then moved to the "crotch area" of LN's bathing suit and tried "to pull the bathing suit to the side." Id. LN was in shock, and felt fingers enter and move within her vagina. (R. at 541.) LN knew it was Appellant because he smelled like a body product he used, and she had smelled on him before. Id. LN did not consent to Appellant's digital penetration. (R. at 572.)

After removing his fingers from LN's vagina, Appellant then touched her buttocks and her right breast under her bathing suit. (R. at 544.) LN did not consent to Appellant touching her buttocks or touching her breast. (R. at 572.) Appellant did not ask if he had consent to touch her, and LN did not say he could touch her. (R. at 605.) LN moved around on the bed to try to get away from Appellant. (R. at 543.) LN flipped from her stomach, onto her back, and finally fell off the bed onto the floor curling into a fetal position. (R. at 542, 543.) Appellant then left the room. (R. at 546.)

Around the time of the sexual assault, AA saw Appellant going into the bathroom near the guestroom. (R. at 627-628.) There was nowhere else Appellant could have been coming

from in that hallway except the guest bedroom. (R. at 629.) AA then came into the guestroom looking "really concerned." (R. at 547.) On cross-examination, LN stated she told the Air Force Office of Special Investigations that she was on the floor when AA came into the room. (R. at 589-590.) At the trial, LN expressed that the memory was "blurry" and that she was "half up at that point, and [she] got on the bed on my knees and was telling [AA] to shut the door as soon as I saw her." Id. LN denied that she was on the bed under the covers when AA came into the guest bedroom. (R. at 590.) AA testified that when she came into the room, LN was "cowering under the covers." (R. at 630.) AA could see LN's face was "really red, and she was crying." Id. LN asked AA to close the bedroom door because "was still scared" and in shock. (R. at 547.) AA stated LN told her to "come in" and "shut the door." (R. at 630.)

AA called LM into the room. (R. at 547.) LN and LM spoke, and LM briefly left LN alone with AA. (R. at 564, 565.) When LM returned, LN refused to use the bedroom door because she did not want to see Appellant. (R. at 565.) Instead, LM helped LN climb out the bedroom window. Id. AA described LN as being "hysterical" shortly afterwards when they were outside Appellant's house. (R. at 633.) AA eventually drove LN to LN's apartment and stayed the night with her. (R. at 567.) The next morning, LN noticed discharge with blood it in coming from her vagina, and her vagina "stung." Id. LN found dried blood in the crotch of the bathing suit she wore that night. (R. at 568.) AA took LN to the emergency room for a sexual assault nurse examination (SANE) that same day. Id. LN wanted "documentation" of what had happened. Id. The SANE included LN providing KC, the SANE nurse, with her medical history, hygiene history, sexual history over the last five days, and details of the sexual assault. (R. at 654.) Following this discussion, LN disrobed and underwent a physical examination to allow KC to document any injuries on her body. (R. at 654-655.) LN endured a pelvic

examination, which required her to lay back with her legs in stir-ups while KC examined her genitalia. (R. at 655-656.) This examination required KC to use her hands to examine LN's labia, to use a special dye designed to highlight injuries in the vaginal tissue, and to swab LN's genitalia for possible DNA. (R. at 656-657.) KC also had to take photographs of LN's genitalia. (R. at 653.) KC saw abrasions and lacerations on LN's vaginal tissue during the SANE. (R. at 665-667; Pros. Ex. 5.) KC testified that the injuries were consistent with what LN had described to KC as the sequence of the sexual assault, although KC did not observe any bleeding. (R. at 672, 683.) LN testified she told KC that she had received a Brazilian wax on her genitals the day before. (R. at 593.) KC did not recall or document LN telling KC about the Brazilian wax she'd received that day, but from KC's observations it was "possible but unlikely" that waxing could have caused LN's genital injuries. (R. at 687, 692.)

LN first learned of the possibility of an expedited transfer (ET) from the sexual assault response coordinator (SARC) at the hospital during her SANE. (R. at 571.) While in other circumstances LM would have been LN's support system at Travis AFB, LN did not want to see Appellant in common spaces on base like at their children's school or in her work area. (R. at 570.) On an unspecified day after 17 July 2021, AA and LN saw Appellant while driving onto base. (R. at 633.) Upon seeing Appellant at the gate, AA saw LN "freak out" and begin "shaking and crying." (R. at 633.)

When LN requested an ET, she asked to be near her boyfriend for support. (R. at 572.) LN agreed that she wanted to be stationed at Nellis AFB since her arrival at Travis AFB, and that she told numerous people of this desire. (R. at 597-599.) LN declined an ET to Wright-Patterson AFB, because she had no support system in place there. (R. at 570-571, 599-600.) LN moved to Nellis AFB in September of 2021. (R. at 604.) LN also admitted that, if she had been

unfaithful to her boyfriend with Appellant, it would have caused personal and professional problems. (R. at 601-602.) LN also admitted that she and her boyfriend were experiencing a "rough patch" in their relationship at the time of the sexual assault, and that LN wanted her boyfriend to propose marriage to her, but he was not ready to propose. (R. at 600.) LN and her boyfriend's conflict had been quickly resolved, and by 29 March 2023, they were still together but not engaged. (R. at 603.)

Appellant testified that he had a consensual sexual encounter with LN

Appellant testified in his own defense that LN's allegations were false and that he had a consensual sexual interaction. (R. at 813, 814.) Appellant stated LN put his hand on her vagina and asked if he felt how smooth it was because she had a "wax" that day. (R. at 831.) Appellant claimed that LN then "masturbated" herself with his hand and her hand. Id. Appellant stated LN that began to "jerk [him] off," and he touched his breast with his other hand. Id. Appellant stated that following this, he told LN that they needed to stop because it was "wrong." (R. at 832.) According to Appellant, LN then began saying "no, no, no," and got into a fetal position on the bed. Id. LN was whimpering on the bed, but Appellant did not ask LN what upset her. (R. at 832.) Appellant left the room because "it was wrong and [he] no longer wanted to be there." (R. at 832, 833.)

The Monday after the sexual assault, Appellant spoke with DS, one of his supervisors. (R. at 736, 737.) Appellant told DS that "an incident occurred at his house . . . the prior weekend, and that it was a [sic] potentially career changing, career altering." (R. at 737.) Appellant acknowledged that his life, career, and marriage were on the line during the court-martial. (R. at 848-849.)

DNA analysis was unable to find Appellant's DNA on LN

RF testified that Appellant's DNA was not found from the cheek swab or internal vaginal swab taken from LN during her SANE. (R. at 707, 709.) An unknown male's DNA was found on the cheek swab collected from LN. (R. at 710.)

LN's testimony had minor inconsistencies with other witnesses' testimony.

LN previously told OSI and others that she did not have Appellant's phone number, and that she communicated with him on Instagram. (R. at 584.) While Appellant offered evidence of text messages between them using his phone number, he also stated that they communicated "mainly on Facebook or Instagram." (R. at 825.)

AA stated that after the initial report of sexual assault, she may have talked to LN about what happened before or after the Air Force Office of Special Investigations (AFOSI) reached out to AA. (R. at 648.) AA wanted to offer support to LN. Id. AA and LN also exchanged text messages regarding the case sometime in September of 2022. (R. at 638.) However, AA denied discussing her testimony with LN in advance of the trial and denied any willingness to lie for LN under oath. (R. at 648.) LN stated she did not recall exchanging text messages with AA about the case itself, and still did not remember after being shown a copy of the text message. (R. at 583-584.)

At trial, four witnesses testified that LN has a character for truthfulness: EH, AA, SG, and KB. (R. at 617, 634, 727, 734.) EH was formerly LN's coworker under LM, and they regularly spent time together at work. (R. at 609-610.) While AA was not a coworker, she worked at the base hospital on Travis AFB like LN, and they spent time together outside of work. (R. at 622). SG was LN's coworker and friend from her current position at Nellis AFB, who worked with LN closely every day and spent time with her socially every other week. (R. at

726-727.) KB was LN's current squadron commander at Nellis AFB. (R. at 729.)

Besides Appellant, only KV, another of LN's former coworkers at Travis AFB, testified that LN had a character for untruthfulness. (R. at 794-796.) KV further testified that LN has a character for manipulation and attention-seeking. (R. at 796.) On cross examination, the Government addressed KV's bias as LN had once "painted [KV] in a bad light" to their mutual supervisor. (R. at 796-797.) KV explained that she was friends with Appellant and his family and spent time with them outside of work. (R. at 797.)

AA was not asked on the record about any blood stains in the bathing suit worn by LN on the night of the assault, and so did not comment on it. (R. at 621-649.) The Government stated in their rebuttal closing argument that AA testified that she had seen the blood stains. (R. at 943.) The Defense objected, and the military judge instructed the members to rely on their own recollection of her testimony. Id. He further reminded the members to "base the determination of the issues in this case on the evidence as you remember it." Id. at 944.

The military judge instructed the members on evaluating the credibility of witnesses, including:

> In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called. These rules apply equally to the testimony given by the accused.

(R. at 889, 890; D.A. Pam. 27-9, para. 7-7-1.)

There were mixed findings in this case: the members found appellant of guilty of sexual assault for digitally penetrating LN without her consent, but not guilty of abusive sexual contact for touching her buttocks and breast without her consent. (R. at 962.)

ARGUMENT

SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Issues of legal and factual sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[1]:

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

10 U.S.C. § 866(d)(1)(B).

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

Per the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the "standard for factual sufficiency has become harder for an appellant to meet." United States v. Harvey, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023), *rev. granted*, __M.J.__, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). NMCCA held that the new standard was more deferential to the trial court than the prior standard. 83 M.J. at 692-93. First, NMCCA held that an appellant must "identify a weakness in the evidence admitted at trial to support an element . . . and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding" to make a "specific showing of a deficiency in proof," Id. at 691. Second, NMCCA determined that "'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence' is a higher standard than the previously used 'recognizing that the trial court saw and heard the witnesses.'" Id. at 692. NMCCA stated that it would "weigh the evidence in a deferential manner to the result at trial. If we are clearly convinced that, when weighed, the evidence (including the testimony) does not support a conviction, we may set it aside. Id. at 693.

Following Harvey, the Army Court of Criminal Appeals (ACCA) took up the new standard in United States v. Scott, 84 M.J. 583 (A. Ct. Crim. App. 2024), *rev. granted,* __M.J.__, No. 24-0149/AR, 2024 CAAF LEXIS 267 (C.A.A.F. 13 May 2024). ACCA agreed that "the new burden of persuasion with its required deference makes it more difficult for one to prevail on appeal." 84 M.J. at 585.

This Court previously agreed with Harvey and stated that the new standard requires more deference to the trial court when weighing the evidence. United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, at *19-20 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.). The Court held that "in order to set aside a finding of guilty we must be *clearly convinced* that the weight of

the evidence does not support the conviction beyond a reasonable doubt." Id. at *23 (emphasis added).

Mostly recently, this Court supported their holding in Csiti, stating "the finder of fact at the trial level is always in the best position to determine the credibility of a witness." United States v. George, No. ACM 40397, 2024 CCA LEXIS 224, at *11 (A.F. Ct. Crim. App. June 7, 2024) (citing United States v. Peterson, 48 M.J. 81, 83 (C.A.A.F. 1998)).

Analysis

To sustain a conviction for sexual assault in violation of Article 120, UCMJ, the evidence must show:

> (1) That at or near Fairfield, California, on or about 17 July 2021, Appellant committed a sexual act upon LN, by penetrating her vulva with his finger, with an intent to gratify his sexual desire; and
>
> (2) That the accused did so without the consent of LN.

See Manual for Courts-Martial, United States (2019 ed.) (MCM), pt IV, ¶ 60.a.(b)(2).

Consent, as defined by the MCM, means in relevant part:

> A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent. . . . A sleeping, unconscious, or incompetent person cannot consent. . . . All the surrounding circumstances are to be considered in determining whether a person gave consent.

See MCM, pt IV, ¶ 60.a.(g)(7).

"While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (U.S.C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See*

generally United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). The combination of direct and circumstantial evidence "produced at trial" is factually sufficient to affirm Appellant's conviction for sexual assault. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

The weight of the evidence establishes beyond a reasonable doubt that Appellant committed a sexual act upon LN without her consent.

LN testified credibly and consistently regarding the sexual assault, and other witnesses and evidence corroborated her testimony. Appellant admitted to engaging in a sexual act with LN, and so the only element at issue on appeal is consent. (*See generally* App. Br. at 8.)

Appellant contends that his conviction is factually insufficient because LN was a "woman scorned" who lied to protect herself from the personal and professional consequences of a consensual sexual encounter with Appellant. (App. Br. at 8.) Appellant also claims that LN "misrepresented" the sexual assault to gain an ET to Nellis AFB, NV to be with her boyfriend and that the inconsistencies between her testimony and other witnesses' is evidence of her fabrication. (App Br. at 9-10.) LN and the other witnesses refute this version of events, and the Court is not required to accept Appellant's view of the record of trial and the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990).

1. LN's testimony met the element that there was no consent.

LN did nothing to give consent to Appellant or to reasonably make him believe he had consent to digitally penetrate her. LN provided detailed testimony of the sexual assault and events leading up to it. LN did not suffer from any "loss of memory" or drunkenness that impeded her ability to understand what had happened to her. (R. at 581). LN went into the guestroom to sleep. Appellant came into the guest room uninvited while she was "dozing." (R. at 539-540.) While LN was "dozing," Appellant put his hands on LN's body and pushed three of his fingers beneath her bathing suit to penetrate her vulva without exchanging any words with

her. (R. at 541-543.) LN identified Appellant by his smell. (R. at 541.) Appellant never asked LN if she wanted to engage in sexual conduct with him, and Appellant had no reason to believe she consented. (R. at 540-542, 572.) LN testified she tried to move away from Appellant and fell off the bed as a result. Then Appellant left. (R. at 543-546.) LN was so scared to see Appellant that she left his house through a window to avoid him. (R. at 565.) LN's testimony alone is sufficient to meet the elements that Appellant digitally penetrated her vulva without her consent.

2. LN had no motive to fabricate the sexual assault.

LN had no reason or time to fabricate a sexual assault allegation. To start, LN testified that she only considered of the possibility of an ET *after* she was at the hospital for a SANE. (R. at 571.) No evidence was offered to suggest she knew or entertained the possibility of using an ET before the SANE. This weakens Appellant's argument that LN lied to move closer to her boyfriend.

Furthermore, as trial counsel noted in her closing argument, LN had already been at Travis AFB since February 2020 and was close friends with Appellant and his wife. (R. at 605, 902.) There is little evidence to support Appellant's contention that she was willing to destroy those relationships just to get to her boyfriend but waited nearly a year and a half to do it. Once the ET was completed, LN would have little reason to keep up a ruse against Appellant. By the time of trial, LN had been living with her boyfriend at Nellis AFB, NV for about a year and a half and the couple was still not engaged. (R. at 603-604.)

Appellant's argument that LN continued to pursue a false allegation of sexual assault for fear of repercussions also fails. Merely acknowledging that she could have gotten in trouble for consensual sexual acts with a married noncommissioned officer did not create a large strike

against her credibility. If LN was afraid that she was going to get in trouble, she could have denied the sexual encounter entirely when AA came into the guestroom. LN was still entirely dressed, and AA hadn't seen Appellant touching LN. If LN feared repercussions, she could have said nothing happened and ended the incident with that. Contrary to Appellant's assertion that LN could not "admit that she lied without the potential adverse consequences" (App. Br. at 10), LN could have simply declined to participate in the court-martial against Appellant without admitting to making a false allegation. Appellant's contention that LN had motives to fabricate is unpersuasive. The weight of the evidence still supports LN's credibility and her honest motives to report the sexual assault.

3. Other witness testimony and evidence corroborated LN's version of events.

Forensic evidence and witness testimony supported LN's allegation against Appellant, and therefore lend it credibility. AA observed LN's reaction to the sexual assault. While AA did not see the sexual assault itself, she witnessed the immediate aftermath. "Direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence). AA saw Appellant in proximity to the guestroom at the time of the sexual assault. (R. at 627-629.) AA went into the guest room and saw LN "cowering" under the covers and crying. Once outside Appellant's house, AA thought LN was "hysterical." (R. at 632-633.) Sometime after the sexual assault, AA saw LN's reaction to merely seeing Appellant in another car, which was to "freak out" and begin "shaking and crying." (R. at 633.) These moments could not have been planned by LN. For LN have decided to fabricate a sexual assault allegation against Appellant, she would have needed to make that decision and forced herself to cry in the mere seconds she had between Appellant's departure from the guestroom and AA's

arrival at the door. LN's reaction to Appellant at the gate shows a genuine fear response to Appellant's mere presence. AA's testimony bolsters LN's credibility and increases the weight of the Government's evidence against Appellant.

The SANE revealed lacerations and abrasions on LN's labia. (R. at 665-667.) While conceding that the injuries could possibly have been obtained during consensual sexual acts, KC stated those kinds of injuries were consistent with LN's description of the sexual assault. (R. at 672.) Considering this, Appellant's version of events becomes untenable. He insisted LN was "masturbating" herself with his hand and hers. (R. at 831.) The weight of the evidence support's LN's testimony that Appellant injured her with his unconsented to and unprepared digital penetration of LN's vulva, rather than that LN was in control of the sexual encounter and then injured herself on Appellant's hand.

While not assigned as error, Appellant argues that trial counsel's erroneous reference to AA seeing blood and the military judge's corrective instruction did "not result in justice." (App. Br. at 10-11.) "Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions." United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003) (*see* Lakeside v. Oregon, 435 U.S. 333, 340 (1978); United States v. Hornback, 73 M.J. 155, 161 (C.A.A.F. 2014)). Appellant's argument is that this Court should not "presume that the members were able to correctly assess the evidence in absence of a verbatim transcript." (App. Br. at 11.) However, this is the exact presumption given to members if other evidence is not offered to rebut it. Trial counsel herself reminded them to "check [their] notes" during deliberations. (R. at 943.) Appellant has not offered any evidence to support his contention that the members did not use their own recollection of the testimony. But even if there were such evidence, this single moment of argument would have been minor in comparison to LN's

testimony and the evidence from the SANE. This Court should presume that the members heeded the military judge's instructions.

Finally, AA, EH, SG, and KB all testified that LN has a character for truthfulness. (R. at 617, 634, 727, 734.) The one witness brought forth by the Defense to say otherwise admitted to a basis for a bias against LN and to being friends with Appellant and his family. (R. at 795-797.) These witnesses helped tip the weight of the evidence to support LN's credibility over Appellant's. In sum, totality of the evidence introduced by the government at trial established that LN was a truthful witness.

4. Appellant's story was not believable.

Appellant's testimony was unpersuasive, self-serving, and informed. Appellant testified after hearing all the other evidence. By testifying, Appellant became a witness, and per the military judge's instructions, the members decided how much weight to give his testimony. Appellant argues that LN could not take back her allegation without suffering repercussions. (App. Br. at 10.) However, it was Appellant who had everything to lose if he was convicted of sexual assault. (R. at 848-849.) It is well-documented that criminals might deny committing the crime they are being investigated for. *See, e.g*, United States v. Young, 49 M.J. 265, 266 (C.A.A.F. 1998) (appellant denied participating in a robbery until his co- conspirator confessed); United States v. Delarosa, 67 M.J. 318, 323 (C.A.A.F. 2009) (appellant denied involvement in infant son's death during pre-polygraph interview). It follows that a person on trial for committing a crime may also deny their guilt when testifying.

As was the case in Csiti, Appellant's explanation for what happened in the guest room with LN lacked substance. He stated that out of nowhere, LN wanted Appellant to "masturbate" her with his hand while she "jerk[ed] [Appellant] off." (R. at 831-832.) Appellant's choice of

words to describe a consensual sexual encounter attempts to place blame on LN while protecting himself. Despite testifying that his and LN's shared hands were on her vagina, Appellant calls this "masturbating." "Masturbation" means, in relevant part, the "erotic stimulation especially of *one's own genital organs."*[2] In contrast, when Appellant alleged LN touched his penis, he described this not as masturbation, but as her "jerking [him] off." The one action Appellant admits to doing of his own volition was grabbing LN's breast, at which point he pulled away and said "it's wrong." (R. at 831-832.) With this language, Appellant attempted to artificially remove himself and his culpability to leave all the blame with LN: LN masturbated herself, and he was just the tool she used; LN decided to "jerk [him] off" without being asked. This Court should recognize this story as self-serving deflection.

Appellant further testified that when he pulled away from her, LN curled into a fetal position on the bed, saying "no" and "whimpering." (R. at 832.) Appellant didn't ask LN what was wrong at that point and just left the room. Id. Common sense suggests Appellant included this version of events to offer a bare explanation for why AA found LN distraught in Appellant's guest room. (R. at 630.) But Appellant's version of events is implausible, and a rational factfinder could have easily rejected it, as this Court should do as well.

Appellant argues that there was no way he could have known about LN's Brazilian wax unless she told him about it in the manner he described. (App. Br. at 11.) Appellant had already heard LN and KC testify regarding the Brazilian wax LN had received the day of the assault and whether LN had disclosed it to KC. (R. 593, 687.) By the time of his testimony, there was no

[2] *Masturbation Definition,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/masturbation (last visited 26 August 2024) (emphasis added).

doubt at that point in the trial that LN's genitals had been waxed close in time to the assault, so his knowledge of her waxing should carry little weight.

Appellant's testimony stands predominantly alone within the record and should not tip the weight of the evidence in his favor. In consideration of the new standard for factual sufficiency, this Court should give appropriate deference to the fact that the panel heard and witnessed LN's testimony and Appellant's alongside the other witnesses, and through their verdict, found LN to be more credible. The panel in this case was discerning and carefully weighed the testimony and evidence, as there were mixed findings of guilty for sexual assault but *not guilty* of abusive sexual contact. (R. at 962.) The finding of guilty is not against the weight of the evidence in the record of trial. Appellant's testimony should not clearly convince this Court that the weight of the evidence did not support his conviction.

5. Any inconsistencies between LN's testimony and the other witnesses were insignificant

Any inconsistencies in LN's testimony were innocent discrepancies. The few differences that exist between LN's AFOSI interview, her testimony, and other witnesses' testimony should not "significantly undermine her credibility," even when using the previous, less deferential standard for factual sufficiency. *See* United States v. Valentin-Andino, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *9 (A.F. Ct. Crim. App. June 7, 2024) ("We are not persuaded by Appellant's arguments that inconsistencies or incongruities in [victim]'s testimony significantly undermine her credibility.)

For example, how exactly Appellant removed LN from the couch bears little weight on whether he sexually assaulted her later that night. LN, AA, and EH all agreed that LN resisted Appellant when he pretended to be taking her to throw her in the pool outside. (R. at 579, 618, 647.) While Appellant used it as evidence that LN lied under oath regarding their

interaction, this incident highlights that LN did not consent to Appellant touching her "like a groom would carry a bride" earlier in the evening. (R. at 618.) Contrary to Appellant's argument that LN was a "woman scorned" who drank alcohol and "los[t] [her] inhibitions" with Appellant, after a day of drinking LN rejected physical touch from Appellant rather than welcoming it. Whether Appellant picked her up by the arms or by her body is immaterial. LN could have forgotten the precise way Appellant grabbed her on the couch in the aftermath of the subsequent sexual assault. This different recollection does not damage LN's credibility as Appellant contends.

With respect to LN's position when AA entered the guestroom, the most important details were consistent. LN testified that she got up from the floor after Appellant left, and thought she was "half up" and telling AA to shut the bedroom door when AA appeared. (R. at 589-590.) Meanwhile, AA remembered LN as "cowering under the covers" when she came into the room. (R. at 630.) LN and AA agree regarding LN's demeanor in those moments. LN was "in shock" and "scared," and asked AA to close the door. (R. at 547.) AA likewise testified she saw LN with a "red face" and crying before LN asked her to close the door. (R. at 630.) The minor difference of whether LN was on the floor, as she originally told AFOSI, or half-way up on the bed was not evidence that LN was lying. The similarities between the two statements give greater weight to LN's testimony and establish an important fact: that LN was distraught immediately after her encounter with Appellant.

Appellant argues that LN lied about texting AA. (App. Br. at 9.) LN stated that she did not recall sending the messages, but acknowledged they existed when shown. (R. at 583-584.) AA said she and LN discussed the case, but AA denied ever discussing AA's testimony and stated she only spoke of what happened to offer support to LN. (R. at 638, 648.) Appellant

misses the mark regarding LN's credibility here because she did not lie: She stated that she had no memory of those text messages, rather than denying that she ever sent them. LN did not lie under oath, and so her credibility was not diminished by this exchange.

Appellant further argues LN was misleading regarding how close her relationship was to Appellant. LN stated she didn't have Appellant's number saved on her phone and that they mostly communicated on Instagram (R. at 584, 602.) While Appellant provided evidence that they had texted before, even *he* testified that they mostly communicated on Instagram. (R. at 825.) LN never implied that she didn't communicate with Appellant in general during their friendship. This disparity should have very little weight when compared to the other evidence presented by the Government.

With respect to the DNA, Appellant was not charged or convicted with licking LN's cheek. The unknown male profile found on LN's cheek (R. at 707) does not alter AA's testimony that she saw Appellant leaving LN's guestroom, LN's statement that she identified him by smell, or Appellant's admission that he *did,* in his own words, "masturbate her" with his hand. (R. at 541, 630, 831.) Appellant cannot admit to the sexual act at issue while simultaneously claiming that reasonable doubt exists due to an unknown DNA profile collected from another part of LN's body. That rationale is illogical.

Taking the minor nature of these inconsistencies into account, Appellant has not demonstrated that the record is so devoid of facts in support of his conviction to leave this Court "clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." Csiti, 2024 CCA LEXIS 160, at *23. Appellant's conviction is factually sufficient.

Appellant also stated his conviction was legally insufficient. "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." Id. at *8 (citing United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted)). Because Appellant's conviction is factually sufficient, it meets the lower standard for legal sufficiency. A rational factfinder could have found all of the elements of sexual assault beyond a reasonable doubt, as the members did in this case. Therefore, Appellant is unentitled to relief. This Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 August 2024.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 1
Senior Master Sergeant (E-8) **MARK L. MARTELL** United States Air Force *Appellant*	)	No. ACM 40501 4 September 2024

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

Appellant, Senior Master Sergeant (SMSgt) Mark L. Martell, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer (Ans.), dated 28 August 2024. In addition to the arguments in his opening brief (Appellant's Br.), filed on 30 July 2024, SMSgt Martell submits the following arguments for the issue below.

The Government repeatedly mischaracterized or misconstrued arguments presented in Appellant's Brief. The most notable points were those related to the Forensic Medical Report (FMR, which the Government identified as "SANE") in conjunction with K.C.'s testimony, L.N.'s resistance when SMSgt Martell picked up L.N. to purportedly throw her into the pool, and SMSgt Martell's testimony regarding the wax treatment.

The FMR was as consistent with SMSgt Martell's testimony as with L.N.'s testimony.

At trial, the Defense was careful to show K.C.'s testimony and photographs taken by her regarding her findings and opinions that she documented and observed in the FMR were as consistent with consensual sex as with non-consensual sex. R. at 672, 674, 678-79. The key point here is that at trial the Defense offered into evidence photographs that did not include any dye, to counter the Government's photographs that were taken with dye to highlight the otherwise minor or superficial abrasions and lacerations. Def. Ex. G and I, Pros. Ex. 5, R. at 693-94, 696-97. The

FMR and K.C.'s testimony did not help the Government's case.

L.N.'s resistance when SMSgt Martell picked her up was relevant to show her ability to resist.

The Government argued that the Defense brought up the pool incident solely as an effort to undermine L.N.'s credibility. Ans. at 17-18, R. at 919. While it does undermine her credibility because of contradictory testimony by others, it is also relevant in recognizing L.N.'s ability to resist an unwanted touching. Defense Counsel argued at trial:

> But when that pool situation happened, when Senior Martell is rough housing with her and picking her up and . . . wants to throw her in the pool, and she is protecting both verbally and physically, try to explain how it makes sense that she's willing in that circumstance to tell him, in no uncertain terms, that she doesn't want to go in the pool and to fight against him physically for trying to put her in the pool as a joke, but then when he supposedly in that room sexually assaulting her she won't say anything . . . now he's doing this and you're saying nothing and doing nothing in response to it.

R. at 928.

SMSgt Martell testified that L.N. said her skin felt like a dolphin due to the wax treatment.

The Government argued that SMSgt Martell could have known about the wax treatment because L.N. testified about it during the trial before SMSgt Martell took the stand. R. at 569. It is also true, however, that he could have learned about the wax treatment because she told him about it that night. SMSgt Martell testified that L.N. told him her skin felt like a dolphin because of the wax treatment, something that cannot be explained away by the evidence. R. at 831-32. No evidence suggests how he could have known how her skin felt as described by her that night. It is inconceivable that he could have made that up or that she would have shared this description of her skin outside of a consensual sexual interaction.

For all the reasons stated above and in the brief assigning error, Specification 1 of the Charge is not legally and factually sufficient and this Court should not affirm the finding of guilty.

WHEREFORE, SMSgt Martell respectfully requests that this Honorable Court set aside and dismiss Specification 1 of the Charge and the Charge and set aside the sentence.

Respectfully submitted,

FRANK J. SPINNER
Attorney at Law

HEATHER M. BRUHA, 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 Government Trial and Appellate Operations Division on 4 September 2024.

Respectfully submitted,

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