19 May 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Airman (E-2) **CODY L. KINDRED** United States Air Force, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE NOTICE OF STATUS OF COMPLIANCE** Before Panel No. 3 No. ACM 40607

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

Pursuant to Rule 23.3 of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file Notice of Compliance in the above-captioned case.

On 7 April 2025, this Court remanded the record of trial in the above captioned case for correction. Specifically, this Court highlighted that (1) the audio recordings of Appellant's 25 April 2023 arraignment and (2) the audio of the closed hearings held on 6 July 2023, were omitted from the record. This Court ordered the Government to rectify the omissions from the record and return the record of trial to this Court no later than 19 May 2025, "unless a military judge or this Court" granted an enlargement of time for good cause shown. (Order, dated 7 Apr. 2025.)

As of the date of this notice, the United States is continuing to confirm compliance with the order. The base legal office has obtained the audio of Appellant's 25 April 2023 arraignment. They have also been able to locate a portion of the 6 July 2023 motions hearing audio containing testimony of witnesses but are still working to locate the audio that contains the arguments from the motions hearing. Due to these circumstances, Judge Stoffel—the detailed military judge for the remand of this case—granted the government an enlargement of time to 2 June 2025 for the government to comply. This Court did not order the government to provide

updates to this Court, however, in the interest of transparency the government believes it is necessary to provide this Notice of Status of Compliance.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's continuing compliance with its 7 April 2025 remand order.

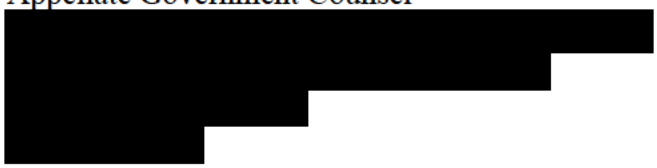
[redacted]
TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 19 May 2025.

TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel



2 June 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Airman (E-2) **CODY L. KINDRED** United States Air Force, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE NOTICE OF STATUS OF COMPLIANCE (SECOND)** Before Panel No. 3 No. ACM 40607

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

Pursuant to Rule 23.3 of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file a Notice of Compliance in the above-captioned case.

On 7 April 2025, this Court remanded the record of trial in the above captioned case for correction. Specifically, this Court highlighted that (1) the audio recordings of Appellant's 25 April 2023 arraignment and (2) the audio of the closed hearings held on 6 July 2023, were omitted from the record. This Court ordered the Government to rectify the omissions from the record and return the record of trial to this Court no later than 19 May 2025, "unless a military judge or this Court" granted an enlargement of time for good cause shown. (Order, dated 7 Apr. 2025.) Pursuant to this Court's order the detailed military judge for the remand in the above-titled case, Judge Stoffel granted the government an enlargement of time to 2 June 2023. On 19 May 2025, the government provided its first notice of status of compliance, which this Court accepted on 28 May 2025.

As of the date of this notice, the United States is continuing to confirm compliance with this Court's order. Prior to Judge Stoffel granting the government an enlargement of time, Judge Stoffel declined to include Appellate Government Counsel on emails relating to this remand because Appellate Defense Counsel did not wish to be included on any email traffic pertaining to

the remand of this case. Judge Stoffel instructed Appellate Government Counsel to obtain updates through the base legal office. On 2 June 2025, undersigned counsel requested an update from the base legal office. Due to the Chief of Military Justice having been out of the office due to a medical procedure, the base legal office was not able to provide an update regarding the status of the remand or whether the military judge had granted another expansion of time. Also on 2 June 2025, undersigned counsel contacted the military judge requesting an update to be able to provide to this Court. As of the date and time of this motion, the government has not received any update from the parties. This Court did not order the government to provide updates to this Court, however, in the interest of transparency the government believes it is necessary to provide this Notice of Status of Compliance. Once undersigned counsel receives additional information regarding the status of this remand, undersigned counsel will provide an additional update to this Court to properly verify the status of compliance.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's continuing compliance with its 7 April 2025 remand order.

[redacted]

TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division

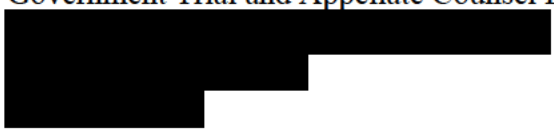
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 2 June 2025.

TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division


3 June 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Airman (E-2) **CODY L. KINDRED** United States Air Force, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE NOTICE OF STATUS OF COMPLIANCE (THIRD)** Before Panel No. 3 No. ACM 40607

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

Pursuant to Rule 23.3 of this Court's Rules of Practice and Procedure, the United States respectfully requests leave to file a Notice of Compliance in the above-captioned case.

On 7 April 2025, this Court remanded the record of trial in the above captioned case for correction. Specifically, this Court highlighted that (1) the audio recordings of Appellant's 25 April 2023 arraignment and (2) the audio of the closed hearings held on 6 July 2023, were omitted from the record. This Court ordered the Government to rectify the omissions from the record and return the record of trial to this Court no later than 19 May 2025, "unless a military judge or this Court" granted an enlargement of time for good cause shown. (Order, dated 7 Apr. 2025.) Pursuant to this Court's order the detailed military judge for the remand in the above-titled case, Judge Stoffel granted the government an enlargement to 2 June 2025.

As of the date of this notice, the United States is continuing to confirm compliance with this Court's order. The government provided a notice of status of compliance to this Court on 2 June 2025. At that time, Appellate Government Counsel had not received an update regarding the status of the above-titled remand from the parties. On the morning of 3 June 2025, undersigned counsel received an update from the assigned military judge. The draft certificate of correction is almost completed, and the military judge expects it to be ready for signature this

week. The military judge conveyed that the required documentation has been collected, but the process to ensure the additional documentation was accurately reflected in the record has taken more time than initially anticipated by the parties. The military judge will ensure the additional enlargements of time are appropriately reflected in the record.

This Court did not order the government to provide updates to this Court, however, in the interest of transparency the government believes it is necessary to provide this Notice of Status of Compliance. Undersigned counsel is submitting this notice to furnish a more substantive update to this Court following the notice that was provided by the government on 2 June 2025.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's continuing compliance with its 7 April 2025 remand order.

[redacted]

TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
[redacted]

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 3 June 2025.

TYLER L. WASHBURN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Cody L. KINDRED	)	**DOCKETING**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM) and docketed on 18 June 2025.

Accordingly, it is by the court on this 18th day of June, 2025,

ORDERED:

That the Record of Trial in the above styled matter is referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Cody L. KINDRED	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 4th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Special Panel and referred to a new Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
KUBLER, JOSEPH J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Cody L. KINDRED	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Special Panel and referred to a new Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
KUBLER, JOSEPH J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.*

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

* The change from the 4 August 2025 Notice of Panel Change order is in the ACM No.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR LEAVE TO FILE AND REPLY TO THE UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGMENT OF TIME**
Appellee,	)	
v.	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred**, United States Air Force,	)	No. ACM 40607
Appellant.	)	12 August 2025

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

COMES NOW Appellant, Airman Cody L. Kindred, by and through his undersigned counsel, and moves for leave pursuant to Rule 23(d) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals to file this reply to the Government's opposition to Appellant's motion for first enlargement of time filed on 11 August 2025 (hereinafter Government's Opposition).

The Government's opposition misstates this case's procedural posture. The record of trial that the Government originally provided to this Court for docketing was missing audio recordings of the court-martial's first two days. *See United States v. Kindred*, No. ACM 40607, 2025 CCA LEXIS 147 (A.F. Ct. Crim. App. Apr. 7, 2025) (order). This Court therefore returned the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, "for correction under [Rule for Courts-Martial] 1112(d) to account for the missing portions of the verbatim recording of the proceedings, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties." *Id.* at *2 –3. Following proceedings to attempt to correct the record notwithstanding the irretrievable loss of the audio recordings of a portion of the trial,[1] this Court

[1] *See* Certificate of Correction IAW R.C.M. 1112(d), United States v. AMN Cody L. Kindred.

re-docketed the case on 18 June 2025. AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 11 Aug. 2025.

On 8 August 2025, Appellant moved for a first enlargement of time. The Government's opposition to that motion states, without explanation, that "[i]f Appellant's new delay request is granted, the defense delay in this case will be 300 days in length" and that granting the motion would "only leave about 8 months combined for the United States and this Court to perform their separate responsibilities" within "the 18-month standard for this Court to issue a decision." Government's Opposition at 1. The Government's calculations would be incorrect regardless of whether the Government is counting or excluding the defense-requested delay that preceded this Court's remand order. Moreover, this Court has held that the eighteen-month standard established by *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), runs from the date on which a case that has been remanded for correction of the record returns to this Court, not the original docketing date. *E.g.*, *United States v. Phillips*, No. ACM 38771 (f rev), 2019 CCA LEXIS 102, at *28 (A.F. Ct. Crim. App. Mar. 8, 2019); *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *15 (A.F. Ct. Crim. App. June 7, 2024). Thus, the Government's analysis of the enlargement request's effect on the *Moreno* 180-day standard is erroneous.

This Court should disregard the Government's flawed opposition, which relies on an erroneous account of this case's procedural posture, and grant Appellant's motion for first enlargement of time.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,

[redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

[redacted]

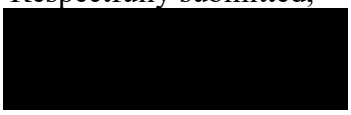
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 August 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cody L. KINDRED	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 8 August 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First), requesting an additional 60 days in which to file Appellant's assignments of error, which would end on 16 October 2025. However, Appellant further moves this court "for an extension of time to file his brief until 17 October 2025."[1] On 11 August 2025, the Government opposed the motion stating, *inter alia*, that "[i]f Appellant's new delay request is granted, the defense delay in this case will be 300 days in length."

On 12 August 2025, Appellant's counsel moved this court for leave to file a reply to the Government's opposition to address the Government's "300 days in length" statement. The Defense asks this court to "disregard the Government's flawed opposition, which relies on an erroneous account of this case's procedural posture, and grant Appellant's motion for a first enlargement of time."[2]

Later, on 12 August 2025, the Government filed a general opposition to Appellant's motion for enlargement of time, purporting to withdraw its 11 August 2025 opposition. As the Government failed to comply with the Joint Rules of Appellate Procedure and this court's Rules of Practice and Procedure when

---

[1] Where this court redocketed Appellant's case on 18 June 2025, Appellant's brief would be due on 17 August 2025—60 days from date of docketing. Appellant's request for a first enlargement of time of 60 days will end on 16 October 2025. However, Appellant notes that 17 August 2025 is a Sunday and contends "it is *not counted* when counting the sixty days for purposes of [Joint] Rule 18(d)(1)," therefore seeks an enlargement "until 17 October 2025."

[2] In Appellant's 12 August 2025 motion, Appellant's counsel cites *United States v. Phillips*, No. ACM 38771 (f rev), 2019 CCA LEXIS 102, at *28 (A.F. Ct. Crim. App. 8 Mar. 2019) (unpub. op.), and *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *15 (A.F. Ct. Crim. App. 7 Jun. 2024) (unpub. op.). For purposes of this order, we find it unnecessary to distinguish these cases from Appellant's case.

filing this new opposition and withdrawing the original opposition, the court will not consider this new opposition. *See* JT. CT. CRIM. APP. R. 18(c), (d); A.F. CT. CRIM. APP. R. 23.2, 23.3.

The court has considered Appellant's motions, the Government's opposition of 11 August 2025, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 14th day of August, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED IN PART**. Appellant shall file any assignments of error **not later than 16 October 2025**.

Appellant's Motion for Leave to File and Reply to the United States' Opposition to Appellant's Motion for Enlargement of Time is **GRANTED**.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements 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.

It is further ordered:

Government's General Opposition to Appellant's Motion for Enlargement of Time, dated 12 August 2025, is **RETURNED WITHOUT ACTION**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (FIRST)**
v.	)	
	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred,** United States Air Force, *Appellant*.	)	No. ACM 40607 (f rev)
	)	8 August 2025

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file his brief.

Under Rule 18(d)(1) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP), Appellant's brief "shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." Appellant's case was redocketed on 18 June 2025, sixty days from which is Sunday, 17 August 2025. However, under Rule 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, it is not possible for a filing deadline to occur on a weekend. That rule expressly provides:

> In computing *any period of time* prescribed or allowed under these rules, . . . *[t]he last day . . . is to be included,* ***unless it is a*** Saturday, ***Sunday***, or legal holiday, or a day on which the Court is closed . . . *in which event the period runs until the end of the next day that is not* a Saturday, *Sunday*, holiday, or day on which the Court is closed.

JRAP 15 (emphasis added).

That rule is unambiguous. Under Rule 15, because 17 August is a Sunday, it is *not counted* when counting the sixty days for purposes of Rule 18(d)(1). When 17 August is excluded from the count—as Rule 15 clearly prescribes—day sixty is Monday, 18 August. That is the current due date of Appellant's brief.

This Court regularly applies Rule 15 in accordance with its plain meaning to accept Government answers filed more than thirty calendar days after the filing of an accused's brief. Any time an accused's opening brief is filed with this Court on a Thursday or Friday, the Government's thirty-day answer period prescribed by Joint Rule 18(d)(1) would end on a Saturday or Sunday but for Joint Rule 15. This Court routinely accepts as timely Government briefs filed on the following Monday without requiring the Government to move for an extension of time. *See, e.g.*, Answer to Assignments of Error, *United States v. Vongphachanh*, No. ACM 40741 (filed on Monday, 14 July 2025—thirty-one days after the appellant filed his opening brief). Joint Rule 15 cannot apply one way for the Government and another for the defense. As Joint Rule 15 unambiguously prescribes, *every* filing deadline that would otherwise occur on a weekend is extended until the next business day.

Joint Rule 15's application as discussed above is precisely how this Court's two superior courts apply their counterparts to Joint Rule 15. Consider, for example, the case of *United States v. Dawson*, USCA Dkt. No. 25-0156/AF. The Court of Appeals for the Armed Forces docketed Senior Airman Dawson's case on 5 May. *United States v. Dawson*, __ M.J. __, No. 25-0156/AF, 2025 CAAF LEXIS 353 (C.A.A.F. May 5, 2025) (mem.) (docketing notice). Rule 19(a)(5)(A) of that court's rules allows an appellant's counsel to move for leave to file a supplement subsequent to a petition for grant of review. C.A.A.F. R. 19(a)(5)(A). That rule continues, "If granted, the supplement must be filed within twenty-one days of the order." *Id.* Senior Airman Dawson filed such a motion, which the Court granted. *Dawson*, No. 25-0156/AF, 2025 CAAF LEXIS 351 (C.A.A.F. May 5, 2025) (mem.). Twenty-one days from the date of that order was the federal Memorial Day holiday. In keeping with its computation of time rule, C.A.A.F. R. 34, the court extended the supplement deadline by twenty-two days—to Tuesday, 27 May. *Dawson*, 2025

CAAF LEXIS 351. It did not indicate that the filing deadline was the date that was twenty-one days after the order granting the extension—which would have been Monday, 26 May—because, pursuant to C.A.A.F. Rule 34(a), when the last day of the period computed is a federal holiday, that day is not included in the count. Tuesday, 27 May was day twenty-one as counted in accordance with C.A.A.F. R. 34(a).

The Supreme Court of the United States applies its computation of time rule in similar fashion. For all computation of time purposes, the Supreme Court uses the "final filing date" as that date is determined under Rule 30.1—the Supreme Court's computation of time rule, which is almost identical in relevant respects to Joint Rule 15. The leading treatise on Supreme Court practice explains:

> To use an example supplied by the Clerk's Office, when the 90th day for filing a petition is a Sunday, the "final filing date" is Monday. Thus, the preceding 10-day period should be computed from that Monday. Likewise, if the 10th day before the "final filing date" is a Saturday, a Sunday, or a federal legal holiday, the applicant will satisfy the 10-day provision by ensuring that the application is filed on the next business day.

STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 6-33 (11th ed. 2019)

The Court of Appeals for the Armed Forces' and Supreme Court of the United States' constructions of their computation of time rules are instructive. But they do no more than apply those rules in the manner required by the rules' unambiguous text. Joint Rule 15 is similarly unambiguous: when the last day of a time period prescribed by the JRAP is a Sunday, that day *is not included* when counting the number of days. Thus, Appellant's brief is currently due on Monday, 18 August 2025—the sixtieth day from docketing when Sunday, 17 August 2025 is excluded from the count, as prescribed by Joint Rule 15.

This Court must follow the JRAP's provisions; it has no discretion to decline to apply Joint Rule 15's provision excluding Sunday, 17 August from Joint Rule 18(d)(1)'s sixty-day period. *United States v. Gilley*, 59 M.J. 245 (C.A.A.F. 2004).

In accordance with Rule 23.3(m)(1)(2) of this Court's Rules of Practice and Procedure, Appellant moves for an extension of time to file his brief until **17 October 2025**.

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

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

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 8 August 2025

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES'
	)	OPPOSITION TO
Appellee,	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Special Panel
Airman (E-2)	)	
CODY L. KINDRED	)	No. ACM 40607 (f rev)
United States Air Force.	)	
Appellant	)	11 August 2025

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 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 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 leave about 8 months combined for the United States and this Court to perform their separate 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.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

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 11 August 2025.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO EXCEED PAGE LIMIT**
v.	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred**, United States Air Force, *Appellant*.	)	No. ACM 40607
	)	12 August 2025

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

COMES NOW Appellant, Airman Cody L. Kindred, by and through his undersigned counsel, and moves pursuant to Rule 23.3(q) of this Honorable Court's Rules of Practice and Procedure to file a brief in excess of Rule 17.3's page limit.

Rule 17.3 provides that except as authorized by this Court, a brief may not exceed either fifty pages or 20,000 words, with certain materials excepted from those limitations. This case is unusually complex. Appellant was charged with a total of eighteen specifications. Charge Sheet. After a fully contested trial, the members found Appellant guilty of thirteen specifications. Trial Tr. 1149. The military judge imposed a significant sentence, including confinement for twenty years and three months. *Id.* at 1189–90. The trial transcript is 1,191-pages long. Appellant's brief will raise multiple assignments of error.

The working draft of Appellant's brief exceeds fifty pages but does not exceed 20,000 words. Appellant respectfully requests that this Court waive the page limit while retaining the 20,000-word maximum length, excluding indices, tables, attachments, and appendices.

If this Court grants this motion, Appellant will have no objection to a request by the Government to exceed the fifty-page limit when filing its answer.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,

[redacted]

[redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

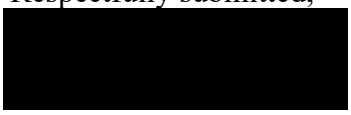
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 August 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

18 August 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Cody L. Kindred
Airman (E-2),
United States Air Force
Appellant.

No. ACM 40607 (f rev)

BRIEF ON BEHALF OF APPELLANT

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before a Special Panel
Airman (E-2) **CODY L. KINDRED,** United States Air Force, *Appellant*.	)	No. ACM 40607 (f rev)
	)	18 August 2025

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

Assignments of Error[1]

I.

The evidence supporting Charge II, Specification 3, which alleged Appellant penetrated SJM's anus with his penis by first rendering her unconscious by strangling her with his hands, is factually insufficient because when asked by law enforcement agents whether the anal sex was consensual, SJM replied "I want to say, yes," and added that she "wasn't entirely sure due to the fact [she] was intoxicated and had spotty memory."

II.

The evidence supporting Charge V, Specification 4, domestic violence, is factually insufficient because SJM acknowledged that, during a discussion of "rough sex" that preceded the biting, she told Appellant, "You can do whatever you want," or words to that effect, thereby establishing either that the biting was not unwelcome or that Appellant had a reasonable and honest mistake of fact as to whether the biting was unwelcome.

[1] In addition to the seven assignments of error noted below, Appellant personally raises three assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

III.

The evidence supporting Charge I, communicating a threat, and its specification is factually insufficient because no evidence indicated that Appellant uttered the charged language or similar words.

IV.

The evidence supporting Charge III, kidnapping, and its specification is factually and legally insufficient because the evidence did not establish that the incident—which the alleged victim testified may have lasted as little as five minutes—constituted holding of the alleged victim as that term is used for purposes of the kidnapping punitive article.

V.

The special trial counsel committed prosecutorial misconduct during closing argument by indirectly commenting on Appellant's failure to testify, directly vouching for three prosecution witnesses' credibility, and using personal pronouns while offering his personal opinion of the strength of the evidence.

VI.

The Government's egregious post-trial processing deficiencies, including irretrievably losing a portion of the audio recording of the trial and omitting some other audio recordings from the record of trial originally docketed with this Court, thereby necessitating a remand for correction of the record, violated Appellant's due process right to timely review of his convictions or, in the alternative, warrant a reduction in the sentence under this Court's Article 66(d)(2), Uniform Code of Military Justice, authority.

VII.

Appellant's constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.[2]

[2] The defense raises this assignment of error for issue preservation purposes.

Statement of the Case

On 28 October 2023, a general court-martial panel of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of communicating a threat in violation of Article 115, Uniform Code of Military Justice (UCMJ); one specification of rape and two specifications of sexual assault in violation of Article 120, UCMJ[3]; one specification of kidnapping in violation of Article 125, UCMJ; one specification of assault consummated by a battery in violation of Article 128, UCMJ; six specifications of domestic violence in violation of Article 128b, UCMJ; and one specification of obstructing justice in violation of Article 131b, UCMJ. Trial Tr. 113, 1149. Consistent with Appellant's pleas, the court-martial found him not guilty of one specification of rape in violation of Article 120, UCMJ; three specifications of domestic violence in violation of Article 128b, UCMJ; and one specification of obstructing justice in violation of Article 131b, UCMJ. *Id.* at 113, 1149. The military judge sentenced Appellant to reduction to the grade of E-1, a total of twenty years and three months of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* at 1189–90. The military judge ordered 312 days of pretrial confinement credit. *Id.* at 1190. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, Dec. 4, 2023.

Statement of Facts

This statement of facts presents a broad overview to contextualize the eighteen specifications that were referred to Appellant's court-martial, thirteen of which resulted in findings of guilty. Charge Sheet; Trial Tr. 1149. As discussed below, those offenses fall into four groups. Additional relevant facts are provided as warranted in an initial section of the assignments of error below.

[3] Charge II, Specification 2 alleged a rape. Charge Sheet. The members found Appellant guilty of the lesser-included offense of sexual assault. Trial Tr. 1149.

Appellant and DW were both security forces personnel assigned to Osan Air Base, Republic of Korea in 2021. Trial Tr. 609. Around April 2021, the two developed an intimate relationship. *Id.* at 610.

One of the four groups of charges against Appellant arose from an incident that allegedly occurred roughly three months after Appellant and DW began dating. Late one night, Appellant went to DW's dorm suite, very drunk and frantically looking for her. *Id.* at 583–84, 593–94. Appellant encountered DW's suitemate, AS. *Id.* at 579, 583. According to AS, Appellant grabbed her, shook her, and demanded to know where DW was. *Id.* at 585–86, 596. He did not believe AS when she responded that she did not know. *Id.* at 586. According to AS, Appellant stepped in front of her to block her exit at least twice when she tried to leave the suite's kitchen area. *Id.* at 587. He then grabbed and shook her again before finally letting her leave. *Id.* at 588. AS estimated the incident lasted five to ten minutes. *Id.* at 595. The Government charged Appellant with kidnapping and battering AS. Charge Sheet, Charge III, Specification; Charge IV, Specification. The members convicted Appellant of those offenses. Trial Tr. 1149.

Appellant's and DW's relationship continued until Appellant transferred from Osan to Luke AFB, Arizona, while DW remained at Osan. *Id.* at 610–11, 651. DW characterized their relationship following Appellant's departure from Osan as "like on a break," although they continued to speak with one another every day. *Id.* at 611. When DW left Osan, she transferred to Hill AFB, Utah. *Id.* at 651. At some point after DW's return to the United States, the two renewed their relationship for approximately two months, "went on another break," and then "got back together again." *Id.* at 611.

Soon after transferring to Luke AFB, Appellant developed a romantic relationship with SJM, a security forces member with whom he was stationed. *Id.* at 416. They had consensual vaginal intercourse four to five times before 7 June 2022. *Id.* at 417.

On 7 June 2022, while SJM was at Appellant's dorm room, she sent two text messages to a friend she was living with at the time that caused the friend alarm. *Id.* at 509. SJM then called her friend while driving home, crying and saying, "I thought he was going to kill me." *Id.* at 436, 460, 508. SJM's friend texted 9-1-1. *Id.* at 509, 511. A civilian police officer responded to the house SJM was sharing with her friend and her friend's husband. Pros. Ex. 7. SJM repeatedly told the police officer, "It was my fault." *Id.* SJM then had a sexual assault medical examination performed. Trial Tr. 438–39, 511, 519–20; Pros. Ex. 24. The examination report stated that SJM alleged that after having consensual vaginal sex with a man, he strangled her to the point of unconsciousness and that when she awoke, her rectum hurt. Pros. Ex. 24 at 6. She also said the man ejaculated in her rectum and that he made her wash it in the shower. *Id.* She further stated that the man bit her hand while he had one hand on her neck. *Id.* She also alleged that after she regained consciousness, the man hit her in the face and pulled her hair. *Id.*

SJM elected not to make an unrestricted report. Trial Tr. 440. The Air Force Office of Special Investigations (OSI) nevertheless somehow learned that SJM may have been the victim of a criminal offense committed by Appellant. *Id.* OSI agents interviewed SJM, who told them Appellant was not involved in the incident. *Id.*

Soon after SJM resumed her romantic relationship with Appellant, she became upset with him because he did not spend as much time with her as she wanted. *Id.* at 477, 480. She became further upset with him when he did not let her spend the night with him in his dorm room as they had previously planned. *Id.* at 484–85. The following month, as part of a continuing investigation

of the 7 June 2022 incident, an OSI agent contacted DW at Hill AFB to ask questions about Appellant. *Id.* at 653–55. DW then reached out to SJM, first by electronic messages and then on a telephone call. *Id.* at 656–57. Before DW initiated those communications, SJM had never heard DW's name and was unaware that Appellant was dating someone else while she and Appellant were involved with each other. *Id.* at 443. Following that exchange, SJM sent a taunting email to Appellant, informing him that he was "caught" and telling him, "Keep your girlfriend out of my inbox. She knows you cheated." *Id.* at 486. The next day, SJM contacted OSI to report the 7 June 2022 incident. *Id.* During a subsequent interview, when an OSI agent asked her whether the act of anal sex that night was consensual, SJM responded, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." *Id.* at 489. The Government nevertheless ultimately charged Appellant with rape for the anal intercourse, as well as one specification of communicating a threat and five specifications of domestic violence, all for alleged conduct on 7 June 2022. Charge Sheet, Charge I, Specification; Charge II, Specification 3; Charge V, Specifications 2, 4, 5, 6, 7. The members found Appellant guilty of all those offenses except one domestic violence specification. Trial Tr. 1149.

In the wake of DW's and SJM's mutual discovery of each other, DW resumed her romantic relationship with Appellant. *Id.* at 661. In late December 2022, Appellant drove to Hill AFB to see DW. *Id.* at 667. Two mornings after Appellant's arrival there, DW reported for duty with her security forces unit with a bruised nose, one black eye, and a scratch under her other eye. *Id.* at 765, 778, 791, 850; Pros. Ex. 9. When questioned by supervisors, she said Appellant had beaten her. Trial Tr. 691. As a result of an investigation into that allegation, Appellant was charged with committing three offenses over a two-day period: two domestic violence offenses and obstructing

justice. Charge Sheet, Charge V, Specifications 8, 9; Charge VI, Specification 2. The members found Appellant guilty of all three offenses. Trial Tr. 1149.

The Government also charged Appellant with several offenses he allegedly committed against DW during their relationship in Osan that DW did not report to anyone until 2 December 2022. Charge Sheet, Charge II, Specifications 1, 2, 4; Charge V, Specifications 1, 3.[4] The members found Appellant not guilty of one rape specification and two domestic violence specifications. Trial Tr. 1159. As to a second rape specification, the members found Appellant not guilty of rape but guilty of the lesser-included offense of sexual assault. *Id.* The members also found Appellant guilty of another Article 120 specification alleging divers sexual assaults against DW in Osan. *Id.*

Argument

Assignment of Error I

The evidence supporting Charge II, Specification 3, which alleged Appellant penetrated SJM's anus with his penis by first rendering her unconscious by strangling her with his hands, is factually insufficient because SJM acknowledged that, when asked by law enforcement agents whether the anal sex was consensual, she replied, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory."

Additional Facts

As part of an ongoing relationship that involved repeated acts of physical intimacy, SJM went to Appellant's dorm room at Luke AFB on 7 June 2022. Trial Tr. 416–17, 419. She took with

[4] *See also* Trial Tr. 650 (DW responding "No, never," when asked, "Throughout this period of time where you were having this relationship with Airman Kindred in Korea, did you ever report the physical or the sexual attacks to law enforcement?"); *id.* at 655 (DW responding "No, not during that phone call" when asked whether, during a call with an OSI agent in the summer of 2022, "Did you tell them about the times those physical and sexual violence that we've talked about in this courtroom, did you tell them about that?"). While being interviewed by OSI agents on 21 December 2022, DW told them about some of her sexual activities with Appellant at Osan Air Base. *Id.* at 716. At the time, she claimed, she did not understand that they were criminal offenses. *Id.* The OSI agents informed her they were. *Id.*

her "shooters," a bottle of wine, drink mix, and a pizza. *Id.* at 420. The two watched a movie while drinking alcoholic beverages. *Id.* They then had consensual vaginal intercourse. *Id.* at 420–21.[5] SJM testified that sometime afterward, while she stood at a sink in Appellant's room, he slapped her face. *Id.* at 421. She testified that she was confused about the slapping incident, explaining that "we had been drinking a lot that night," which impeded her ability to "fully process[] what happened in that moment." *Id.* at 423. The slap led to a discussion about what Appellant described as "rough sex." *Id.* at 425. Appellant told SJM that he liked to do certain things with his ex-girlfriend, but he did not think SJM would enjoy those activities. *Id.* at 424. SJM replied, "Well, how do you know that?" *Id.* at 424–25. When Appellant proceeded to discuss "rough sex." SJM told Appellant he could do anything he wanted to her. *Id.* at 425.

SJM testified at trial that Appellant then put a hand on her throat and squeezed. *Id.* at 426. After she asked him to stop, he responded with words to the effect of, "Oh, you don't want me to stop" or "you want me to continue," and placed a second hand on her throat. *Id.* She testified that she lost consciousness and subsequently awoke to Appellant shaking her. *Id.* at 427. When she awoke, she was no longer wearing the shorts she put on after the consensual vaginal intercourse. *Id.* SJM testified that after regaining consciousness, she hyperventilated and cried. *Id.* at 429. She described getting off the bed and sitting on the floor with her back against a wall. *Id.* She testified that Appellant hit her on the left side of the face while telling her to stop crying. *Id.* at 430. She also testified that "[h]e said if I don't stop crying, something along the lines of, like, I'll find out what happens." *Id.* SJM testified that Appellant then grabbed her by the hair and hit her head

[5] The sexual assault medical examination report indicates that SJM also consensually performed oral sex on Appellant. Pros. Ex. 24 at 6.

against the wall "about twice." *Id.*[6] According to SJM, Appellant then again hit her in the face. Trial Tr. 430. Appellant then pulled her into the bathroom by her shirt and told her to shower. *Id.* at 431. Appellant told her to wash her hair, face, and body. *Id.* She testified that Appellant joined her in the shower, where he raised his hand several times as if to hit her and then laughed when she flinched. *Id.*

At the time, SJM—who expected to transfer to Guam imminently—was living with a friend who was an Air Force member and the friend's husband. *Id.* at 436, 465. After Appellant left her alone in the bathroom, SJM used her cellphone to send text messages to the friend with whom she was living. *Id.* at 433. One message provided her current location and said, "If anything happens to me this is my location." *Id.* at 433–34; Pros. Ex. 3. Another said, "[A]nd the last known person I was with is Cody Kindred from security forces." Pros. Ex. 3. SJM also took pictures of a bruise on her leg, a bite mark on her hand, and her face in the mirror. Trial Tr. 433; Pros. Ex. 1.

After SJM left the bathroom, she quickly exited Appellant's dorm room. Trial Tr. 435. She called her friend with whom she was living and spoke with her on the way home. *Id.* at 436. During the conversation, which lasted approximately thirty-five to forty minutes, SJM cried and said, "I thought he was going to kill me." *Id.* at 436, 460, 508. The friend texted 9-1-1 about the incident and civilian police responded to the house, arriving at the same time as SJM. *Id.* at 509, 511. When a police officer attempted to question SJM, she repeatedly said, "It was my fault." Pros. Ex. 7.

SJM testified that after arriving home, she felt pain in her anal area and noticed fluid, which she assumed to be semen, in her anal region. Trial Tr. 436–37, 460. SJM went to a civilian hospital where a forensic nurse examiner performed a sexual assault medical examination. *Id.* at

[6] The members found Appellant not guilty of committing domestic violence against SJM by "unlawfully grabbing her hair with his hand and slamming her head against a wall." Charge Sheet, Charge V, Specification 7; Trial Tr. 1149.

438–39, 511, 519–20; Pros. Ex. 24. During that examination, the forensic nurse noted a number of injuries, including a "[p]urple contusion from 11-1 O'Clock on anus with laceration at 1 O'clock." Trial Tr. 527–30; Pros. Ex. 24 at 11. A DNA analysis of anal swabs from SJM's sexual assault medical examination revealed sperm cells from Appellant. Trial Tr. 562; Pros. Ex. 6 at 1. The forensic nurse acknowledged at trial that the anal contusion and laceration could have been caused by consensual or nonconsensual anal sex. Trial Tr. 536. She also acknowledged that consensual and nonconsensual strangulation can cause similar injuries. *Id.* at 542.

SJM did not make an unrestricted report. *Id.* at 440. Nevertheless, within a week of the incident, OSI agents reached out to her about it. *Id.* As she admitted while testifying, she told them "it was specifically not Kindred." *Id.* She also acknowledged that that was a lie. *Id.*

During her in-court testimony, SJM admitted that when testifying under oath at a motion hearing in the case, she had provided false information that suggested her relationship with Appellant ended on 7 June 2022 when, in fact, it did not.[7] SJM acknowledged testifying under oath at a 6 July 2023 hearing that she did not have "any sort of interactions with Airman Kindred" after 2 June 2022. Trial Tr. 468–71. SJM also acknowledged testifying under oath at the 6 July 2023 hearing that after 7 June 2022, she never saw Appellant outside of work. *Id.* at 472. She also acknowledged testifying under oath at the 6 July 2023 hearing that she never went to Appellant's dorm room after 7 June 2022. *Id.* at 473. But, as she admitted while testifying during the prosecution's case-in-chief, none of that was true, though she claimed that she did not intentionally

[7] In keeping with the rule that factual sufficiency review is limited to the evidence presented to the fact-finder during the findings phase of the court-martial, this discussion is limited to the evidence concerning SJM's testimony at the motion hearing as presented during the findings portion of the trial rather than citing her testimony from the motion hearing directly. *See, e.g.*, *United States v. Rice*, No. ACM 39071 (reh), 2021 CCA LEXIS 37, at *13 (A.F. Ct. Crim. App. Jan. 29, 2021) ("We limit our review on legal and factual sufficiency to the evidence produced at trial.").

provide false testimony. *Id.* at 470–74. In fact, within two days of 7 June 2022, SJM and Appellant resumed communicating with one another. *Id.* at 475. On 9 June 2022, SJM messaged Appellant that she wanted to go to his dorm room and hang out. *Id.* at 476. She admitted that she did visit Appellant at his dorm room "maybe twice, once or twice" after 7 June 2022. *Id.* at 473, 477. She also admitted sending messages to Appellant that called him a sweetheart and handsome, as well as exchanging messages with Appellant containing heart emojis. *Id.* at 479. She also admitted having lengthy telephone calls with Appellant after the alleged 7 June incident. *Id.* at 488.

On 15 June 2022, SJM and Appellant got into an argument because she was upset that he did not want to spend time with her before her anticipated change of duty station to Guam at the end of the month. *Id.* at 477, 480. The next day, the two agreed to go to a movie together. *Id.* at 481. SJM admitted that she and Appellant exchanged sexually related messages in anticipation of seeing one another. *Id.* The two got together that evening at Appellant's dorm room, where SJM became upset with Appellant because he would not let her spend the night in his room as the two had originally planned. *Id.* at 484–85. On 30 June 2022, SJM learned that her orders to Guam had been canceled. *Id.* at 485.[8] SJM perceived that Appellant "bl[ew] [her] off" when she told him that she would be remaining at Luke AFB. *Id.* at 485.

In July 2022, SJM received a Facebook message from DW, who had been contacted by Air Force OSI concerning possible offenses by Appellant against SJM. *Id.* at 442–43. DW identified herself as Appellant's girlfriend. *Id.* at 443. Before DW reached out to her, SJM did not know Appellant was dating someone else, nor had she ever heard DW's name. *Id.* The two exchanged electronic messages and then had a telephone conversation. *Id.* at 443–47; Pros. Ex. 23. SJM

[8] SJM testified that she later learned her transfer to Guam had been delayed rather than canceled, but she believed at the time that it had been canceled. *Id.*

forwarded to Appellant screenshots of messages from DW accompanied by a clown face emoji and the words, "I guess you got caught" and "Keep your girlfriend out of my inbox. She knows you cheated." Trial Tr. 486.

The day after her exchange with DW, SJM went to OSI and alleged that Appellant had assaulted her. *Id.* When asked by an OSI agent if the anal intercourse on 7 June 2022 was consensual, SJM responded, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." *Id.* at 489.

While testifying at Appellant's court-martial, SJM agreed that when testifying at a motion hearing four days before she was called during the prosecution's case-in-chief, she "had some memory problems" and "couldn't remember a lot of things." *Id.* at 454.

During its case-in-chief, the defense called PDT, Ph.D., as a witness. *Id.* at 949. The military judge recognized Dr. PDT as an expert in forensics. *Id.* at 952. Dr. PDT testified that an individual can lose consciousness within five to ten seconds of being strangled. *Id.* at 953–54. Once the strangulation ceases, she explained, an individual regains consciousness within "[a] second or two." *Id.* at 954. *See also id.* at 955 (Dr. PDT agreeing that when pressure on the neck is released, an individual regains consciousness almost immediately).

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *United States v. Cabuhat*, 83 M.J. 755, 770 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024).

This case—in which all findings of guilty were for offenses allegedly committed between on or about 1 March 2021 and on or about 20 December 2022—is subject to this Court's factual sufficiency review authority under the version of Article 66(d)(1)(B), UCMJ, enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year

2021 (NDAA for FY 2021), Pub. L. No. 116-283, 134 Stat. 3388, 3611–12 (2021).[9] Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge II, Specification 3, and, as demonstrated below, makes a specific showing of deficiency of proof that the act of anal sex alleged by that specification was nonconsensual.

Analysis

As previously indicated, during an interview with OSI agents, when asked whether the act of anal intercourse alleged by Charge II, Specification 3 was consensual, SJM responded, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. 489. Significantly, the military judge admitted SJM's prior inconsistent statements not merely for their impeachment value, but as substantive evidence concerning the charges. *See id.* at 1044.[10] SJM's own characterization of the anal intercourse is more than sufficient to create reasonable doubt as to whether it was nonconsensual.

[9] The amendment of Article 66 enacted by section 539E of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is inapplicable to this case. The amendment of Article 66 enacted by section 544 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 did not affect subsection (d)(1). Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

[10] The military judge instructed the members: "I have admitted testimony concerning the prior statements of these witnesses[, including SJM]. You may consider these statements in deciding whether to believe these witnesses' in-court testimony. You may also consider these statements along with all the other evidence in this case." Trial Tr. 1044 (paragraph break omitted).

SJM's own statement presents a "real possibility" that she consented to the sexual intercourse.[11] It also presents a real possibility that she consented while in a state of fragmentary alcohol-induced blackout—a state that, as this Court has recognized, does not equate to incapacity for consent to sexual activity. *United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, at *20 (A.F. Ct. Crim. App. Sep. 30, 2019). The most reasonable interpretation of her statement is that she thought the anal sex was consensual, but she was not sure because her alcohol intake that night impaired her memory. That assessment from the alleged victim establishes reasonable doubt.

Expert witness testimony at Appellant's court-martial further demonstrates that there is reasonable doubt as to whether the anal intercourse was nonconsensual. During the defense case-in-chief, Dr. PDT, whom the military judge recognized as an expert in forensics, testified that someone who loses consciousness from strangulation will typically regain consciousness within a second or two of pressure being released from the person's throat. Trial Tr. 954–55. In this case, the evidence suggests that a considerable amount of time passed between the strangulation incident and the completion of the anal intercourse. During the interim, either Appellant or SJM removed SJM's shorts. The evidence strongly suggests that Appellant penetrated and ejaculated in SJM's anus. That act may have been preceded and facilitated by application of a lubricant, which SJM indicated the couple used that evening. *See* Pros. Ex. 24 a 6 ("Any form of contraception/lubricant used? . . . [X] Yes Describe 'Flavored strawberry.'"). Notwithstanding the trial counsel's cross-examination of Dr. PDT concerning the possibility of repeated acts of strangulation, Trial Tr. 960-62, it is far more likely than not that SJM regained consciousness during preparations for and

[11] *See United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017). *See also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020) ("If we believe there is a 'real possibility' that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant's conviction.").

commission of the anal intercourse. There is certainly a real possibility that she did. The most likely reason for her lack of recollection concerning the act of anal intercourse is that provided by her own statement to OSI: her alcohol intake that night caused her memory to be "spotty." *Id.* at 489.

Additionally, SJM's testimony demonstrates that she is a singularly unreliable witness. As SJM admitted, she lied to an OSI agent when first questioned about the 7 June 2022 incident. *Id.* at 440. Moreover, the conflict between her testimony at the 6 July 2023 motion hearing and during the findings stage demonstrates that her testimony is insufficient to establish guilt beyond a reasonable doubt. SJM testified under oath that she had no relationship with Appellant after 7 June 2022, never went to his dorm room after that night, and never interacted with him outside of work after that night. Yet while testifying on the merits, she admitted that all those denials were false. *Id.* at 470–74.

One of two things must be true. Either SJM committed perjury at the motion hearing or her recollection was grossly deficient. It strains credulity that SJM would honestly have forgotten reforging a relationship with Appellant, feeling rejected by him when he chose not to spend as much time with her as she wished, and then learning about Appellant's girlfriend and reporting the alleged offenses to OSI *the very next day*. If SJM denied those facts under oath at the motion hearing knowing she was testifying untruthfully, then she is a perjurer whose testimony should not be relied upon to establish proof beyond a reasonable doubt. But if she testified honestly at the motion hearing, her credibility is even worse. At least if she committed perjury, she knew the difference between the truth and her lies. On the other hand, if she honestly believed that she had no interactions with Appellant after 7 June 2022, then some internal narrative supplanted her actual memory of the events about which she testified. Significantly, her statement that she wanted to say

yes to whether the anal sex was consensual occurred roughly a month and a half after the incident, apparently before any alternative internal narrative distorted her memories of the evening.

The word of SJM—who acknowledged providing untrue testimony about highly salient events during a judicial proceeding in this case and intentionally lying to an OSI agent about the alleged offenses—is insufficient to prove beyond a reasonable doubt that Appellant engaged in anal intercourse with her on 7 June 2022 without her consent. Accordingly, this Court should set aside the finding of guilty to doing so.

Finally, while this Court must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," UCMJ art. 66(d)(1)(B)(ii)(I), 10 U.S.C. § 866(d)(1)(B)(ii)(I), the members' assessment of SJM's credibility was tainted by the special trial counsel's improper vouching during closing argument. As discussed more fully in Assignment of Error V, *infra*, during closing argument, the special trial counsel told the members that SJM "came in here and she told the truth." Trial Tr. 1076. That improper argument impermissibly "place[d] the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). Because of the resulting distortion of the members' credibility determination, in this case, the "appropriate deference" to the members' opportunity to see and hear SJM is none.

For the foregoing reasons, this Court should set aside the finding of guilty to Charge II, Specification 3, dismiss that specification with prejudice, and set aside the segmented confinement adjudged for that offense.

Assignment of Error II

The evidence supporting Charge V, Specification 4, domestic violence, is factually insufficient because SJM acknowledged that, during a discussion of "rough sex" that preceded the biting, she told Appellant, "You can do whatever you want," or words to that effect, thereby establishing either that the biting was not unwelcome or that Appellant had a reasonable and honest mistake of fact as to whether the biting was unwelcome.

Additional Facts

After Appellant and SJM engaged in consensual vaginal intercourse on 7 June 2022, the two had a conversation about "rough sex." Trial Tr. 424. During that conversation, SJM told Appellant he could "do whatever you want to me." *Id.* at 490.[12]

At trial, the special trial counsel showed SJM a photograph she identified as "a picture of the bite mark on my hand." *Id.* at 434 (discussing Pros. Ex. 1 at 3). SJM testified, "I don't recall him doing that while I was awake." *Id.* During cross-examination, when Appellant's counsel asked, "And you were asleep when he bit you?," SJM replied, "I wasn't sure when it happened. I only assumed so that it was during that time period." *Id.* She then confirmed that she had no memory of Appellant biting her. *Id.* Later in the cross-examination, SJM volunteered that she told law enforcement agents that on the night of the incident, "I was intoxicated and had spotty memory." *Id.* at 489.

During a sexual assault medical examination conducted in the early morning hours of 8 June 2022, the forensic nurse examiner recorded that SJM stated, "When he had one hand on my neck he took my hand and bit it." Pros. Ex. 24 at 6. That same document also quotes her as saying, "He bit my hand." *Id.* The forensic nurse examiner noted a "3 cm x 4 cm Patterned purple contusion with red contusion circling around it left hand." *Id.* at 6.

[12] *See also* Trial Tr. 424 ("I did make the statement like 'You could do anything you wanted'"), 440 ("I did say the statement he could do whatever he wanted").

The members found Appellant guilty of Charge V, Specification 4, which alleged that "on or about 7 June 2022," Appellant "commit[ted] a violent offense against [SJM], the intimate partner of the accused, to wit: assault consummated by a battery by unlawfully biting her hand." Charge Sheet; Trial Tr. 1149.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *Cabuhat*, 83 M.J. at 770.

This Court's analysis of factual sufficiency in this case is governed by the version of Article 66(d)(1)(B), UCMJ, enacted by section 542(b) of the NDAA for FY 2021, Pub. L. No. 116-283, 134 Stat. at 3611–12. Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge V, Specification 4 and, as demonstrated below, makes a specific showing of deficiency of proof regarding SJM's purported lack of consent and deficiency of proof that Appellant did not reasonably and honestly believe that SJM consented.

Analysis

SJM acknowledged that during a discussion of "rough sex," she told Appellant he could do whatever he wanted to her. Trial Tr. 424. It is reasonable to assume that "rough sex" may include biting. *See Bufkin v. State*, 207 S.W.3d 779 (Tex. Crim. App. 2006) (holding that the defense was entitled to a consent instruction concerning bite marks that the defense contended were made during consensual sexual activity).

The Court of Appeals for the Armed Forces has defined an assault consummated by a battery as "bodily harm to another . . . done without legal justification or excuse and without the lawful consent of the person affected." *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021)

(quoting Pt. IV, ¶ 54.c.(1)(a), (2)(a), *Manual for Courts-Martial, United States* (*MCM*) (2016 ed.)). The court further explained that, "as a general matter, consent 'can convert what might otherwise be offensive touching into non-offensive touching.'" *Id.* (quoting *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 433 (C.M.A. 1994))). Finally, the court noted "that even if an alleged victim did not consent to being touched, an accused cannot be convicted of assault consummated by a battery if the accused mistakenly believed the alleged victim consented and that belief was 'reasonable under all the circumstances.'" *Id.* (citing Rule for Courts-Martial (R.C.M.) 916(j)(1), *MCM* (2016 ed.)). Thus, "a 'reasonable and honest mistake of fact as to consent constitutes an affirmative defense in the nature of legal excuse.'" *Id.* (quoting *Greaves*, 40 M.J. at 433). Here, SJM offered lawful consent to the biting that formed the basis for an assault consummated by battery conviction or, at the very least, created a reasonable and honest mistake of fact on Appellant's part that she had consented to the biting, hence establishing an affirmative defense to assault consummated by battery.

The circumstances surrounding when and how SJM's hand was bitten are murky. SJM took a photograph of a bite mark on her left hand while in Appellant's bathroom. Trial Tr. 433–34; Pros. Ex. 1 at 3. SJM testified at trial that she did not remember the bite. Trial Tr. 434. SJM also testified that she told law enforcement agents that as a result of being "intoxicated" that night, she had a "spotty memory" of the evening. *Id.* at 489. During the sexual assault medical examination, on the other hand, SJM told the forensic nurse that Appellant bit her on the hand while he was using one hand to choke her. Pros. Ex. 24 at 6. Given those inconsistent accounts and SJM's self-professed "spotty" memory of the evening due to her intoxication, Trial Tr. 489, the evidence does not establish beyond a reasonable doubt when or how the biting occurred.

In light of SJM's self-professed memory lapse, it is reasonably possible that the biting occurred early in the "rough sex," shortly after her fully consensual statement that Appellant could do whatever he wanted to her and before any arguable withdrawal of consent. If so, the evidence fails to prove beyond a reasonable doubt either that the biting was not consensual or that Appellant did not reasonably and honestly believe that SJM consented to being bitten.

The military judge correctly recognized that a reasonable and honest mistake of fact defense was available for Charge V, Specification 4. *Id.* at 1016, 1037; *see generally* R.C.M. 916(j)(1), *MCM* (2019 ed.). Once that defense was raised—as the military judge properly concluded it was—it was the prosecution's burden to prove beyond a reasonable doubt that Appellant did not have such a reasonable and honest mistake of fact as to whether SJM consented to the biting. *United States v. Rodela*, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021), *petition denied*, 82 M.J. 312 (C.A.A.F. 2022). The prosecution failed to do so because it was objectively reasonable for Appellant to conclude that when SJM told him during a discussion of "rough sex" that he could do whatever he wanted to her, she was consenting to being bitten on the hand.

For the foregoing reasons, this Court should set aside the finding of guilty to Charge V, Specification 4, dismiss that specification with prejudice, and set aside the segmented confinement adjudged for that specification.

Assignment of Error III

The evidence supporting Charge I, communicating a threat, and its specification, is factually insufficient because no evidence indicated that Appellant uttered the charged language or similar words.

Additional Facts

Charge I's specification alleged that Appellant "wrongfully communicated to [SJM] a threat to injure her by hitting her, to wit: 'If you do not stop crying, I will hit you,' or words to that effect." Charge Sheet, Charge I, Specification.

The members received two different accounts of what Appellant allegedly said to SJM as she cried, neither of which matches the specification's allegation. At the court-martial, SJM testified that as she sat on the floor of Appellant's dorm room, Appellant hit her on the left side of the face and "said that if I don't stop crying, something along the lines of, like, I'll find out what happens." Trial Tr. 430. The special trial counsel parroted, "That you will find out what happens?" *Id.* SJM replied, "Yes." *Id.* The prosecution elicited no additional testimony concerning the alleged threat or SJM's understanding of the words that she will find out what happens. During its case-in-chief, the prosecution also presented a sexual assault medical examination report resulting from a forensic nurse's examination of SJM on 8 June 2022. Pros. Ex. 24; *see* Trial Tr. 518–19 (testimony of SK).[13] According to that document, SJM recounted that Appellant "said if I cried one more time there would be problems for me." Pros. Ex. 24 at 6.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *Cabuhat*, 83 M.J. at 770.

[13] SK testified that the examination occurred on 7 June 2022. Trial Tr. 521. The report of examination, however, states that the examination was performed at 0158 on 8 June 2022. Pros. Ex. 24 at 4.

This Court's analysis of factual sufficiency in this case is governed by the version of Article 66(d)(1)(B), UCMJ, enacted by 542(b) of the NDAA for FY 2021, Pub. L. No. 116-283, 134 Stat. at 3611–12. Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge I and its specification and, as demonstrated below, makes a specific showing of deficiency of proof that Appellant stated, "If you do not stop crying, I will hit you" or words to that effect.

Analysis

In the military justice system, a charge and specification must contain the elements of the offense charged and fairly inform the accused of the charge against which he must defend. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). Here, the specification informed the defense that the manner by which Appellant allegedly violated Article 115, UCMJ, was by uttering a threat to "hit" SJM, or using words to that effect. Charge Sheet, Charge I, Specification. Yet the evidence did not establish that Appellant used such words. Nevertheless, without making any exceptions or substitutions, the members found Appellant guilty of Charge I's specification as alleged. Trial Tr. 1149. That was error.

The words "you'll find out what happens" and "there will be problems for you" are materially different from "I will hit you." While the first two suggest the possibility of negative repercussions, neither expresses a current conditional intent to inflict violence. Those words are not to the effect of "I will hit you," which directly suggests such a present conditional intent to inflict violence.

Here, just as in the recently decided Court of Appeals for the Armed Forces case of *United States v. Patterson*, the prosecution was aware of the discrepancy between the specification and

the evidence presented at trial. *See United States v. Patterson*, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548, at *13 (C.A.A.F. July 14, 2025).[14] Indeed, the special trial counsel parroted back to SJM her recitation of Appellant's words that are inconsistent with those alleged by Charge I's specification. Trial Tr. 430. Tellingly, during closing argument, the special trial counsel misstated the charged language, telling the members that Appellant said, "'If you don't stop crying, I'm going to hit you. Things are going to be worse for you.' That's the charge." *Id.* at 1063. But that was not the language of the charge's specification, which did not include the words, "Things are going to be worse for you," and no evidence presented during the findings stage of the court-martial indicates that Appellant said "I'm going to hit you."

Despite the prosecution's knowledge of the inconsistency between the charge sheet's allegation of what Appellant said and the evidence of what he said, just as in *Patterson*, the prosecution failed to take any appropriate corrective step, such as "ask[ing] the military judge to instruct the panel members on findings by exceptions and substitutions as is permitted under R.C.M. 918." *Patterson*, 2025 CAAF LEXIS 548, at *13. Where, as here, a finding of guilty was entered without exceptions and substitutions, "there is no variance" for this Court to consider. *United States v. Kershaw*, No. ACM 40455(f rev), 2025 CCA LEXIS 205, at *13 (A.F. Ct. Crim. App. Mar. 27, 2025), *certificate for review filed*, __ M.J. __, No. 25-0177/AF, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025). Rather, this Court evaluates such a scenario "utilizing the factual sufficiency standard." *Id.*

[14] In *Patterson*, there was a discrepancy between the timeframe as alleged in a specification and the evidence presented at trial. 2025 CAAF LEXIS 548, at *3. The Court of Appeals for the Armed Forces faulted the prosecutors in *Patterson* for "declin[ing] to take any corrective steps despite being aware of the discrepancy between the specification and evidence presented at trial." *Id.* at *13.

As this Court observed in *Patterson*, to obtain a conviction, the prosecution is required to "prove the facts alleged in the specification" beyond a reasonable doubt. *United States v. Patterson*, No. ACM 40426, 2024 CCA LEXIS 399, at *45 (A.F. Ct. Crim. App. Sep. 27, 2024), *aff'd*, __ M.J. __, No. 25-0073/AF (C.A.A.F. July 14, 2025). The prosecution did not prove the facts alleged by Charge I's specification. The finding of guilty to uttering "I will hit you" or words to that effect is "against the weight of the evidence." UCMJ art. 66(d)(1)(B)(iii). Indeed, *no evidence* was presented to the members indicating that Appellant used those or similar words. Where, as here, the evidence is factually insufficient to prove a factual allegation in a specification, the correct remedy is to set aside the affected finding of guilty. *See Patterson*, 2024 CCA LEXIS 399, at *45.

Both the Court of Appeals for the Armed Forces and this Court have recognized that "a CCA cannot except or substitute 'language [in] a specification in such a way that creates a broader or different offense than the offense charged at trial.'" *Id.* (alteration in original) (quoting *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019)). In *Patterson*, this Court declined to alter a finding of guilty by exceptions and substitutions to adjust the dates alleged by the specification. *Id. A fortiori*, it would be inappropriate to use exceptions and substitutions here to change the words alleged to communicate a threat—the very essence of the charged offense.

For the foregoing reasons, this Court should set aside the finding of guilty to Charge I and its specification, dismiss that charge and specification with prejudice, and set aside the segmented confinement adjudged for that charge and specification.

Assignment of Error IV.

The evidence supporting Charge III, kidnapping, and its specification is factually and legally insufficient because the evidence did not establish that Appellant held the alleged victim as that term is used for purposes of the kidnapping punitive article.

Additional Facts

At approximately 0200 on 21 June 2021, while stationed at Osan Air Base, Appellant was "very drunk," disoriented, and distraught. Trial Tr. 583–84, 593–94. He could not locate his girlfriend, DW, and was concerned about her. *Id.* at 594. Appellant went to DW's dorm suite, where he encountered DW's roommate, AS, in the hall outside. *Id.* at 579, 583. AS, who was doing laundry, was returning to the suite just as Appellant was trying to punch the combination into the suite's lock to enter. *Id.* at 583–84. His ability to do so was apparently hindered by his intoxication. When Appellant finally succeeded in entering the code, the two went into the suite's common area. *Id.* at 585. According to AS's testimony, the following events then transpired. Shortly after AS asked Appellant if he knew where a trash bag was and he shook his head no, Appellant started to shove her into a corner of the kitchen with his hands. *Id.* at 585, 596. He grabbed her by the shoulders and shook her while asking, "Where is [DW]?" *Id.* at 586. When AS told Appellant she did not know, Appellant accused her of lying. *Id.* She told him she had to do her laundry in an attempt to get away from him. *Id.* He then again accused her of lying while continuing to shake her and then grabbing her face as she again told him she did not know where DW was. *Id.* at 586–87.

AS was backed into the room's corner throughout this exchange. *Id.* at 587. Appellant then calmed down and AS again told him she had to do her laundry. *Id.* He said, "No, you're lying." *Id.* When AS then stepped to the side to try to bypass Appellant and leave the room, he stepped to the same side so he was once again in front of her. *Id.* This occurred at least twice. *Id.* AS did not

try to push past Appellant because she did not want to escalate the situation. *Id.* Instead, she repeatedly told Appellant that she had to do laundry and he continued to tell her she was lying about not knowing where DW was. *Id.* at 587–88. At one point during the encounter, Appellant put his hand on AS's chest and asked her if she was scared. *Id.* at 588. She told him she was not, although she actually was afraid. *Id.* After initially calming down, Appellant "freaked out again." *Id.* at 597. He shoved AS into a wall for a second time and again grabbed her face before eventually letting her leave the room. *Id.* at 588. During direct examination, she responded to the question, "How long did Airman Kindred keep you in that room?" with "Ten minutes." *Id.* at 588. She clarified that she did not check her watch, but "[i]t felt like 10 minutes." *Id.* at 588. During cross-examination, she stated that the encounter was "roughly 5–10 minutes." *Id.* at 595.

Concerning that incident, the members found Appellant guilty of kidnapping in violation of Article 125, UCMJ. Charge Sheet, Charge III; Trial Tr. 1149. The specification alleged that Appellant "did, at or near Osan Air Base, South Korea, on or about 21 June 2021, wrongfully seize and hold [AS] against her will." Charge Sheet, Charge III, Specification. The members also found Appellant guilty of violating Article 128, UCMJ, by unlawfully grabbing AS on her arm and face with his hand. Charge Sheet, Charge IV, Specification; Trial Tr. 1149.

Standard of Review and Applicable Legal Test

This Court reviews both factual and legal sufficiency de novo. *Cabuhat*, 83 M.J. at 770; *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023).

This Court's analysis of factual sufficiency in this case is governed by the version of Article 66(d)(1)(B), UCMJ, enacted by 542(b) of the NDAA for FY 2021, Pub. L. No. 116-283, 134 Stat. at 3611–12. Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ

art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge III and its specification and, as demonstrated below, makes a specific showing of deficiency of proof that Appellant held AS as that term is used for purposes of the kidnapping punitive article. "The test for legal sufficiency is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Analysis

Kidnapping first became an enumerated military crime when the 1984 edition of the *Manual for Courts-Martial* included it as a presidentially prescribed Article 134 offense. Pt. IV, ¶ 92, *MCM* (1984 ed.); Analysis, Appendix 21 at A21-102, *MCM* (1984 ed.). The *MCM*'s drafters noted that the provision was "based generally on 18 U.S.C. § 1201." Analysis, Appendix 21 at A21-102, *MCM* (1984 ed.). The Military Justice Act of 2016 made kidnapping a punitive article. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5439, 130 Stat. 2000, 2953 (2016) (codified at UCMJ art. 125, 10 U.S.C. § 925).[15] This Court has noted "the close similarities between the federal and military definitions of kidnapping" and used civilian federal appellate opinions construing 18 U.S.C. § 1201 as aids in construing the military kidnapping offense. *United States v. Corralez*, 61 M.J. 737, 747 (A.F. Ct. Crim. App. 2005). Additionally, this Court has noted "judicial precedent clearly signaling disapproval" of "overzealous" application of kidnapping offenses. *Id.* at 749.

[15] The version of the kidnapping offense enacted by the Military Justice Act of 2016 omitted not only the Article 134 terminal element, but also the previous requirement that the accused have committed the offense willfully. *Compare* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5439, 130 at 2953, *with* Pt. IV, ¶ 92.b.(3), *MCM* (2016 ed.).

In a case involving a kidnapping charge brought under the pre-Military Justice Act of 2016 presidentially prescribed Article 134 offense, the then-named Court of Military Appeals stated that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *United States v. Jeffress*, 28 M.J. 409, 413 (C.M.A. 1989) (alteration in original) (quoting *Government of Virgin Islands v. Berry*, 604 F.2d 221, 225 (3d Cir. 1979) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1869))). Consistent with such concerns, the United States Court of Appeals for the Ninth Circuit noted the importance of "standards to distinguish the crime of kidnaping from other crimes, so kidnaping is not broadened into a secondary charge wherever there is a detention accompanying another crime. 'Were we to sanction a careless concept of the crime of kidnaping . . . the boundaries of liability would be lost in infinity.'" *United States v. Etsitty*, 140 F.3d 1274, 1274 (9th Cir. 1977) (per curiam) (quoting *Chatwin v. United States*, 326 U.S. 455, 464 (1946)). With that danger in mind, in its 2022 opinion in *United States v. Jackson*, the Ninth Circuit endorsed the view that "meaning has to be given to the phrase 'and holds' beyond the conduct already denoted by 'seizes' and 'confines,' such that 'an appreciable period' of holding is necessary to establish the offense." *United States v. Jackson*, 24 F.4th 1308, 1312 (9th Cir. 2022) (quoting *United States v. Etsitty*, 130 F.3d 420, 427 (9th Cir. 1997) (Kleinfeld, J., concurring) (internal citations and quotation marks omitted)). In this case, just as in *Jackson*, the facts "do not bear the hallmarks of a true kidnapping. To conclude otherwise would convert the kidnapping statute into a steroidal version of the assault laws . . . ." *Jackson*, 24 F.4th at 1312 (quotation marks and citation omitted).

In *United States v. Santistevan*, the then-named Navy-Marine Corps Court of Military Review announced a six-factor balancing test to determine whether "an act constitutes kidnapping

in situations during which a separate offense is committed." *United States v. Santistevan*, 22 M.J. 538, 543 (N.M.C.M.R. 1986), *aff'd*, 25 M.J. 123 (C.M.A. 1987). The Court of Appeals for the Armed Forces subsequently adopted that test, listing the six factors as:

> a. The occurrence of an unlawful seizure, confinement, inveigling, decoying, kidnapping, abduction or carrying away and a holding for a period. Both elements must be present.
>
> b. The duration thereof. Is it appreciable or de minimis? This determination is relative and turns on the established facts.
>
> c. Whether these actions occurred during the commission of a separate offense.
>
> d. The character of the separate offense in terms of whether the detention/asportation is inherent in the commission of that kind of offense, at the place where the victim is first encountered, without regard to the particular plan devised by the criminal to commit it. . . .
>
> e. Whether the asportation/detention exceeded that inherent in the separate offense and, in the circumstances, evinced a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered. . . .
>
> f. The existence of any significant additional risk to the victim beyond that inherent in the commission of the separate offense at the place where the victim is first encountered. It is immaterial that the additional harm is not planned by the criminal or that it does not involve the commission of another offense.

United States v. Seay, 60 M.J. 73, 80–81 (C.A.A.F. 2004) (alterations in original).

This Court applied that test in *Corralez* and concluded that the facts there failed to establish kidnapping "by a wide margin." 61 M.J. at 749. One of the kidnapping convictions this Court overturned in that case resulted from the accused sitting in a parked car outside his family's house and arguing with MR, with whom he was in a relationship. As this Court explained:

> During the course of this five-minute "kidnapping," the appellant assaulted MR by hitting, biting, choking, and pulling her hair. According to MR's testimony, she wanted to go into the house but the appellant "didn't want to take an argument into the home in front of all the family." To keep her from entering the house, he held her seatbelt for about five minutes until the argument was over.

Id. Here, the facts are even *less* conducive to a finding of kidnapping than those in *Corralez*.

Here, the second, fourth, and sixth *Santistevan* factors are particularly significant. The second factor is the length of the duration. In *United States v. Jackson*—a kidnapping case brought under the military kidnapping offense's model, 18 U.S.C. § 1201—the Ninth Circuit emphasized that "the duration of the holding[] weighs against kidnapping, as a seven-minute holding would be quite brief on the spectrum of possible kidnappings." *Jackson*, 24 F.4th at 1314. The Ninth Circuit favorably cited this Court's *Correlez* opinion, which set aside two convictions for alleged kidnappings each of approximately five minutes' duration. *Id.* at 1313 (citing *Corralez*, 61 M.J. at 748–49).[16] Here, the alleged victim testified that the encounter resulting in the kidnapping conviction may have lasted as little as five minutes. Trial Tr. 595. Thus, just as in the Ninth Circuit's *Jackson* case and this Court's *Corralez* case, the length of the incident weighs heavily against concluding that there was a holding for kidnapping purposes.

Here, just as in *Corralez*, the purported detention occurred during a series of assaults consummated by battery. Those assaults far better capture the gravamen of the offenses than does kidnapping. Additionally, in this case, the nature of the "holding" itself is best characterized as an assault. In *Corralez*, the accused detained the victim by means of a seatbelt, thus physically preventing her from leaving the car. *Corralez*, 61 M.J. at 749. Here, on the other hand, Appellant kept AS in the room by means of stepping in front of her when she tried to bypass him. AS—no doubt wisely—attempted to defuse the situation by discontinuing her efforts to bypass Appellant. But she did not describe any physical detention beyond that which occurred during the separately

[16] *But see United States v. Jennings*, No. ACM 36890, 2008 CCA LEXIS 122 (A.F. Ct. Crim. App. Mar. 19, 2008) (rejecting challenge to guilty plea for a kidnapping of approximately four minutes' duration).

charged batteries. Thus, the fourth *Santistevan* factor favors relief here even more strongly than in *Corralez.* Finally, in *Jackson*, the Ninth Circuit emphasized that "this case did not involve a lengthy detention jeopardizing a victim's health or external restraints causing additional injuries." 24 F.4th at 1314. The same is true here. Thus, the sixth *Santistevan* factor also favors concluding that AS was not "held" for purposes of the kidnapping statute.

This argument does not suggest that Appellant's conduct as described by AS was not criminal. On the contrary, that alleged conduct would constitute a series of assaults and assaults consummated by battery. But it exaggerates the criminality of Appellant's conduct to label it a kidnapping—an offense punishable by up to confinement for life without eligibility for parole. Pt. IV, ¶ 74.d, *MCM* (2019 ed.).[17]

For the foregoing reasons, this Court should set aside the finding of guilty to Charge III and its specification, dismiss that charge and specification with prejudice, and set aside the segmented confinement adjudged for that charge and specification.

Assignment of Error V.

The special trial counsel committed prosecutorial misconduct during closing argument by indirectly commenting on Appellant's failure to testify, directly vouching for three prosecution witnesses' credibility, and using personal pronouns while offering his personal opinion of the strength of the evidence.

Additional Facts

The special trial counsel began the prosecution's closing argument by stating, "This is not a case like he said, she said." Trial Tr. 1051. Shortly thereafter, he told the members, "Now, in some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might only have the

[17] That maximum punishment remains unchanged in the 2024 edition of the *MCM*. Pt. IV, ¶ 74.d, *MCM* (2024 ed.).

testimony of one." *Id.* at 1051–52.

The special trial counsel proceeded to discuss the evidence concerning the charges that Appellant kidnapped and battered AS. *Id.* at 1054. Appellant and AS were the only people present during that situation and the prosecution introduced no physical evidence concerning those charges. The special trial counsel concluded his recitation of AS's testimony by telling the members: "This is undeniable. This has not been refuted. There is nothing contradicting [AS's] testimony." *Id.* at 1054. He also told the members, "I don't know any other explanation of why [AS] would have been lying." *Id.* at 1077.

While discussing Charge II, Specifications 1 and 2, which alleged that Appellant anally and vaginally raped DW at or near Osan Air Base, the special trial counsel told the members:

> We're going to talk about consent with [DW] too because rape has something called a lesser included offense of sexual assault. And what that means is, as the military judge told you, if you find that even though he penetrated her vulva and her anus, then maybe the force that he used wasn't sufficient to overcome her will. It wasn't sufficient to qualify as unlawful force like we talked about. Our position is it did. I believe the evidence shows that.

Id. at 1068–69.

While discussing Charge V, Specification 8, which alleged that Appellant committed domestic violence by ripping a pair of DW's pants, the special trial counsel told the members that the elements require that pants belonging to DW "be destroyed; and being destroyed means that they must be sufficiently injured to be useless for their intended purpose. I think that is what he did." *Id.* at 1074.

Later, referring to SJM's testimony, the special trial counsel told the members that "she came in here and she told the truth." *Id.* at 1076. Later still, referring to DW's testimony, the special trial counsel stated, "She sat here and took an oath and was as honest as she possibly could be with all of us." *Id.* at 1080.

Near the end of the prosecution's closing argument, the special trial counsel displayed a slide that led Appellant's counsel to make an objection: "Your Honor, at this point, I am going to object. I think this slide is 100-percent burden shifting. He's been doing it throughout. But at this point in time, he's 100-percent burden shifting. We are asking for an instruction on that to the panel." *Id.* at 1083.[18] The military judge then reminded the members that "the burden of proof to establish the guilt of an accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense." *Id.* at 1083–84. The military judge then confirmed that the members understood that instruction. *Id.* at 1084. The military judge also provided on-the-spot instructions in response to several prosecution objections during the defense counsel's closing argument. *Id.* at 1088–89, 1094, 1096, 1098.

Standard of Review and Applicable Legal Tests

Military appellate courts apply de novo review to issues of prosecutorial misconduct and improper argument. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Where no objection is made at trial, a military appellate court reviews the issue under a plain error standard. *Id.* Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). Where an error is of constitutional magnitude, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). "[T]he lack of a defense objection is 'some measure of the minimal

[18] The record of trial does not establish which slide the special trial counsel was displaying when Appellant's counsel made this objection.

impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

Analysis

The prosecution's closing argument was "riddled with egregious misconduct," including obvious errors of multiple types. *Vorhees*, 79 M.J. at 10. That serious misconduct—some of which impinged on Appellant's constitutional right to remain silent—warrants relief.

A. The special trial counsel's implicit commentary on Appellant's failure to testify was improper.

The special trial counsel began his argument with an obvious reference to Appellant's failure to testify: "This is not a case like he said, she said." Trial Tr. 1051. The implication was clear. While the three alleged female victims took the stand and testified, the male accused did not. Lest there be any doubt, the special trial counsel drove the point home: "Now, in some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might only have the testimony of one." *Id.* at 1051–52. That observation did precisely what the law forbids.

As the Court of Appeals for the Armed Forces observed in its 2005 decision in *United States v. Carter*, "it is black letter law that a trial counsel may not comment directly, *indirectly, or by innuendo*, on the fact that an accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (emphasis added) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). Consistent with both military and civilian case law, a discussion section accompanying R.C.M. 919(b) in the 2019 *MCM* expressly warned prosecutors that they "may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused." Discussion, R.C.M. 919(b), *MCM* (2019 ed.). *See also, e.g.*, *Carter*, 61 M.J. at 33;

United States v. Webb, 38 M.J. 62, 66 (C.M.A. 1993); *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981). Yet the special trial counsel did exactly that.

For example, the alleged offenses against AS, like those at issue in *Carter*, "involved two adults alone in a private room" where there "were no screams, no injuries, no physical evidence of a struggle, and no other witnesses" and where only the accused "possessed information to contradict the Government's sole witness." *Carter*, 61 M.J. at 33–34. Thus, just as in *Carter*, the prosecutor here committed error of constitutional magnitude when he told the members, "Nothing refuted what [AS] said on the stand." Trial Tr. 1054. There was no physical evidence concerning AS's allegations and no one was present during the alleged offenses other than AS and Appellant. Thus, the special trial counsel's argument did precisely what *Carter* forbids. The special trial counsel then exacerbated that error by directly following his statement that "nothing refuted what [AS] said on the stand" by noting that "[s]he took the stand" and she "swore an oath to tell the truth." *Id.* The contrast with Appellant's failure to testify is obvious. After recounting AS's testimony, the special trial counsel concluded that portion of his closing argument by telling the members, "This is undeniable. This has not been refuted. There is nothing contradicting [AS's] testimony." *Id.* Again, that argument directly violated *Carter*.

Just as in *Carter*, "[t]he improper comments in this case were not isolated or a 'slip of the tongue.'" *Carter*, 61 M.J. at 34. Rather, the special trial counsel repeatedly commented "indirectly" and "by innuendo" on Appellant's failure to testify. *See id.* Therefore, just as in *Carter*, the special trial counsel's closing argument "improperly implied that [the accused] had an obligation to produce evidence to contradict the Government's witness. This essentially shifted the burden of proof to [the accused] to establish his innocence—a violation of protections of the Fifth Amendment." *Id.*

The special trial counsel's argument was plain error. In *Carter*, the Court of Appeals for the Armed Forces concluded that "[i]n light of the well-established prohibition against such comments, as reflected in *Mobley*, 31 M.J. at 279, and in the Discussion accompanying R.C.M. 919(b), the error was plain under the second prong of the plain error test." *Carter*, 61 M.J. at 34. The error was even plainer in this case because *Carter* itself clearly prohibited the special trial counsel's arguments.

B. The special trial counsel's expressions of personal opinions and vouching for prosecution witnesses' credibility were improper.

The Court of Appeals for the Armed Forces has also held that it is improper for a trial counsel to "express[] his personal opinion about Appellant's guilt, utilize[] personal pronouns, . . . and vouch[] for government witnesses. While a prosecutor may argue that the evidence establishes an accused's guilt beyond a reasonable doubt, he is prohibited from expressing his personal opinion that the accused is guilty." *Voorhees*, 79 M.J. at 11. The special trial counsel's closing argument violated all of those prohibitions.

During closing argument, the special trial counsel impermissibly expressed personal opinions about the evidence—and used both first-person singular personal pronouns and first-person plural pronouns while doing so:

- "[I]f you find that even though he penetrated her vulva and her anus, then maybe the force that he used wasn't sufficient to overcome her will. It wasn't sufficient to qualify as unlawful force like we talked about. Our position is that it did. *I believe the evidence shows that*." Trial Tr. 1068–69 (emphasis added).
- "*[W]e know* she didn't freely give agreement to the sex. In fact, *we know* that she actively told him, 'No, I don't want to have sex with you,' and he did it anyway." *Id.* at 1069 (emphasis added).

- "[I]n order to charge domestic violence in this case, we have to charge kind of a sub-crime that gets looped into that. So there are other elements that are in your instructions and the judge told you about. So those elements are: It requires the pants belonging to [DW], they have to be of some value, and they need to be destroyed; and being destroyed means that they must be sufficiently injured to be useless for their intended purpose. *I think that is what he did*." *Id.* at 1071–72 (emphasis added).

Also during closing argument, the special trial counsel impermissibly vouched for the credibility of each of the three alleged victims—and used a first-person singular personal pronoun while vouching for AS's credibility. The Court of Appeals for the Armed Forces has observed that "improper vouching occurs when the trial counsel 'places the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *Fletcher*, 62 M.J. at 180 (quoting *Necoechea*, 986 F.2d at 1276). The special trial counsel did just that when he told the members:

- SJM "came in here and she told the truth." Trial Tr. 1076.
- "I don't know any other explanation of why [AS] would have been lying." *Id.* at 1077.
- DW "sat here and took an oath and was as honest as she possibly could be with all of us." *Id.* at 1080.

Given both the nature of the violations, the number of violations, and their obvious impermissibility, just as in *Fletcher*, the prosecution's clearly improper arguments "rose to the level of prosecutorial misconduct" and constituted "'plain and obvious' errors. 62 M.J. at 178, 184.

C. The special trial counsel's improper arguments prejudiced Appellant.

Once an appellant has established plain error in the prosecution's improper commentary "directly, indirectly, or by innuendo" on his failure to testify, "the burden shifts to the Government to convince [the appellate court] that this constitutional error was harmless beyond a reasonable

doubt." *Carter*, 61 M.J. at 34. "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (alteration in original) (quoting *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)). The Government cannot carry that burden here.

1. The Government cannot carry its burden to prove beyond a reasonable doubt that the special trial counsel's improper indirect references to Appellant's failure to testify were harmless.

The special trial counsel's impermissible indirect references to Appellant's failure to testify affected all three alleged victims, as he implicitly contrasted all threes' sworn testimony with Appellant's silence. Trial Tr. at 1051–52. That impermissible argument was particularly prejudicial regarding charged offenses for which there was no corroborating evidence and charged offenses for which an alleged victim's in-court testimony contradicted her previous out-of-court statements.

The two charged offenses involving AS—Charges III and IV and their specifications—fall into the first category. There was no evidence of those offenses other than AS's testimony—testimony that the special trial counsel impermissibly strengthened by indirectly referring to Appellant's failure to refute it.

Charge II, Specification 3—alleging that Appellant anally raped SJM—falls into the second category. As discussed above in Assignment of Error I, when previously asked by an OSI agent whether the act of anal sex on 7 June 2022 was consensual, SJM responded, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. 489. Thus, SJM previously made a statement inconsistent with Appellant's guilt concerning the most serious of her allegations. Also as discussed above in Assignment of

Error I, inconsistencies between SJM's previous testimony at a motion hearing and that provided before the members seriously undermined her credibility. *See* Trial Tr. at 468–79. Moreover, she admitted to lying to a law enforcement agent about the alleged incident. *Id.* at 440. Given the resulting damage to SJM's believability, the special trial counsel's improper indirect references to Appellant's failure to testify may have been the difference between conviction and acquittal for the allegations dependent on her testimony, particularly Charge II, Specification 3. Thus, that improper argument was not harmless beyond a reasonable doubt.

The findings of guilty for sexual assault against DW at Osan Air Base (Charge II, Specification 2 (lesser-included offense) and Specification 4) fall into both categories of heightened danger of prejudice arising from the special trial counsel's impermissible indirect references to Appellant's failure to testify. The prosecution presented no extrinsic evidence of those alleged offenses, which purportedly occurred nine to twenty-one months before DW first reported them. *Compare* Charge Sheet, Charge II, Specifications 2, 4, *with* Trial Tr. at 716. Additionally, DW made statements to law enforcement agents that were inconsistent with her in-court allegations, thereby presenting a challenge to her credibility. Trial Tr. at 714. Moreover, one of her former flight sergeants testified that she had a character for untruthfulness. *Id.* at 981–82. In that posture, there is far more than a "real possibility"[19] that the special trial counsel's unconstitutional references to Appellant's failure to testify influenced the outcome. Thus, the Government cannot carry its burden to establish harmlessness beyond a reasonable doubt as to those specifications in particular.

[19] *See Meeks*, 41 M.J. at 157 n.2 (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)).

2. The special trial counsel's improper expressions of personal opinion about Appellant's guilt, use of personal pronouns, and vouching for prosecution witnesses prejudiced Appellant.

For the special trial counsel's improper expressions of personal opinion about Appellant's guilt, forbidden use of personal pronouns, and impermissible vouching for prosecution witnesses, the burden is on Appellant to show that the improper argument materially prejudiced a substantial right of the accused. *Voorhees*, 79 M.J. at 9. When assessing prejudice, an appellate court considers "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184. Thus, the prejudice assessment for the special trial counsel's improper expressions of personal opinion about Appellant's guilt, forbidden use of personal pronouns, and impermissible vouching for prosecution witnesses must be made in conjunction with the prejudice arising from the special trial counsel's improper indirect references to Appellant's failure to testify.

A prejudice analysis in this context "weigh[s] three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.'" *Voorhees*, 79 M.J. at 12 (quoting *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (quoting *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017))).

a. The special trial counsel's prosecutorial misconduct was severe.

Here, the misconduct was severe. The special trial counsel repeatedly violated a constitutionally based right, a particularly grave form of prosecutorial misconduct. Moreover, the special trial counsel committed numerous violations of multiple well-established norms. Even the least experienced military lawyer should know it is impermissible to make statements of personal belief during closing argument, such as "I believe the evidence shows that" or "I think that is what

he did." Trial Tr. 1069, 1072. Coming from a special trial counsel—a judge advocate who must be "well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses," 10 U.S.C. § 1044f(a)(4)—the misconduct is especially egregious.

b. The military judge failed to take adequate curative measures.

In this case, just as in *Fletcher*, "[t]he military judge's curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct." 62 M.J. at 185. Just as in *Fletcher*, before the closing arguments began, "the military judge gave a generic limiting instruction reminding the members that 'what the attorneys say is not evidence.'" *Id.*[20] Just as in *Fletcher*, "[t]his instruction was not a targeted, curative response as it was given before the findings arguments rather than in response to a given statement or at the end of the argument." *Id.* at 185.[21] That failure in this case contrasts sharply with curative measures the military judge took regarding several other issues during closing argument. When Appellant's counsel objected to a portion of the special trial counsel's closing argument on a different basis than the prosecutorial misconduct at issue in this assignment of error—shifting the burden of proof—the military judge instructed the members that the burden of proof to establish guilt beyond a reasonable doubt is on the government and never shifts to the defense. Trial Tr. 1083–84. During the defense's closing argument, following a prosecution facts-not-in-evidence objection, the military judge immediately instructed the members that argument by counsel is not evidence, counsel are not witnesses, and

[20] Here, the military judge instructed the members before closing arguments that "the arguments counsel [sic] are not evidence." Trial Tr. 1051.

[21] In this case, the day before counsel gave their closing arguments, the military judge instructed the members: "The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness. The fact that the accused has not testified must be disregarded by you." Trial Tr. 1044. Not only did this instruction precede the special trial counsel's closing argument—thus depriving it of "curative" status, *see Fletcher*, 62 M.J. at 185—the fact that it was given the day before closing arguments further attenuates its ability to cure the subsequent impermissible argument.

the members' memory of the evidence controls. *Id.* at 1088–89. Later, when the special trial counsel made an improper-statement-of-the-law objection, the military judge immediately instructed the members that if there is any inconsistency between the instructions he provided and counsel's reference to the instructions, the members must accept the version as stated by the military judge. *Id.* at 1094. Still later in the defense's closing argument, in response to another objection from the special trial counsel, the military judge instructed the members that they should not consider or guess why either the prosecution or defense did not present certain evidence or made certain objections. *Id.* at 1096, 1098.

But the military judge neither stopped the special trial counsel nor gave subsequent curative instructions concerning indirect commentary on the accused's failure to testify, the special trial counsel's statement of personal opinions, the special trial counsel's use of personal pronouns, or the special trial counsel's vouching for the alleged victims' credibility. As the Court of Appeals for the Armed Forces has emphasized, a trial judge should interrupt a trial counsel's impermissible argument because "[c]orrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (quoting *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977)). Just as in *Fletcher*, the military judge's failure to give curative instructions supports finding prejudice.

c. The limited evidence supporting Charge II, Specifications 2 through 4 made the prosecutorial misconduct particularly prejudicial as to those specifications.

Regarding the weight of the evidence, the special trial counsel's arguments were most prejudicial concerning those specifications identified above for which the alleged victim's uncorroborated testimony was the only evidence, the alleged victim made prior statements

inconsistent with guilt, or both. For those offenses, the special trial counsel's improper vouching for the alleged victims' credibility was particularly prejudicial.

The special trial counsel's statements that "we know [DW] didn't freely give agreement to the sex" and that, "[i]n fact, we know that [DW] actively told him, 'No, I don't want to have sex with you,' and he did it anyway" carried a heightened danger of influencing the outcome. Trial Tr. 1069. Those statements concerned allegations by DW—a witness with serious credibility issues—that had no corroborating evidence. The special trial counsel's insinuations that the prosecutors were somehow privy to information that allowed them to "know" that her allegations were "fact" were not only grossly improper but also particularly likely to influence the members' verdicts concerning Charge II, Specification 2.[22]

The special trial counsel's improper vouching for DW's honesty, Trial Tr. 1080, carried a similar danger of offsetting damage to her credibility caused by, *inter alia*: (1) her admission to intentionally lying to her command concerning the AS incident that is the subject of Charges III and IV and their specifications, *id.* at 712–13; (2) her statement to an OSI agent in July 2022 that Appellant was a good boyfriend, *id.* at 714; (3) her former flight sergeant's testimony that DW was not truthful, *id.* at 981–82; (4) her failure to report the purported sexual assaults at Osan Air Base to anyone for months after they allegedly occurred, *id.* at 716; and (5) her testimony about those alleged offenses that "I didn't know that it was, like, un-consensual. That's not how I was labeling it or anything whenever I was in a relationship with him," *id.* Given those serious challenges to the credibility of DW's uncorroborated allegations, three or more members may have been reticent to convict Appellant based on her testimony alone. The special trial counsel's

[22] The members found Appellant not guilty of Charge II, Specification 1, the other specification that this portion of the special trial counsel's argument addressed. Trial Tr. 1149.

vouching for her honesty while testifying may have improperly silenced the doubts that the facts above would reasonably raise in the members' minds concerning Charge II, Specifications 2 and 4.

The special trial counsel's improper vouching for SJM was also particularly prejudicial. As discussed in Assignment of Error I, *supra*, her testimony revealed compelling reasons to doubt her reliability as a witness, including her admitted lie to an OSI agent concerning the events of 7 June 2022 and the many untrue statements she admitted to making under oath while testifying about her relationship with Appellant after 7 June 2022. Trial Tr. 440, 470–74. The special trial counsel's vouching to the members that SJM "came in here and she told the truth," *id.* at 1076, was particularly prejudicial because it improperly "place[d] the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *Fletcher*, 62 M.J. at 180 (quoting *Necoechea*, 986 F.2d at 1276). Without that transferred prestige, it is unlikely that SJM's testimony would have been sufficient to convict Appellant of Charge II, Specification 3.

For the foregoing reasons, this Court should hold that the special trial counsel's closing argument constituted prosecutorial misconduct, set aside the findings of guilty and the sentence, and remand the case for a new trial at which the prosecutors will eschew improper argument.

Assignment of Error VI.

The Government's egregious post-trial processing deficiencies, including irretrievably losing a portion of the audio recording of the trial and omitting some other audio recordings from the record of trial originally docketed with this Court, thereby necessitating a remand for correction of the record, violated Appellant's due process right to timely review of his convictions or, in the alternative, warrant a reduction in the sentence under this Court's Article 66(d)(2), Uniform Code of Military Justice, authority.

Additional Facts

Appellant was sentenced and his court-martial adjourned on 28 October 2023. Trial Tr. 1189–91. His appeal was docketed with this Court 188 days later on 3 May 2024.[23]

On 13 February 2024, DO executed the Certification of the Record of Trial in the case of *United States v. Airman Cody L. Kindred*. That certification stated, "I examined the record of trial in the above-referenced case and find that it accurately reports the proceedings. I certify the Record of Trial is accurate and complete in accordance with R.C.M. 1112(b) and (c)(1)." The record of trial was not complete in accordance with R.C.M. 1112(b) and (c)(1).

The record of trial that was docketed with this Court was missing audio recordings of the first day (which included the arraignment) and second day (which included two closed Article 39(a) sessions during a motions hearing) of Appellant's court-martial. *United States v. Kindred*, No. ACM 40607, 2025 CCA LEXIS 147 (A.F. Ct. Crim. App. Apr. 7, 2025) (order). On 7 April 2025, this Court ordered that the record be returned to the Chief Trial Judge, Air Force Trial Judiciary, "for correction under R.C.M. 1112(d) to account for the missing portions of the verbatim recording of the proceedings, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties." *Id.* at *2–3. This Court further ordered

[23] This Court may take judicial notice of its own records to establish that docketing date. *See United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957) ("An appellate court . . . can take judicial notice of its own records.").

that "[t]he record of trial will be returned to the court not later than **19 May 2025** unless a military judge or this court grants an enlargement of time for good cause shown." *Id.* at *3.

Upon remand, the Government was initially unable to locate audio recordings of either the initial 25 April 2023 Article 39(a) session during which Appellant was arraigned or portions of the closed 6 July 2023 Article 39(a) sessions concerning a Military Rule of Evidence 412 motion. *See* email from Captain Fito M. Andre to Colonel Matthew P. Stoffel, 2 May 2025, App. Ex. XLIV at 12–15. The military judge ordered that "[i]f all missing audio is not located by 21 April 2025, trial counsel shall provide updates regarding all efforts undertaken to locate the missing audio by 1700L every Monday, Wednesday, and Friday until further notice." App. Ex. XLVII at 2. Numerous personnel from Luke AFB expended considerable effort attempting to locate the missing audio recordings. App. Ex. XLIV at 13–15. On 22 April 2025, the court reporter from the 25 April 2023 Article 39(a) session found the missing audio recording of that session. App. Ex. XLIV at 15. Extensive search efforts continued in an attempt to find the missing audio from the closed 6 July 2023 Article 39(a) sessions. *See* App. Ex. XLIV at 1–4, 8–9. On 16 May 2025, the military judge ordered an enlargement of time until 2 June 2025 "for return of the record of trial to AFCCA." App. Ex. XLIX. On 5 June 2025, the military judge signed a certificate of correction. Certificate of Correction IAW R.C.M. 1112(d), United States v. AMN Cody L. Kindred. That certificate included the following: "The court recognizes that certain portions of audio remain missing from the record. Specifically, audio recording of the portion of the closed sessions in which the marking of appellate exhibits and oral argument on the motions occurred were unable to be located after exhaustive search efforts." *Id.* at 1.

The corrected record of trial was docketed with this Court on 18 June 2025, 599 days after sentencing. AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 9 August 2025.

Standard of Review and Applicable Legal Test

A military appellate court "review[s] de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Toohey*, 63 M.J. 353, 359 (C.A.A.F. 2006). A presumption of unreasonable post-trial delay triggers a four-factor analysis considering: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Even absent prejudice, a due process violation arises when a balance of the other three factors indicates "the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022) (quoting *Toohey*, 63 at 362).

Analysis

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135. In this case, the Government twice violated the aggregate 150-day timeline from sentencing to docketing with this Court, creating a presumption of unreasonable post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). The Government initially filed what it purported to be the record of trial in this case 188 days after sentencing. That "record," however, was missing required contents.

Although a court-martial record may consist of either an official written transcript or an official audio or video recording,[24] Article 54(c), UCMJ, provides that the President may prescribe required contents of a record of trial. UCMJ art. 54(c), 10 U.S.C. § 854(c). President Trump did so, requiring that general and special court-martial records of trial include a "substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." Exec. Order No. 13825 of March 1, 2018, 83 Fed. Reg. 9889, 10046 (2018) (codified as amended at R.C.M. 1112(b)). A record of trial that does not include a substantially verbatim recording of the court-martial proceedings is incomplete. *United States v. Valentin-Andino*, 83 M.J. 537, 540–41 (A.F. Ct. Crim. App. 2023). Appellant was tried by a general court-martial at Luke AFB, Arizona, on 25 April, 6 July, and 19, 20, 23, 24, 25, 26, 27, and 28 October 2023. Trial Tr. 1, 11, 105, 262, 375, 566, 802, 920, 1049, 1143. No audio recording of any court-martial session conducted on 25 April or 6 July 2023 was included in the purported "record of trial" docketed by this Court on 3 May 2024. Because of that substantial omission, no record of trial was docketed on that date.

The first date on which a record of trial (albeit with a certificate of correction in place of a portion of its audio recordings) was docketed with this Court was 18 June 2025, 599 days after sentencing. AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 9 August 2025. That presumptively unreasonable delay warrants a due process analysis. *See Livak*, 80 M.J. at 633. In this case, notwithstanding the absence of an assertion of the right to timely review or specific prejudice, the length and reasons for the delay are "so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *Toohey*, 63 M.J. at 362).

[24] UCMJ art. 1(14), 10 U.S.C. § 801(14).

The post-trial processing of this case was abysmal. The base legal office irretrievably lost a portion of the audio recordings of Appellant's court-martial—something that the "Commander in Chief of the Army and Navy of the United States," U.S. CONST. art. II, § 2, cl. 1, (and, by implication, the United States Air Force[25])—has decreed to be a required component of a record of trial. R.C.M. 1112(b). The public would be aghast and distraught to learn that the Air Force—a military service for which attention to detail is an essential aspect of its culture[26]—irretrievably lost a recording that the President of the United States requires it to retain. But that was not the only failure in this case. The Air Force also violated the President's directions when it omitted other recordings from the record of trial it originally provided to this Court for docketing. The Air Force's maintenance of its records was so poor that it required repurposing massive personnel resources to find the audio recording of the arraignment and some, but not all, of the closed motions hearing in this case. App. Ex. XLIV at 13–15. And the public would be dismayed to learn that an Air Force employee not only certified a record of trial as complete when it was not, but did so when the absence of audio recordings of two days of the trial was glaringly obvious. *See* Certification of the Record of Trial in the case of *United States v. Airman Cody L. Kindred*, Feb. 13, 2024.

The public would be further chagrined to learn that the deficiencies in this case are merely part of a much wider problem in the Department of the Air Force. This case is one of at least eight

---

[25] Presidential Authority as Commander in Chief of the Air Force, 1 Op. O.L.C. Supp. 463 (Aug. 26, 1947) ("The fact that one branch of the armed forces is called the 'Air Force,' a name not known when the Constitution was adopted, and the fact that the Congress has seen fit to separate the air arm of our armed forces from the land and sea arms cannot detract from the President's authority as Commander in Chief of all the armed forces").

[26] *See*, *e.g.*, Airman Sean M. Crowe, *Attention to detail: difference between life, death*, AIR MOBILITY COMMAND (May 9, 2013), available at https://www.amc.af.mil/News/Commentaries/Display/Article/149290/attention-to-detail-difference-between-life-death/.

instances so far this fiscal year in which this Court has had to remand a defective record of trial for correction.[27] In one additional case this fiscal year, this Court granted a Government motion to attach missing audio recordings corresponding to 45 percent of the court-martial transcript that were omitted from the record this Court initially docketed.[28] Moreover, in the past twelve months, this Court has decided at least fourteen cases in which the Government failed to meet the *Livak* 150-day standard.[29] The public would be even more distressed to learn that these deficiencies

---

[27] *See also United States v. Hooker*, No. ACM 40646 (A.F. Ct. Crim. App. July 9, 2025) (order) (provided in contemporaneously filed motion to attach documents); *United States v. Turtu*, No. ACM 40649, 2025 CCA LEXIS 300 (A.F. Ct. Crim. App. June 30, 2025) (order); *United States v. Robinson*, No. ACM 24044, 2025 CCA LEXIS 259 (A.F. Ct. Crim. App. June 6, 2025) (order); *United States v. Anderson*, No. ACM 40654, 2025 CCA LEXIS 204 (A.F. Ct. Crim. App. May 8, 2025) (order); *United States v. Burkhardt-Bauder*, No. ACM 24011, 2025 CCA LEXIS 81 (A.F. Ct. Crim. App. Feb. 19, 2025) (order); *United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551 (A.F. Ct. Crim. App. Dec. 16, 2024) (order); *United States v. Covitz*, No. ACM 40139 (reh), 2022 [sic] CCA LEXIS 751 (A.F. Ct. Crim. Dec. 6, 2024) (order).

[28] *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. Mar. 21, 2025) (order) (provided in contemporaneously filed motion to attach documents); *see also United States v. Dawson*, No. ACM 24041 at 1 (A.F. Ct. Crim. App. Apr. 10, 2025) (order) (provided in contemporaneously filed motion to attach documents).

[29] *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024) (412 days between sentencing and docketing; relief granted), *vacated and reconsidered on other grounds*, 2024 CCA LEXIS 494 (A.F. Ct. Crim. App. Oct. 9, 2024) (order), *upon reconsideration*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. Nov. 25, 2024), *reconsideration denied*, No. ACM 40439 (A.F. Ct. Crim. App. Jan. 10, 2025) (order), *certificate for review filed on other grounds*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025), *petition filed*, __ M.J. __, No. 25-0113/AF, 2025 CAAF LEXIS 184 (C.A.A.F. Mar. 11, 2025); *United States v. Byrne*, No. ACM 40391, 2024 CCA LEXIS 346 (A.F. Ct. Crim. App. Aug. 22, 2024) (290 days between sentencing and docketing; no relief granted), *petition denied*, 85 M.J. 272 (C.A.A.F. 2024); *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024) (362 days between sentencing and docketing; no relief granted), *aff'd on other grounds*, __ M.J. __, No. 25-0004, (C.A.A.F. Aug. 18, 2025); *United States v. Scott*, No. ACM 40411. 2024 CCA LEXIS 415 (A.F. Ct. Crim. App. Oct. 7, 2024) (297 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0038/AF, 2025 CAAF LEXIS 250 (C.A.A.F. Apr. 1, 2025); *United States v. Nakken*, No. ACM S32767, 2024 CCA LEXIS 420 (A.F. Ct. Crim. App. Oct. 10, 2024) (222 days between sentencing and docketing; no relief granted); *United States v. Cassaberry-Folks*, No. ACM 40444, 2024 CCA LEXIS 500 (A.F. Ct. Crim. App. Nov. 22, 2024) (412 days between sentencing and docketing; relief granted); *United States v. Atencio*, No. ACM S32783, 2024 CCA LEXIS 543 (A.F. Ct. Crim.

persist even after this Court found "a systemic problem indicating institutional neglect" in one case. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, *17 (A.F. Ct. Crim. App. June 7, 2024), *aff'd*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). Worse still, they persist after this Court, in another decision, chastised the Government for "a series of cases involving post-trial delay at various stages" that raise "serious questions as to the scope of potential institutional neglect within the Air Force, particularly when it comes to timely and accurate assembly of records of trial and forwarding of verbatim trial transcripts." *Cassaberry-Folks*, 2024 CCA LEXIS 500, at *43. Thus, the reason for delay in this case—grossly deficient compilation of the record of trial requiring a remand for correction and involving the irretrievable loss of a portion of the presidentially required audio recordings—warrants finding a due process violation.

Although a portion of the delay in this case arose during periods when Appellant's counsel sought extensions of the briefing deadline, Appellant bears no responsibility for that delay, which

App. Dec. 20, 2024) (166 days between sentencing and docketing; no relief granted); *United States v. Floyd*, No. ACM S32784, 2025 CCA LEXIS 31 (A.F. Ct. Crim. App. Feb. 3, 2025) (155 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0126/AF, 2025 CAAF LEXIS 345 (C.A.A.F. May 6, 2025); *United States v. Covitz*, No. ACM 40193 (reh), 2025 CCA LEXIS 105 (A.F. Ct. Crim. App. Mar. 19, 2025) (155 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0169/AF, 2025 CAAF LEXIS 538 (C.A.A.F. July 8, 2025); *United States v. Jenkins*, No. ACM S32765, 2025 CCA LEXIS 148 (A.F. Ct. Crim. App. Apr. 7, 2025) (154 days between sentencing and docketing; no relief granted), *petition filed*, __ M.J. __, No. 25-0180/AF, 2025 CAAF LEXIS 428 (C.A.A.F. June 2, 2025); *United States v. Johnson*, No. ACM 40537, 2025 CCA LEXIS 193 (A.F. Ct. Crim. App. May 2, 2025) (196 days between sentencing and docketing; no relief granted), *petition filed*, __ M.J. __, No. 25-0202/AF, 2025 CAAF LEXIS 503 (C.A.A.F. June 26, 2025); *United States v. Hagen*, No. ACM 40561, 2025 CCA LEXIS 234 (A.F. Ct. Crim. App. May 28, 2025) (183 days between sentencing and docketing; no relief granted), *petition filed*, __ M.J. __, No. 25-0224/AF (C.A.A.F. July 23, 2025); *United States v. Blair*, No. ACM S32778, 2025 CCA LEXIS 341 (A.F. Ct. Crim. App. July 28, 2025) (175 days between sentencing and docketing; no relief granted); *United States v. Tompkins*, No. ACM 40619, 2025 CCA LEXIS 359, at *2 n.2 (A.F. Ct. Crim. App. Aug. 1, 2025).

reflected deficiencies in the staffing of the Air Force Appellate Defense Division.[30] Appellant's counsel's motions seeking enlargements of the filing period demonstrated an overwhelming workload that prevented more prompt attention to Appellant's case.[31] That overwhelming workload was not limited to Appellant's counsel. Rather, it was a systemic problem resulting from the Government's failure to provide adequate personnel resources to the Air Force Appellate Defense Division. *See* Declaration of the Deputy Chief of the Air Force Appellate Defense Division, Jan. 25, 2025, in contemporaneously filed motion to attach documents. In any event, there was no "record of trial" meeting the presidentially prescribed requirements pending before this Court when Appellant's counsel sought those enlargements of time or when this Court granted them.

A military appellate court that finds a violation of an appellant's right to timely review of a court-martial conviction "should tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Moreno*, 63 M.J. at 143 (citation modified). Possible remedies include, but are not limited to:

> (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice.

---

[30] *See generally Vermont v. Brillon*, 556 U.S. 81, 94 (2009) ("Delay resulting from a systemic 'breakdown in the public defender system,' [*State v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008)], could be charged to the State.").

[31] *See, e.g.*, Motion for Enlargement of Time (Fourth), *United States v. Kindred*, No. ACM 40607 (filed Oct. 18, 2024) (stating that "[t]hrough no fault of Appellant, undersigned defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case" and setting out detailed appellate defense counsel's workload and conflicting demands); Motion for Enlargement of Time (Fifth), *United States v. Kindred*, No. ACM 40607 (filed Nov. 19, 2024) (same); Motion for Enlargement of Time (Sixth), *United States v. Kindred*, No. ACM 40607 (filed Dec. 19, 2024); Motion for Enlargement of Time (Seventh), *United States v. Kindred*, No. ACM 40607 (filed Jan. 16, 2025).

Id.

In this case, which is characterized by gross dereliction including the loss of the audio recording of part of the trial and where the deficiencies are part of an overall pattern of institutional neglect and indifference, the appropriate remedy is to provide day-for-day confinement credit for the period of presumptively unreasonable appellate delay. *Id.* ("relief . . . may include . . . day-for-day reduction in confinement or confinement credit"). Accordingly, this Court should order 449 days of additional confinement credit.

Even if this Court were to determine that the defective post-trial processing did not violate Appellant's constitutional rights, relief would still be appropriate. This Court is statutorily empowered to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). Here, there is both error and excessive delay post-dating the entry of judgment.

This Court has set out non-exclusive factors to consider when deciding whether to grant relief for unreasonable post-trial delay. *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). Four of those six factors strongly support granting relief in this case. First, the delay in this case was extensive; a complete record of trial meeting the presidentially prescribed requirements was not filed with this Court until 599 days after sentencing. Second, the reasons for the delay are disconcerting. The base legal office compiled an incomplete record of trial missing audio recordings of two days of the court-martial, yet certified that the record was complete. The Government then provided that incomplete record to this Court for docketing. Worse still, the Government irretrievably lost a portion of the audio recording of the court-martial and was initially unable to find the audio recording of another day of the court-

martial. Searches for these missing recordings delayed the prompt return of the record to this Court for re-docketing. Third, as discussed above, the deficiencies in this case are part of an overall pattern of institutional neglect concerning timely and accurate post-trial processing in the Department of the Air Force. Fourth, this Court can provide meaningful, yet proportionate and appropriate, relief in the form of confinement credit.

This Court should send a clear message to the Department of the Air Force that the post-trial processing of this case is intolerable. Providing Appellant with 449 days of additional confinement credit will send that message.

For the foregoing reasons, this Court should order an additional 449 days of confinement credit.

Assignment of Error VII.

Appellant's constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.

Additional Facts

The military judge's findings instructions included the following:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have seven members, that means six members must concur in any finding of guilty.
>
> If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty bearing in mind the instructions I gave you about voting on the lesser included offenses.

Trial Tr. 1128–29.

The members found Appellant guilty of six charges and a total of thirteen specifications. *Id.* at 1149. It is unknown and unknowable whether each of those findings of guilty was based on a vote of 6-1 or 7-0.

Standard of Review and Applicable Legal Test

The standard of review for questions of constitutional law is de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016). "To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that '"the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress."'" *United States v. Anderson*, 83 M.J. 291, 298 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024) (quoting *Weiss v. United States*, 510 U.S. 163, 177–78, 181 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976))).

Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights. 83 M.J. at 302. Appellant acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, Appellant maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

Respectfully submitted,

[redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

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 Air Force Government Trial and Appellate Operations Division on 18 August 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

APPENDIX

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

List of Issues

I.

The evidence supporting Charge II, Specification 4 and the lesser-included offense of Specification 2 is factually insufficient to prove guilt beyond a reasonable doubt because it was limited to the uncorroborated testimony of DW, who was not a sufficiently credible witness to support a conviction based on her word alone.

II.

The evidence supporting Charge V, Specification 9, alleging domestic violence against DW by assault consummated by a battery, is factually insufficient to prove guilt beyond a reasonable doubt because DW herself testified that she "didn't know" whether the allegation that Appellant hit her in the face "was true or not" and the evidence before the members presented a reasonable possibility of an alternative cause of her injuries.

III.

The evidence supporting Charge V, Specification 2, alleging domestic violence against SJM by strangulation, is factually insufficient to prove guilt beyond a reasonable doubt because: (1) SJM's testimony offered two mutually exclusive accounts of the alleged strangulation; and (2) during a discussion of "rough sex" that, according to one of her accounts, preceded the strangulation, she told Appellant, "You can do whatever you want," or words to that effect, thereby establishing either that the strangulation was not unwelcome or that Appellant had a reasonable and honest mistake of fact as to whether the strangulation was unwelcome.

Legal Authorities and Argument

I.

The evidence supporting Charge II, Specification 4 and the lesser-included offense of Specification 2 is factually insufficient to prove guilt beyond a reasonable doubt because it was limited to the uncorroborated testimony of DW, who was not a sufficiently credible witness to support a conviction based on her word alone.

Facts

The only evidence the prosecution presented to support the two findings of guilty for sexual offenses Appellant allegedly committed in Korea against DW was her uncorroborated testimony.

DW testified that while she and Appellant were stationed at Osan Air Base, Appellant would sometimes enter her dorm room after drinking and physically assault her. Trial Tr. at 623–24. She described one particular night when she feigned sleep to avoid a confrontation with Appellant. *Id.* at 625–27, 640. According to DW's testimony, Appellant engaged in vaginal intercourse with her while she pretended to sleep. *Id.* at 628–34. She testified that he did so several additional times before Appellant told her he was having sex with her while she was asleep. *Id.* at 635–39. She testified that she assured Appellant "it's okay" and told him he could continue to do so. *Id.* at 639–40.

DW also testified about an incident she claimed occurred the morning Appellant transferred from Korea. *Id.* at 642. Both she and Appellant wanted to have sex before parting, but they got into an argument. *Id.* DW testified that she told Appellant she did not want to have sex because he was angry with her. *Id.* at 643. According to DW, Appellant then bent her over a bed with his hand on her neck, pulled her pants down to her knees, and had vaginal intercourse with her. *Id.* at 645, 647. She testified that during the sex act, she was sad and crying. *Id.* at 645. At some point, she claimed, Appellant let her up and she walked to the room's sink. *Id.* at 646, 648.

She testified that Appellant told her to stop crying. *Id.* at 649. She said that when she replied that she was upset because they were having sex while Appellant was angry with her, he responded, "Oh, my God, shut up," and added, "[L]et me finish at least." *Id.* at 712–13. She said he then grabbed her, led her back to the bed, and had anal intercourse with her. *Id.* at 647, 649. She also testified that she had previously told Appellant she did not like anal intercourse. *Id.* at 636–37, 648.

The prosecution presented no evidence to corroborate DW's accounts of Appellant sexually assaulting her at Osan Air Base. While assigned in Korea, DW—who had spent her entire Air Force career in security forces—never reported Appellant to law enforcement for any alleged physical or sexual acts. *Id.* at 650, 700–01, 755. Her allegations that Appellant raped and sexually assaulted her at Osan Air Base arose during her interview with Air Force Office of Special Investigation (OSI) agents on 21 December 2022—roughly nine months after Appellant left Korea. *Id.* at 716, 757–58. Concerning the sex acts she described in her testimony, DW testified that "I didn't even know that those were considered crimes or bad at the time." *Id.* at 716. She testified that the OSI agents "told me that those things weren't okay." *Id.* She added, "I didn't know that it was, like, un-consensual. That's not how I was labeling it or anything whenever I was in a relationship with him." *Id.*

During her testimony, DW confessed to knowingly submitting a false statement to her commander concerning AS's allegations against Appellant that are the subject of Charges III and IV and their specifications. *Id.* at 712–13. DW admitted that when an OSI agent contacted her in July 2022 concerning an investigation into suspected offenses by Appellant against SJM, she told the agent that Appellant was a good boyfriend. *Id.* at 714. She also acknowledged that shortly before Appellant's trial, she received copies of thousands of electronic messages she previously

exchanged with Appellant. *Id.* at 732–33. When Appellant's counsel asked her, "And in these messages, is there a single reference to any sexual assault," DW replied, "No, I don't think so." *Id.* at 733. She also acknowledged that on the day Appellant left Korea and the following day, no messages between them discussed beatings or sexual assault. *Id.* DW also acknowledged that when interviewed by an OSI agent on 21 December 2022, she said she had never consented to having anal sex with Appellant when, in fact, on one occasion she had. *Id.* at 736–37. DW also acknowledged that after returning to the United States, she renewed her relationship with Appellant, including visits each made to the other at their bases a considerable distance apart and a visit she made to Appellant's family home. *Id.* at 661, 734–75.

Technical Sergeant (TSgt) BAM, DW's former flight sergeant, testified that he did not believe DW was a truthful person and that she had a character for untruthfulness. *Id.* at 981–82.

The Government charged Appellant with five offenses allegedly committed against DW at or near Osan Air Base. Charge Sheet, Charge II, Specifications 1, 2, and 4; Charge V, Specifications 1 and 3. The members found Appellant not guilty of a vaginal rape specification that appears to correspond to the alleged incident on Appellant's last day at Osan Air Base. Charge Sheet, Charge II, Specification 1; Trial Tr. at 1149. The members found Appellant not guilty of anal rape but guilty of the lesser-included offense of anal sexual assault apparently arising from that same incident. Charge Sheet, Charge II, Specification 2; Trial Tr. at 1149. The members found Appellant guilty of divers vaginal sexual assaults against DW at or near Osan Air Base over a thirteen-month period starting on 1 March 2021. Charge Sheet, Charge II, Specification 4; Trial Tr. at 1149. The members found Appellant not guilty of two domestic violence specifications alleging offenses against DW at or near Osan Air Base. Charge Sheet, Charge V, Specifications 1 and 3; Trial Tr. at 1149.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *United States v. Cabuhat*, 83 M.J. 755, 770 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024).

This Court's analysis of factual sufficiency in this case is governed by the version of Article 66(d)(1)(B), Uniform Code of Military Justice (UCMJ), enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611–12 (2021) (NDAA for FY 2021). Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to the findings of guilty to Charge II, Specification 4 and the lesser-included offense of Charge II, Specification 2 and, as demonstrated below, makes a specific showing of deficiency of proof that he vaginally sexually assaulted DW at or near Osan Air Base on divers occasions or that he anally sexually assaulted her at or near Osan Air Base on one occasion.

Argument

The findings of guilty to Charge II, Specification 4 and the lesser-included offense of Charge II, Specification 2 depend entirely on the uncorroborated testimony of DW. Her word alone is insufficient to provide proof beyond a reasonable doubt for five primary reasons.

First, DW is an admitted liar. She confessed on the stand to making a false official statement to her commander concerning certain allegations against Appellant. Trial Tr. at 712–13. Those lies were purportedly for Appellant's benefit. But there is no reason to believe that a witness who decided to commit a criminal offense involving dishonesty to vindicate an

individual would have any moral compunction about falsely testifying against that individual if the witness's assessment of her self-interest has shifted.

Second, DW's allegations against Appellant were stale. She did not make any report of a sexual offense against Appellant until approximately nine months after Appellant had left Korea. By that time, there was no prospect of obtaining any physical evidence to either corroborate or refute her allegations. Nor had she made any prior consistent statements to anyone in the intervening period—including in the thousands of email messages she exchanged with Appellant. *Id.* at 733. Before describing her sexual relationship with Appellant to OSI agents on 21 December 2022, DW herself did not know that the acts were nonconsensual. *Id.* at 716. DW said it was the OSI agents who informed her that the acts were wrong, *id.*, suggesting that the OSI agents altered her understanding of the acts or that she changed her narrative concerning the acts to please the OSI agents.

Third, when interviewed by an OSI agent in July 2022 concerning her relationship with Appellant, she said he was a good boyfriend and did not report any allegations of abusive conduct in Korea—an account inconsistent with her testimony. *Id.* at 714.

Fourth, a former flight sergeant of DW's testified that she had a character for untruthfulness. *Id.* at 981–82.

Fifth, after Appellant allegedly victimized her in Korea, DW chose to reestablish an intimate relationship with him, including visits each made to the other at their bases a considerable distance apart and a visit DW made to Appellant's family home. *Id.* at 661, 734–75.

Testimony suffering from those considerable weaknesses is insufficiently reliable to constitute proof beyond a reasonable doubt.

Finally, while this Court must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," UCMJ art. 66(d)(1)(B)(ii)(I), 10 U.S.C. § 866(d)(1)(B)(ii)(I), the members' assessment of DW's credibility was tainted by the special trial counsel's improper vouching during closing argument, when he told the members that "[s]he sat here and took an oath and was as honest as she possibly could be with all of us." Trial Tr. at 1080. As discussed more fully in Assignment of Error V in Appellant's brief, that clearly improper argument "place[d] the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). Because of the resulting distortion of the members' credibility determination, in this case, the "appropriate deference" to the members' opportunity to see and hear DW is none.

For the foregoing reasons, Appellant personally asks this Court to set aside the findings of guilty to Charge II, Specification 4 and the lesser-included offense of Charge II, Specification 2; dismiss those specifications with prejudice; and set aside the segmented confinement adjudged for those offenses.

II.

The evidence supporting Charge V, Specification 9, alleging domestic violence against DW by assault consummated by a battery, is factually insufficient to prove guilt beyond a reasonable doubt because DW herself testified that she "didn't know" whether the allegation that Appellant hit her in the face "was true or not" and the evidence before the members presented a reasonable possibility of an alternative cause of her injuries.

Facts

On the morning of 20 December 2022, DW reported for security forces duty with a bruised nose, one black eye, and a scratch under her other eye. Trial Tr. at 765, 778, 791, 850; Pros. Ex. 9. The flight sergeant for DW's flight, Technical Sergeant (TSgt) NV, asked her if she was involved

in a bar fight. Trial Tr. at 788. During his court-martial testimony, TSgt NV responded affirmatively when asked, "[W]as that a possibility in your mind that she had gotten into a fight at a bar." *Id.* He also confirmed that DW would have been in trouble had she gotten into a bar fight. *Id.* at 787. Another one of DW's supervisors, Staff Sergeant CJ, testified that getting into a bar fight and then being late for work could result in initiation of involuntary discharge proceedings. *Id.* at 775. DW told her supervisors that she had not been in a bar fight.[1] *Id.* at 786. She subsequently alleged that Appellant had caused the injuries to her face. *Id.* at 691.

DW also testified that she reached out to a woman she met at a bowling alley on the night of 19 to 20 December who was apparently also at the bar Appellant and DW went to after bowling. *Id.* at 752. DW explained that she contacted the woman because, after speaking with Appellant and Appellant's mother about being involved in a bar fight that night, "I was just confused, like, is that what happened?" *Id.* DW also acknowledged that during a telephone conversation on 21 December 2022, she told Appellant's mother that "I said that I had gotten in a fight with a girl at the bar." *Id.* at 754.

When the special trial counsel asked DW on redirect examination why she did not tell Appellant's mother that Appellant had physically attacked her, DW testified, "I didn't want her to think badly. Also, I didn't—like, from that night, I don't remember the whole night and stuff, so I didn't want to lie to her and tell her something that *I didn't know if that was true or not*." *Id.* at 755 (emphasis added). On cross-examination, when asked whether her memory of the evening of 19 to 20 December was "shaky," DW replied, "Very, yes." *Id.* at 749.

[1] As discussed further below, DW also testified at the court-martial that she did not get into a fight at the bar on the night of 19 to 20 December 2022. Trial Tr. at 677. Yet she also testified, "I just don't remember the whole time at the bar." *Id.* at 722. Nor did DW remember leaving the bar or why she left the bar. *Id.* at 722–23.

Later that day, two OSI agents interviewed Appellant concerning the source of DW's injuries. *Id.* at 832; Pros. Ex. 15. Appellant told them DW had gotten into an "altercation" with a woman at an off-base bar the previous night. Pros. Ex. 15. No evidence was presented to the members that OSI conducted any investigation into whether there was a fight involving two women at a bar near Hill Air Force Base on the night of 19 to 20 December 2022. Nor is there any indication that any search was conducted of DW's car to determine whether it contained evidence that the injury to Appellant's hand was suffered on its steering wheel, as Appellant had told his first sergeant. *See* Trial Tr. at 834, 858–59, 861.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *Cabuhat*, 83 M.J. at 770.

This case is subject to this Court's factual sufficiency review authority under the version of Article 66(d)(1)(B), Uniform Code of Military Justice (UCMJ), enacted by section 542(b) of the NDAA for FY 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. at 3611–12. Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge V, Specification 9 and, as demonstrated below, makes a specific showing of deficiency of proof regarding whether it was Appellant rather than another person who caused the injuries to DW on 20 December 2022.

Argument

To prove a charge beyond a reasonable doubt, the prosecution must disprove "every fair and rational hypothesis except that of guilt." *See United States v. Loving*, 41 M.J. 213, 281 (C.A.A.F. 1994) (affirming propriety of the military judge's definition of reasonable doubt). Here, the alleged victim herself, when asked why she did not tell Appellant's mother that

Appellant had physical attacked her, responded, "I didn't know if that was true or not." Trial Tr. at 755. If DW did not know if that was true, then her testimony is insufficient to prove the allegation beyond a reasonable doubt.

Moreover, the evidence failed to disprove the fair and rational hypothesis that DW sustained the injuries to her face during an altercation at a bar. After seeing DW on the morning of 20 December 2022, DW's supervisor TSgt NV—a security forces non-commissioned officer—thought it was a reasonable possibility that she had gotten into a bar fight. *Id.* at 788. Nor did any investigator examine DW's car to determine whether it contained evidence that Appellant injured his hand on its steering wheel, as he told his first sergeant. *Compare* Trial Tr. at 834, 858–59, 861, *with id.* at 845.

While DW denied being in a fight in a bar on the night of 19 to 20 December 2022, she also testified that she did not remember all of the events at the bar, including leaving or why she left. *Id.* at 677, 722–23. She also testified that her memory of that night was very shaky. *Id.* at 749. It is reasonably possible that a bar fight could have occurred during that memory gap. Indeed, a bar fight was most likely to occur immediately before she left, as it would likely result in her ejection from the bar. Additionally, the defense presented evidence that DW had a motive to deny being in a bar fight because she had a poor disciplinary record and further misconduct could have resulted in the initiation of involuntary discharge proceedings. *Id.* at 707, 775.

Again, no deference is due to the members' determination of DW's credibility because it was tainted by the special trial counsel's improper vouching for her honesty during closing argument. *Id.* at 1080; *Fletcher*, 62 M.J. at 180.

For the foregoing reasons, Appellant personally asks this Court to set aside the finding of guilty to Charge V, Specification 9, dismiss that specification with prejudice, and set aside the

segmented confinement adjudged for that offense.

III.

The evidence supporting Charge V, Specification 2, alleging domestic violence against SJM by strangulation, is factually insufficient to prove guilt beyond a reasonable doubt because: (1) SJM's testimony offered two mutually exclusive accounts of the alleged strangulation; and (2) during a discussion of "rough sex" that, according to one of her accounts, preceded the strangulation, she told Appellant, "You can do whatever you want," or words to that effect, thereby establishing either that the strangulation was not unwelcome or that Appellant had a reasonable and honest mistake of fact as to whether the strangulation was consensual.

Facts

SJM testified on direct examination before the members that after she and Appellant engaged in consensual vaginal intercourse on 7 June 2022, the two had a conversation about "rough sex." Trial Tr. at 424. During that discussion, SJM told Appellant he could "do whatever you want to me." *Id.* at 490.[2] After she said that, according to SJM's direct-examination testimony, Appellant placed "one of his hands" on her throat. *Id.* at 425. She recounted that she "immediately struggled to breathe really badly with just the one hand on [her] throat." *Id.* at 426. She added that "it was hard for me to kind of breathe, to speak. It just—I just felt I was losing a lot of air at the time." *Id.* SJM also testified on direct examination that she asked Appellant, "Can you please stop?" *Id.* According to SJM, Appellant responded by saying "something along the lines of, 'Oh, you don't want me to stop' or 'you want me to continue.'" *Id.* SJM testified on direct examination that Appellant then placed a second hand on her throat. *Id.* According to SJM, the application of the second hand completely cut off her air supply. *Id.* at 427. She also testified on direct examination that she felt "kind of like this weird fuzzy sensation all over my body and my eyes

[2] *See also* Trial Tr. at 424 ("I did make the statement like 'You could do anything you wanted.'"), 440 ("I did say the statement he could do whatever he wanted").

start to go black and then I lose consciousness." *Id.* Her next memory was of Appellant shaking her and telling her to wake up. *Id.*

On cross-examination, when Appellant's counsel asked SJM about her statements during a sexual assault medical examination conducted later the same night as the strangulation incident, counsel asked SJM to confirm she had said, "As you were having vaginal sex, [']he put his hands on my throat, and it was hard to breathe?'" *Id.* at 462.[3] She replied, "Yes, that is true." *Id.* Later in the cross-examination, SJM characterized that vaginal intercourse as consensual. *Id.* at 488.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *Cabuhat*, 83 M.J. at 770.

This case is subject to this Court's factual sufficiency review authority under the version of Article 66(d)(1)(B), UCMJ, enacted by section 542(b) of the NDAA for FY 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. at 3611–12. Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge V, Specification 2 and, as demonstrated below, makes specific showings of deficiency of proof regarding the credibility of SJM's inconsistent accounts of the strangulation. The evidence is also deficient to establish that SJM did not consent to the strangulation or that Appellant did not reasonably and honestly believe that SJM consented to the strangulation.

[3] The quotation in the text of this filing makes an alteration to correct an obvious punctuation error in the transcript. The first internal quotation mark was moved based on Pros. Ex. 24 at 6. The portion of counsel's question using the second person ("as you were having vaginal sex") was not a direct quotation but a paraphrase.

Argument

The prosecution failed to prove beyond a reasonable doubt either that SJM did not consent to being strangled or that Appellant did not reasonably and honestly believe that SJM consented to being strangled.

First, while testifying under oath, SJM offered two mutually exclusive accounts of the strangulation incident—one during direct examination and the other during cross-examination. *Compare* Trial Tr. at 426–27, *with id.* at 462. During the latter, she agreed that she had previously said the strangulation occurred *during* vaginal intercourse rather than following it. *Id.* at 462. She also testified that the vaginal intercourse was consensual. *Id.* at 488. Those mutually exclusive accounts are far from the only times SJM provided inconsistent testimony under oath. As she conceded on cross-examination, she had continually offered factually untrue testimony under oath during an earlier motion hearing in the case. *Id.* at 468–88. The mutually inconsistent statements of this unreliable witness are insufficient to provide proof beyond a reasonable doubt of an unlawful strangulation. Moreover, this Court should not defer to the members' determination of SJM's credibility because it was tainted by the special trial counsel's impermissible vouching during closing argument, when he told the members that SJM "came in here and she told the truth." *Id.* at 1076; *Fletcher*, 62 M.J. at 180.

Second, even if SJM's direct-examination testimony were to be credited, that testimony established a reasonable possibility that she actually consented to the strangulation or that Appellant reasonably and honestly believed she consented to it. The Court of Appeals for the Armed Forces has defined an assault consummated by a battery as "bodily harm to another . . . done without legal justification or excuse and without the lawful consent of the person affected." *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (quoting Pt. IV, ¶ 54.c.(1)(a), (2)(a),

Manual for Courts-Martial, United States (*MCM*) (2016 ed.)). The court further explained that, "as a general matter, consent 'can convert what might otherwise be offensive touching into non-offensive touching.'" *Id.* (quoting *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 433 (C.M.A. 1994))). Finally, the court noted "that even if an alleged victim did not consent to being touched, an accused cannot be convicted of assault consummated by a battery if the accused mistakenly believed the alleged victim consented and that belief was 'reasonable under all the circumstances.'" *Id.* (citing Rule for Courts-Martial (R.C.M.) 916(j)(1), *MCM* (2016 ed.)). Thus, "a 'reasonable and honest mistake of fact as to consent constitutes an affirmative defense in the nature of legal excuse.'" *Id.* (quoting *Greaves*, 40 M.J. at 433).

Here, SJM consented to the strangulation that formed the basis for Charge V, Specification 2, or, at the very least, created a reasonable and honest mistake on Appellant's part that she had consented by telling him that he could do whatever he wanted to her. Trial Tr. at 424, 440, 490.

At the request of the defense and with the express concurrence of the prosecution, the military judge instructed the members that Appellant was not guilty of the strangulation offense if he reasonably and honestly believed that SJM consented. *Id.* at 995, 995, 999–1000, 1016, 1037. *But see United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016).

The testimony of PDT, Ph.D., whom the military judge recognized as an expert in forensics, Trial Tr. at 952, supports the reasonableness of Appellant's belief that SJM's statement that he could do whatever he wanted to her would include strangulation. Dr. PDT testified that some couples engage in consensual "erotic asphyxiation" for "sexual gratification" because it "enhances sexual pleasure, heightens orgasms, makes them more intense." *Id.* Dr. PDT's testimony suggests that erotic asphyxiation is a sufficiently common practice between consenting adults that

it is reasonable to believe it is included within a blanket consent to "rough sex." Supporting the honesty of Appellant's belief that SJM's statement that he could do whatever he wanted to her included strangulation, DW testified that long before the incident between Appellant and SJM, she would consent to allowing Appellant to place his hands around her neck and apply light pressure. *Id.* at 616.[4] That testimony suggests that Appellant would honestly believe that blanket consent to "rough sex" would include consent to strangulation.

The evidence was insufficient to prove beyond a reasonable doubt either that SJM did not actually consent to the strangulation as part of her agreement to engage in "rough sex" or that Appellant did not reasonably and honestly believe that he could strangle her as part of "rough sex" immediately after she expressly told him that he could do whatever he wanted to her.

For the foregoing reasons, Appellant personally asks this Court to set aside the conviction to Charge V, Specification 2, dismiss that specification with prejudice, and set aside the segmented confinement adjudged for that offense.

[4] On the other hand, DW testified that Appellant would sometimes choke her more roughly that she desired. Trial Tr. at 617, 619–21, 624. The members found Appellant not guilty of domestic violence by unlawfully strangling DW on divers occasions at or near Osan Air Base. Charge Sheet, Charge V, Specification 1; Trial Tr. at 1149.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cody L. KINDRED	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 18 August 2025, Appellant submitted a motion to attach four documents: (1) an order of this court in the case of *United States v. Dawson*, No. ACM 24041, dated 21 March 2025; (2) a second order of this court in *Dawson* dated 10 April 2025; (3) an order of this court in the case of *United States v. Hooker*, No. ACM 24041, dated 9 July 2025; and (4) a declaration by Lieutenant Colonel Allen S. Abrams, Deputy Chief, Air Force Appellate Defense Division, dated 24 January 2025. Appellant contends these documents are relevant to Appellant's assignment of error alleging unreasonable post-trial delay. Appellant contends attaching these documents "falls squarely within [the] authorization for additional factfinding 'when doing so is necessary for resolving issues raised by materials in the record,'" quoting *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

The Government opposes the motion with respect to attachments (1), (2), and (3) because, *inter alia*, these documents are not necessary to resolve an issue raised by material in the record, citing *Jessie*, 79 M.J. at 437.

Having considered Appellant's motion, this court's Rules of Practice and Procedure, and the applicable law, we grant the motion to attach only with respect to attachments (1), (3), and (4). We defer consideration of the applicability of *Jessie*, 79 M.J. at 444, and related case law to these attachments until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case.

Accordingly, it is by the court on this 27th day of August, 2025,

ORDERED:

Appellant's Motion to Attach Documents dated 18 August 2025 is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is

granted with respect to Attachments (1), (3), and (4), and denied with respect to Attachment (2).

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO ATTACH DOCUMENTS**
v.	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred**, United States Air Force, *Appellant*.	)	No. ACM 40607
	)	18 August 2025

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

COMES NOW Appellant, Airman Cody L. Kindred, by and through his undersigned counsel, and moves pursuant to Rule 23.3(b) of this Honorable Court's Rules of Practice and Procedure to attach documents.

Appellant seeks to attach three orders of this Court and one declaration of the Deputy Chief of the Air Force Appellate Defense Division, all of which are relevant to Assignment of Error VI in Appellant's brief, which concerns post-trial delay. Supplementing the record with these materials is permissible for two reasons. First, the Court of Appeals for the Armed Forces has held that Courts of Criminal Appeals may "consider affidavits and gather additional facts through a *DuBay*[1] hearing when doing so is necessary for resolving issues raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). The "entire record" includes

[1] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *See generally* Andrew S. Effron, United States v. DuBay *and the Evolution of Military Law*, 207 MIL. L. REV. 1 (2011). The Military Justice Act of 2016 essentially codified the Courts of Criminal Appeals' *DuBay* authority to remand a case for further factfinding. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2934 (2016) (codified at UCMJ art. 66(f)(3), 10 U.S.C. § 866(f)(3)). The Military Justice Act of 2016 is division E of the National Defense Authorization Act for Fiscal Year 2017. *Id.*, § 5001, 130 Stat. at 2894. *See also* Rule for Courts-Martial 810(f)(1), *Manual for Courts-Martial, United States* (2024 ed.); *United States v. Kibler*, 84 M.J. 603, 613 (A. Ct. Crim. App. 2024) (en banc) (Arguelles, J., dissenting) ("Rule for Courts-Martial 810(f)(1) in essence codifies the *DuBay* fact-finding process . . . .").

not only the record of trial, but also "briefs and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and 'allied papers.'" *Id.* at 440–41. In this case, the "entire record" includes a showing of presumptively unreasonable post-trial delay that triggers a due process analysis. *See United States v. Livak*, 80 M.J. 631, 633–34 (A.F. Ct. Crim. App. 20202). Thus, this case falls squarely within *Jessie*'s authorization for additional factfinding "when doing so is necessary for resolving issues raised by materials in the record." *Jessie*, 79 M.J. at 444.

Second, Appellant seeks relief under this Court's Uniform Code of Military Justice (UCMJ) Article 66(d)(2) authority as an alternative to a finding of a due process violation. *See* Assignment of Error VI, Appellant's Br., 18 Aug. 2025. Unlike the sentence appropriateness provision of the version of Article 66 that applies to this case, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), Article 66(d)(2) does not limit the basis for relief to "the entire record." Rather, it authorizes this Court to grant relief "if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c)." UCMJ art. 66(d)(2), 10 U.S.C. § 866(d)(2). The materials Appellant seeks to attach are part of that demonstration of excessive delay.

Appellant seeks to attach the following:

1. *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. Mar. 21, 2025) (order).
2. *United States v. Dawson*, No. ACM 24041 at 1 (A.F. Ct. Crim. App. Apr. 10, 2025) (order).
3. *United States v. Hooker*, No. ACM 40646 (A.F. Ct. Crim. App. July 9, 2025) (order).
4. Declaration of Deputy Chief, Air Force Appellate Defense Division (Jan. 25, 2025).

The orders of this Court attached as documents 1 through 3 are relevant to demonstrate that

there is a systemic problem within the Department of the Air Force of the Government submitting incomplete records of trial to this Court for docketing.

This Court has granted a defense motion to attach the declaration that is document 4 in at least one other case. *United States v. Evangelista*, No. ACM 40531 (A.F. Ct. Crim. App. Feb. 13, 2025) (order). The document is relevant in this case to demonstrate that Appellant bears no responsibility for the delay in filing his brief that preceded this Court's remand for correction of the record.

For the foregoing reasons, this Court should grant this motion.

Respectfully submitted,

[redacted] [redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 August 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

25 August 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	)))))))))	OPPOSITION TO MOTION TO ATTACH DOCUMENTS Special Panel ACM 40607 (f rev)

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach Documents, dated 18 August 2025.

In Assignment of Error VI in his brief to this Court, Appellant alleges a due process right to timely review issue based on post-trial processing deficiencies that resulted in a remand of his record of trial for correction. Appellant believes his claimed due process violation warrants a windfall of 449 days of additional confinement credit. As part of his claim, Appellant seeks to attach three documents from two separate cases, United States v. Dawson and United States v. Hooker, as well as a declaration from the Air Force Appellate Defense Division's Deputy Chief, Lt Col AA. The Government takes no position on Lt Col AA's declaration.

However, the Government does oppose the attachment of the three documents from the two separate cases. These documents are matters outside the record and are not "necessary to resolve an issue raised by the record" pursuant to United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

This Court is reviewing this case pursuant to Article 66(d), UCMJ.[1] When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

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

Here, Appellant asks this Court to attach three documents from two separate cases that were either previously before this Court (Dawson) or is currently before this Court (Hooker). Appellant claims these documents are "relevant to demonstrate that there is a systemic problem

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

within the Department of the Air Force of the Government submitting incomplete records of trial to this Court for docketing." (App. Mot. at 2-3.)

However, Dawson did not involve a post-trial delay issue related to the completeness of appellant's record of trial. *See* United States v. Dawson, ACM 24041, 2025 CCA LEXIS 182 (A.F. Ct. Crim. App. 28 April 2025). While the appellant in that case did raise an issue regarding the completeness of his record of trial due to missing portions of the audio recording, that appellant never sought post-trial delay relief based on that issue and that case, unlike Appellant's case, was not remanded for record of trial correction. Furthermore, the second document Appellant wishes to attached, this Court's 10 April 2025 Order, did not involve the "completeness" of that appellant's record, but simply ordered 21 pages of transcript and two discs from the record sealed.[2] (*See* Order, 10 April 2025.)

As to Hooker, as Appellant shows within footnote 27 of his brief, this Court's Orders from the previous cases this fiscal year that involved remand are available on LEXIS and, presumably, this Court's Hooker Order will be added in short order. Rather than attach a document from a separate case to this case, Appellant could instead file a Motion of Supplemental Authority once this Court's Hooker Order is listed on LEXIS.

To this point, when citing to newly released court opinions from this Court that are not yet available on LEXIS, parties' appellate briefs submitted to this Court typically do not involve seeking to attach this Court's opinions in those separate case to the case at hand's record. Instead, recognizing that those opinions will inevitably be listed on LEXIS in short order, parties

[2] In fact, this Court's Order specifically highlights that the record was complete prior to this Order, stating, "After review of the Appellant's *complete record of trial*, the court discovered multiple closed sessions conducted in Appellant's case, both captured in the transcript and in the audio recordings, were not properly sealed in accordance with Rule for Courts-Martial (R.C.M.) 1113, *Manual for Courts-Martial*, *United States* (2024 ed.) (2024 *MCM*)." (Id.) (emphasis added.)

typically cite the opinion recognizing this Court has the ability to access its own opinions even if they are not yet listed on LEXIS. The same should hold true in this instance.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion to attach documents.

[redacted]
G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate
Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 25 August 2025 via electronic filing.

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Cody L. KINDRED	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 2 September 2025, Appellant moved this court to reconsider the portion of its order dated 27 August 2025 which denied in part Appellant's 18 August 2025 motion to attach. The Government opposes Appellant's motion for reconsideration.

The denial in question relates to an interlocutory order in the case of *United States v. Dawson*, No. ACM 24041, 2025 CCA LEXIS 182 (A.F. Ct. Crim. App. 28 Apr. 2025), *rev. denied*, __ M.J. __, 2025 CAAF LEXIS 568 (C.A.A.F.) (unpub. op.). This order primarily addresses the need to seal certain materials in and attached to the record of trial in *Dawson*, but in its first paragraph notes that "[the a]ppellant claims that 'failure to include audio recordings corresponding to forty-five percent of the court-martial's written transcript . . . constitute error warranting reversal of the findings and sentence.'" Appellant's assignments of error brief cites this order from *Dawson* for the assertion that "this [c]ourt granted a Government motion to attach missing audio recordings corresponding to 45 percent of the court-martial transcript that were omitted from the record this [c]ourt initially docketed."

Under *United States v. Jessie*, the general rule is that a Court of Criminal Appeals "cannot consider matters outside the 'entire record.'" 79 M.J. 437, 444 (C.A.A.F. 2020). *Jessie* explains the "entire record" means the "record of trial" and "matters attached to the record" in accordance with the Rules for Courts-Martial, as well as "briefs and arguments" by the parties. *Id*. at 440–41 (citations omitted). *Jessie* provides an exception to this general rule where additional information "is necessary for resolving issues raised by materials in the record." *Id*. at 444.

We do not find the order in question from *Dawson* necessary for resolving any issue raised by the record in the instant case. The portion of the order Appellant's brief cites does not reflect any pertinent finding by this court; it merely quotes one of the appellant's claims from *Dawson*. Appellant remains

free to refer to the 21 March 2025 *Dawson* order this court has attached to the record as well as this court's opinion in *Dawson*, cited above.

Accordingly, it is by the court on this 10th day of September, 2025,

ORDERED:

Appellant's Motion for Reconsideration dated 2 September 2025 is **DENIED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION FOR RECONSIDERATION**
v.	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred**, United States Air Force, *Appellant*.	)	No. ACM 40607 (f rev) 2 September 2025

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

Pursuant to Rule 31.1 of this Court's Rules of Practice and Procedure, Appellant, Airman Cody L. Kindred, moves for reconsideration of the portion of this Court's interlocutory order of 27 August 2025 denying his motion to attach an order of this Court. *United States v. Kindred*, No. ACM 40607 (f rev) (A.F. Ct. Crim. App. Aug. 27, 2025) (order). The United States Court of Appeals for the Armed Forces (CAAF) has not obtained jurisdiction of this case because no petition or certificate has been filed at the CAAF. Nor has any other court obtained jurisdiction.

As discussed in greater detail below, under this Court's case law, Air Force-wide evidence of deficient post-trial processing is relevant when assessing whether relief is warranted in this case. *See United States v. Gay*, 74 M.J. 736, 738 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). A prior order of this Court that the 27 August 2025 order declined to attach offers important evidence not available elsewhere concerning a particularly disconcerting example of deficient post-trial processing. *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. Apr. 10, 2025) (order). A motion to attach is the appropriate vehicle for presenting the information from that order for this Court's consideration in this case. Accordingly, this Court should reconsider its 27 August 2025 order and grant Appellant's request to attach the Court's 10 April 2025 *Dawson* order.

Appellant's brief to this Court challenged the post-trial delay in this case, seeking relief under both the Due Process Clause of the Fifth Amendment to the United States Constitution and this Court's authority under Article 66(d)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(2). Appellant's Br. at 45–54. This Court's case law identifies the following factor as one consideration when deciding whether to grant relief for unreasonably post-trial delay: "Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?" *Gay*, 74 M.J. at 738. That inquiry requires consideration of information from outside the record of trial in a particular case. In *United States v. Valentin-Andino*, this Court found "a systemic problem indicating institutional neglect," referring to, *inter alia*, four records of trial from other cases missing audio recordings of some or all open court-martial sessions. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024), *aff'd*, 85 M.J. 361 (C.A.A.F. 2025). That opinion expressly referred to the extent of the missing audio recordings in each of those cases. *Id.*

In this case, the Government initially offered for docketing a record of trial missing audio recordings of the first two days of the court-martial. Under *Gay* and *Valentin-Andino*, a significant question about the post-trial delay in this case is whether that failure is part of a larger institutional problem of the Government submitting records of trial to this Court with missing audio recordings. To demonstrate that it is, Appellant's brief called this Court's attention to, among other cases, *United States v. Dawson*, No. ACM 24041. Appellant's brief noted that in *Dawson*, "missing audio recordings corresponding to 45 percent of the court-martial transcript . . . were omitted from the record this Court initially docketed." Appellant's Br. at 50. *Gay* and *Valentin-Andino* establish that both the *fact* of the missing audio recordings and the *extent* of the missing audio recordings are germane. Appellant's brief cited two orders from this Court to establish those facts: *United States*

v. Dawson, No. ACM 24041 (A.F. Ct. Crim. App. Mar. 21, 2025) (order), and *Dawson*, No. ACM 24041, at 1 (A.F. Ct. Crim. App. Apr. 10, 2025) (order). Rule 18(e) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP) provides that "[i]f an unpublished opinion is cited in the brief, a copy may be attached in the appendix." JRAP 18(e). On the other hand, "[a] motion must be filed under Rule 23 to attach any" matter other than an unpublished opinion, or an extract of a statute, rule, or regulation. *Id.*

The *Dawson* documents were orders rather than opinions. Accordingly, JRAP 18(e) suggests that the brief's citation to them should be supported by a motion pursuant to JRAP 23. Appellant filed such a motion. *See* Appellant's 18 August 2025 Motion to Attach. Significantly, this Court's 10 April 2025 *Dawson* order and *not* this Court's 21 March 2025 *Dawson* order indicates that audio recordings corresponding to 45 percent of the court-martial's written transcript were omitted from the *Dawson* record of trial as originally docketed. That information is necessary to support the point Appellant made in his brief and is the kind of information this Court considered significant in *Valentin-Andino*. Yet, this Court's 27 August 2025 order, without explanation, denied the portion of Appellant's motion seeking to attach that Court order.

There is no apparent reason this Court should be reluctant to receive and consider one of its own orders. The 10 April 2025 *Dawson* order provides the kind of information this Court has previously relied on when assessing whether to grant relief for post-trial delay. This Court should, therefore, reconsider its 27 August 2025 order, attach the 10 April 2025 *Dawson* order to the record, and consider that order when determining whether the Department of the Air Force has "a systemic problem indicating institutional neglect"[1] in providing complete records of trial to this Court. (Spoiler Alert: it does.)

[1] *Valentin-Andino*, 2024 CCA LEXIS 223, at *17.

For the foregoing reasons, Appellant respectfully requests that this Court grant this motion for reconsideration and grant Appellant's 18 August 2025 motion to attach in full.

Respectfully submitted,

[redacted] [redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 September 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

5 September 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	OPPOSITION TO MOTION FOR RECONSIDERATION
v.	)	Special Panel
Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	)	ACM 40607 (f rev)

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

Pursuant to Rule 31(c) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Reconsideration, dated 2 September 2025.

On 18 August 2025, Appellant filed a Motion to Attach Documents, which included four documents. The Government partially opposed the motion. On 27 August 2025, this Court granted in part and denied in part Appellant's motion, granting with respect to Attachments 1, 3, and 4 and denying with respect to Attachment 2. Appellant now asks this Court to reconsider that denial.

Appellant fails to make a showing of good cause for this Court to reconsider its order as required by Rule 31.1 of this Court's Rules. In response to Appellant's reconsideration motion, the Government stands on its original opposition to Attachment 2 contained within the Opposition to Motion to Attach Documents filed with this Court on 25 August 2025.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's Motion for Reconsideration.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 5 September 2025 via electronic filing.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

17 September 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Special Panel
Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	)	ACM 40607 (f rev)

ANSWER TO ASSIGNMENTS OF ERROR

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

INDEX

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

FEDERAL COURTS

17 September 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	))))))))	ANSWER TO ASSIGNMENTS OF ERROR Special Panel ACM 40607 (f rev)

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

ISSUES PRESENTED

I.

[WHETHER] [T]HE EVIDENCE SUPPORTING CHARGE II, SPECIFICATION 3, WHICH ALLEGED APPELLANT PENETRATED SJM'S ANUS WITH HIS PENIS BY FIRST RENDERING HER UNCONSCIOUS BY STRANGLING HER WITH HIS HANDS, IS FACTUALLY INSUFFICIENT BECAUSE WHEN ASKED BY LAW ENFORCEMENT AGENTS WHETHER THE ANAL SEX WAS CONSENSUAL, SJM REPLIED "I WANT TO SAY, YES," AND ADDED THAT SHE "WASN'T ENTIRELY SURE DUE TO THE FACT [SHE] WAS INTOXICATED AND HAD SPOTTY MEMORY[?]"

II.

[WHETHER] [T]HE EVIDENCE SUPPORTING CHARGE V, SPECIFICATION 4, DOMESTIC VIOLENCE, IS FACTUALLY INSUFFICIENT BECAUSE SJM ACKNOWLEDGED THAT, DURING A DISCUSSION OF "ROUGH SEX" THAT PRECEDED THE BITING, SHE TOLD APPELLANT, "YOU CAN DO WHATEVER YOU WANT," OR WORDS TO THAT EFFECT, THEREBY ESTABLISHING EITHER THAT THE BITING WAS NOT UNWELCOME OR THAT APPELLANT HAD A REASONABLE AND HONEST MISTAKE OF FACT AS TO WHETHER THE BITING WAS UNWELCOME[?]

III.

[WHETHER] THE EVIDENCE SUPPORTING CHARGE I, COMMUNICATING A THREAT, AND ITS SPECIFICATION IS FACTUALLY INSUFFICIENT BECAUSE NO EVIDENCE INDICATED THAT APPELLANT UTTERED THE CHARGED LANGUAGE OR SIMILAR WORDS[?]

IV.

[WHETHER] THE EVIDENCE SUPPORTING CHARGE III, KIDNAPPING, AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THE EVIDENCE DID NOT ESTABLISH THAT THE INCIDENT—WHICH THE ALLEGED VICTIM TESTIFIED MAY HAVE LASTED AS LITTLE AS FIVE MINUTES—CONSTITUTED HOLDING OF THE ALLEGED VICTIM AS THAT TERM IS USED FOR PURPOSES OF THE KIDNAPPING PUNITIVE ARTICLE[?]

V.

[WHETHER] THE SPECIAL TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY INDIRECTLY COMMENTING ON APPELLANT'S FAILURE TO TESTIFY, DIRECTLY VOUCHING FOR THREE PROSECUTION WITNESSES' CREDIBILITY, AND USING PERSONAL PRONOUNS WHILE OFFERING HIS PERSONAL OPINION OF THE STRENGTH OF THE EVIDENCE[?]

VI.

[WHETHER] THE GOVERNMENT'S EGREGIOUS POST-TRIAL PROCESSING DEFICIENCIES, INCLUDING IRRETRIEVABLY LOSING A PORTION OF THE AUDIO RECORDING OF THE TRIAL AND OMITTING SOME OTHER AUDIO RECORDINGS FROM THE RECORD OF TRIAL ORIGINALLY DOCKETED WITH THIS COURT, THEREBY NECESSITATING A REMAND FOR CORRECTION OF THE RECORD, VIOLATED APPELLANT'S DUE PROCESS RIGHT TO TIMELY REVIEW OF HIS CONVICTIONS OR, IN THE ALTERNATIVE, WARRANT A REDUCTION IN THE SENTENCE UNDER THIS COURT'S ARTICLE 66(D)(2),

UNIFORM CODE OF MILITARY JUSTICE, AUTHORITY[?]

VII.

[WHETHER] APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF OFFENSES WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY[?]

VIII.[1]

[WHETHER] THE EVIDENCE SUPPORTING CHARGE II, SPECIFICATION 4 AND THE LESSER-INCLUDED OFFENSE OF SPECIFICATION 2 IS FACTUALLY INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT BECAUSE IT WAS LIMITED TO THE UNCORROBORATED TESTIMONY OF DW, WHO WAS NOT A SUFFICIENTLY CREDIBLE WITNESS TO SUPPORT A CONVICTION BASED ON HER WORD ALONE[?]

IX.

[WHETHER] THE EVIDENCE SUPPORTING CHARGE V, SPECIFICATION 9, ALLEGING DOMESTIC VIOLENCE AGAINST DW BY ASSAULT CONSUMMATED BY A BATTERY, IS FACTUALLY INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT BECAUSE DW HERSELF TESTIFIED THAT SHE "DIDN'T KNOW" WHETHER THE ALLEGATION THAT APPELLANT HIT HER IN THE FACE "WAS TRUE OR NOT" AND THE EVIDENCE BEFORE THE MEMBERS PRESENTED A REASONABLE POSSIBILITY OF AN ALTERNATIVE CAUSE OF HER INJURIES[?]

X.

[WHETHER] THE EVIDENCE SUPPORTING CHARGE V, SPECIFICATION 2, ALLEGING DOMESTIC VIOLENCE AGAINST SJM BY STRANGULATION, IS FACTUALLY

[1] Issues VIII through X, listed as Issues I through III in the appendix of Appellant's brief, are raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT BECAUSE: (1) SJM'S TESTIMONY OFFERED TWO MUTUALLY EXCLUSIVE ACCOUNTS OF THE ALLEGED STRANGULATION; AND (2) DURING A DISCUSSION OF "ROUGH SEX" THAT, ACCORDING TO ONE OF HER ACCOUNTS, PRECEDED THE STRANGULATION, SHE TOLD APPELLANT, "YOU CAN DO WHATEVER YOU WANT," OR WORDS TO THAT EFFECT, THEREBY ESTABLISHING EITHER THAT THE STRANGULATION WAS NOT UNWELCOME OR THAT APPELLANT HAD A REASONABLE AND HONEST MISTAKE OF FACT AS TO WHETHER THE STRANGULATION WAS UNWELCOME[?]

STATEMENT OF THE CASE

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

Appellant faced the following charges and specifications at trial:

- ***SJM***

The Specification of Charge I (Communicating a Threat), Specification 3 of Charge II (Rape), Specification 2 of Charge V (Domestic Violence – Assault by Strangling), and Specifications 4, 5, 6 and 7 of Charge V (Domestic Violence – Commission of a Violent Offense) involved SJM. The Specification of Charge I, in violation of Article 115, UCMJ, alleged Appellant threatened to hit SJM on or about 7 June 2022, by stating, "If you do not stop crying, I will hit you," or words to that effect. (ROT, Vol. I, Charge Sheet.) The member panel convicted Appellant of this specification.[2]

Specification 3 of Charge II, in violation of Article 120, UCMJ, alleged Appellant penetrating SJM's anus with his penis by first rendering her unconscious by strangling her with

[2] Appellant challenges this conviction for factual sufficiency in Issue III of his brief. (App. Br. at 2.)

his hands on or about 7 June 2022. (Id.) The member panel convicted Appellant of this specification.[3]

Specification 2 of Charge V, in violation of Article 128b, UCMJ, alleged Appellant committed an assault upon SJM, an intimate partner, on or about 7 June 2022, by strangling her with his hands. (Id.) The member panel convicted Appellant of this specification.[4]

Specifications 4, 5, 6 and 7 of Charge V, also in violation of Article 128b, UCMJ, alleged Appellant committed violent offenses against SJM on or about 7 June 2022 by biting her hand (Specification 4), raising his hand as if to strike her (Specification 5), striking her on her face with his hand (Specification 6), and grabbing her hair with his hand and slamming her head against a wall (Specification 7). (Id.) The member panel convicted Appellant of Specifications 4, 5 and 6, and acquitted Appellant of Specification 7.[5]

- ***ACS***

The Specification of Charge III (Kidnapping) and the Specification of Charge IV (Assault) involved ACS. The Specification of Charge III, in violation of Article 125, UCMJ, alleged Appellant wrongfully seized and held ACS against her will on or about 21 June 2021. (ROT, Vol. I, Charge Sheet.) The member panel convicted Appellant of this specification.[6]

---

[3] Appellant challenges this conviction for factual sufficiency in Issue I of his brief. (App. Br. at 1.)

[4] Pursuant to Grostefon, Appellant challenges this conviction for factual sufficiency in Issue X of his brief (listed as Issue III of Appellant's Appendix). (App. Br. at 2.)

[5] Appellant challenges his conviction of Specification 4 of Charge V for factual sufficiency in Issue II of his brief. (App. Br. at 1.) Appellant does not challenge his convictions of Specifications 5, 6 or 7 for legal or factual sufficiency purposes.

[6] Appellant challenges this conviction for legal and factual sufficiency in Issue IV of his brief. (App. Br. at 2.)

The Specification of Charge IV, in violation of Article 128, UCMJ, alleged Appellant wrongfully grabbed ACS on her arm and face with his hand. (Id.) The member panel convicted Appellant of this specification.[7]

- ***DMW***

Specifications 1, 2, and 4 of Charge II (Rape, Sexual Assault), Specification 1 of Charge V (Domestic Violence – Assault by Strangling), Specifications 3 and 9 of Charge V (Domestic Violence – Commission of a Violent Offense), Specification 8 of Charge V (Domestic Violence – Commission of a UCMJ Violation Against Property of an Intimate Partner), and Specifications 1 and 2 of Charge VI (Obstructing Justice) involved DMW.

Specification 1 of Charge II, in violation of Article 120, UCMJ, alleged Appellant penetrating DMW's vulva with his penis by using unlawful force between on or about 1 March 2022 and 31 March 2022 at Osan Air Base. (Id.) The panel acquitted Appellant of this specification.

Specification 2 of Charge II, in violation of Article 120, UCMJ, alleged Appellant penetrating DMW's anus with his penis by using unlawful force between on or about 1 March 2022 and 31 March 2022 at Osan Air Base. (Id.) The panel acquitted Appellant of this specification, but convicted him of the lesser-included offense of Sexual Assault.

Specification 4 of Charge II, in violation of Article 120, UCMJ, alleged Appellant penetrating DMW's vulva with his penis by using unlawful force between on or about 1 March

[7] Appellant does not challenge this conviction for legal or factual sufficiency purposes.

2021 and 31 March 2022 at Osan Air Base. (Id.) The member panel convicted Appellant of this offense.[8]

Specification 1 of Charge V, in violation of Article 128b, UCMJ, alleged Appellant committed an assault upon DMW, an intimate partner, between on or about 1 March 2021 and 31 March 2022 at Osan Air Base, by strangling her with his hands. (Id.) The member panel acquitted Appellant of this specification.

Specifications 3, 8 and 9 Charge V, also in violation of Article 128b, UCMJ, alleged Appellant committed violent offenses against DMW. Specification 3 alleged Appellant bit DMW's face between on or about 1 December 2021 and 31 December 2021 at Osan Air Base. The member panel acquitted Appellant of this specification. Specification 8 alleged Appellant committed a UCMJ violation against DMW, an intimate partner, by destroying property, namely ripping a part of DMW's black pants. The member panel convicted Appellant of this specification. Specification 9 alleged Appellant struck DMW's face with is hand on or about 20 December 2022 at Hill Air Force Base. The member panel convicted Appellant of this specification.[9]

Specification 1 of Charge VI, in violation of Article 131b, UCMJ, alleged Appellant instructed DMW on or about 15 July 2022 to not call or talk to the Air Force Office of Special Investigations (AFOSI). The member panel acquitted Appellant of this specification.

---

[8] Pursuant to Grostefon, Appellant challenges the conviction of Specifications 2 and 4 of Charge II for factual sufficiency in Issue VII of his brief (listed as Issue I of Appellant's Appendix). (App. Br. at 2.)

[9] Pursuant to Grostefon, Appellant challenges the conviction of Specification 9 of Charge V for factual sufficiency in Issue IX of his brief (listed as Issue II of Appellant's Appendix). (App. Br. at 2.) Appellant does not challenge his conviction of Specification 8 for legal or factual sufficiency purposes.

Specification 2 of Charge VI, in violation of Article 131b, UCMJ, alleged Appellant instructed DMW on or about 20 December 2022 to provide false information to law enforcement about how she sustained facial injuries. The member panel convicted Appellant of this specification.[10]

STATEMENT OF FACTS

- ***Offenses involving SJM***

On the night of 7 June 2022, Detective (Det) TO of the Buckeye Police Department, was working as a patrol officer when he responded to an incident. (R. at 409-10.) There, he came across SJM who had "was in the middle of the street with her friend [SrA AO] sobbing loudly." (R. at 410.) Det TO said SJM had "some pink and red marks on the bottom of her neck." (Id.) Prosecution Exhibit 7, which was played to the members at trial, is bodycam video footage taken by Det TO that night. (R. at 411.) The video shows SJM sobbing, shaking and holding her arms across her body.

On cross-examination, Det TO agreed that when he talked to SJM that night she, at one point, told Det TO that it was her fault and that she "told him he could do whatever he wanted." (R. at 413.)

SJM met Appellant in May 2022 when Appellant was assigned to SJM's Security Forces flight. (R. at 416.) About a week after they met, the two began a friendship that turned into a sexual relationship. (Id.) Prior to 7 June 2022, SJM testified that she had consensual sex with Appellant four to five times. (R. at 417.) No slapping or choking occurred during those encounters, and SJM testified that she never told Appellant she was okay with any of that activity before 7 June. SJM said prior to 7 June, Appellant had never physically hurt her. (Id.) The two had also never had anal sex prior to 7 June. (R. at 420.)

[10] Appellant does not challenge this conviction for legal or factual sufficiency purposes.

SJM was set to PCS at the time to Guam, but that PCS had been delayed due to a sexual assault allegation made against SJM by her child's father that SJM had forced him to have sex while intoxicated. (R. at 418.) SJM found out about the investigation about two to three months before 7 June. (R. at 419.) However, no charges were brought against SJM, and her orders to Guam were not cancelled.

On 7 June 2022, SJM went to Appellant's dorm room – the two planned to have a movie night. SJM brought some shooters, a bottle of wine, drink mix, and a pizza. (R. at 420.) At one point, the two began to have consensual vaginal sex. When asked if she consented to anal sex with Appellant, SJM testified, "Not to my recollection, no," explaining that they had never discussed anal sex prior to that night, and it was not part of their "typical sexual engagements." (Id.)

Once the couple finished having consensual sex, the movie was still playing. After about 30 minutes to an hour, SJM got up and walked over to the sink to wash her hands. (R. at 421.) SJM testified that Appellant walked behind her. When she turned to face him, SJM said Appellant "slapped me across my face." (Id.)

SJM said Appellant hitting her was "a very confusing moment" because he had never shown any aggression towards her. (R. at 423.) She testified that Appellant "went back and sat at the edge of the bed" facing the television. SJM went to sit on the bed as well and started "provoking a conversation, essentially saying that he likes to do things that he would do with his ex-girlfriend often and that he did not think that I would enjoy those things." (R. at 424.) When SJM asked him what he meant, SJM said Appellant "categorized it was rough sex." (R. at 425.)

SJM continued testifying, "I do believe there was like after we had that conversation around that time, I did make the statement like 'You could do anything you wanted.' Again, just

not fully understanding, I guess, what he had meant to do to me that night." (Id.) When asked what she meant by saying he could do anything he wanted, SJM testified, "I guess I just thought rough sex was, you know, maybe, like, light slapping on, like, you know, butt, maybe like, hair pulling, just – I don't – I guess it's just normal rough sex activity, something that's, you know, you're still getting pleasure out of. It's not supposed to hurt you. It's not supposed to scare you." (Id.)

At that point, SJM said Appellant "turned around and place[d] one of his hands onto my throat," and she began to "get kind of pushed backwards a little bit." (R. at 425-26.) SJM testified that she "immediately struggled to breathe really badly with just the one hand on my throat," adding, "I just felt I was losing a lot of air at the time." (R. at 426.) When asked if this act was what she meant when she said Appellant could do what he wanted, SJM replied, "No." When asked if she did anything to let Appellant know that was not what she wanted, SJM said, "Yes," and that she "asked him, 'Can you please stop?'" (Id.) SJM testified that Appellant "said something along the lines of, 'Oh, you don't want me to stop' or 'you want me to continue,'" while looking directly at her face, and then placed his other hand on her throat. (Id.)

SJM said Appellant "looked scary," and that she had "never really seen him look that way before," adding that it felt like she was "looking at somebody else." (R. at 427.) SJM said Appellant's second hand "completely cut my airway off," that her eyes started to go black, and that she lost consciousness. (Id.)

The next thing she remembered was Appellant "shaking me awake" and "yelling at me to wake up." (Id.) SJM said she was still on the bed and that Appellant "looked scary, just mad, irritated." (R. at 428.) When she woke up, SJM was only wearing a t-shirt and said that prior to

being choked she was also wearing black shorts. (Id.) SJM said she put those shorts on after the two had consensual sex earlier, but then the shorts were off after Appellant shook her awake.

SJM said when she woke up, she was "hyperventilating and, like, just crying a lot." (R. at 429.) SJM said she was "terrified," and that she had "never been, like, strangled unconscious before." SJM said she slid off the bed, put her back against a wall and her knees to her chest, and continued to cry. SJM testified that Appellant started "hitting me on the left side of my face many times and he's telling me to stop crying," and that "he said that if I don't stop crying, something along the lines of, like, I'll find out what happens." (R. at 430.) SJM said she was "already scared" and was "just terrified."

SJM then testified that Appellant "basically tells me to get up and, like, grabs me by my shirt and drags me into the bathroom and has me take my shirt off, and he tells me to get into the shower and wash up, and then he gets into the shower as well." (R. at 431.) Appellant told SJM to wash her hair, face, and whole body. SJM testified that Appellant stood towards the back of the shower while she was bathing and that he "raised his hand numerous times acting like he was going to hit me again. Every time he did so, I flinched; and when I would flinch, he started laughing at me." (R. at 432.)

Appellant then left the bathroom. SJM was able to get to her phone and text her friend SrA OA. (R. at 433.) The text read, ""If I go missing or something happens to me and you don't hear from me tomorrow, [Appellant] is the one who did it, and he's part of the 56th Security Forces Squadron." (Id.) SJM also sent SrA OA her location. SJM testified that she did not know what was going to happen when she left the bathroom, adding, "I was just scared that he could kill me." (Id.) SJM also took pictures of the bathroom, which are contained in

Prosecution Exhibit 1. SJM said, "In the event that something did happen, [SrA OA] would be able to get my phone and they would see those." (Id.)

One of the pictures SJM took was of her thighs, which show bruises, her face, and a picture of a bite mark on her hand. (R. at 434; Pros. Ex. 1.) SJM said she did not recall Appellant doing that while she was awake.

SJM said she dried off, put her shirt back on, and exited the bathroom. She said she did not remember if she saw Appellant but felt she "had an opportunity" to grab her things and leave. She testified, "I was fast and in a hurry. I just put my shorts on, grabbed my bag that already had all my stuff stand inside of it, and I just grabbed it and I ran out the front door." (R. at 435.) SJM said, "I was scared that if I stayed or if he was able to make me stay, I would either continue to get beat the rest of the night or he would end up killing me." (Id.)

SJM said she ran down the stairwell straight to her car and immediately started driving. SJM said she called SrA OA multiple times, finally reached her, and talked to her the whole ride home, which was 30 to 35 minutes. (R. at 436.) SJM said she was not able to tell SrA OA much, but that she was crying the whole time and talked about how scared she was.

SJM said she initially did not notice any pain in her anal area because of everything else that was going on at the time. However, once she arrived at SrA AO's house (which is where SJM had been staying), she noticed pain in her anal area and fluid which she believed to be semen. (Id.)

Unbeknownst to SJM, SrA AO had called the police, who arrived almost immediately after SJM arrived at SrA AO's house. (R. at 437.) SJM testified that in the moment she did not want SrA AO to call the police because she "wasn't ready to report," adding, "I wasn't intending to report in that moment." When asked why she did not want to immediately report, said, "I

didn't even get time to process what happened," adding, "as mentioned earlier, I was already, you know, dealing with my Article 120 accusation, and I was too scared that if I had brought something like this up, they just wouldn't believe." (Id.) SJM said she just "wanted to just go to Guam and start my new job and I just didn't want anything to stop that." (R. at 438.)

When the officers arrived, SJM testified, "I said I am not going to tell them the name nor will I tell them specifics of what happened as far as location and such." (Id.) SJM then went to the Scottsdale Hospital where she had a SANE examination.

About a week later, the Air Force Office of Special Investigations (AFOSI) reached out to her about what happened. (R. at 440.) At that point, SJM said she was not willing to report what had happened and did not want to discuss anything related to it, adding, "I even went as far as just telling them that it was specifically not [Appellant]." (Id.) SJM said this was not true, but explained why she said it:

> I think I again hadn't even processed what happened; and in the moment, there was a lot of just emotions on whether I questioned if I – if it was my fault or like should I have done something differently because, you know, I did say the statement he could do whatever he wanted, so I just had a lot of blame on myself and also the fear of I just didn't want him to know that an investigation was starting because we still were working on the same flight together and I just was scared of what would happen if he found out.

(R. at 440-41.)

SJM said she also made the decision to see Appellant again after the incident because she "just didn't process really what happened to me and again I just didn't know whether to blame myself and if it was really my fault," adding that she was "seeking answers on, you know, why this happened, so I did make the decision to see him again to try to process everything." (R. at 441.) SJM testified that Appellant told her "basically along the lines of 'well, you did say I could do whatever I wanted to you,' so he just kind of kept saying that I told him he could." (Id.)

About a month after the incident, SJM received a Facebook message from DMW. (R. at 442.) DMW had been contacted by AFOSI, who gave DMW SJM's contact information. SJM had never met DMW or ever heard her name. DMW told SJM that she was Appellant's girlfriend at the time. SJM said she had no prior knowledge that Appellant was dating anyone. (R. at 443.)

Prosecution Exhibit 23 are the Facebook messages between DMW and SJM. (R. at 445.) SJM said she was "a bit standoffish" at first with DMW, so the two agreed to have a phone conversation. (R. at 444.) SJM agreed that the phone conversation with DW made her feel more comfortable and that she felt inspired to talk to AFOSI and report what happened to her.

On cross-examination, when asked if she had any sexual contact with Appellant after 7 June 2022, SJM replied, "I do not think so. Again, we did still hang out a few more times, but I do not think sexual contact was a part of it." (R. at 459.) SJM also acknowledged on cross-examination that she had previously testified in a separate hearing that she had had no interactions with Appellant after 7 June 2022. (R. at 471-73.) On re-direct examination, SJM agreed that, at the time she made the statements in the prior hearing, she did not think that she had spent time with Appellant after the attack, and that she believed those statements were true when she made them. She explained, "I think after going through that experience, I just truly never fully processed it, and I think my coping mechanism was just to try to forget everything related to that situation as much as possible so I could try to live a normal life." (R. at 497.)

SJM said she first became aware that what she had said at the previous hearing was not accurate a few days before her current testimony, stating, "When I was actually able to review all of my previous testimonies with OSI and then also the text messages that were provided from my

team and the government." (R. at 498.) SJM agreed that it was not her intention to mislead anyone. When asked how she felt when she saw those messages, SJM said:

> It makes you look not credible. You feel dumb because it's like something like that I just thought you should have been able to remember. Again, I was just trying hard to just forget that situation so I could just move forward. So I just, yeah, I felt kind of dumb.

(Id.)

SJM and Appellant's trial defense counsel also had the following exchange:

> DC: You also made some statements about the sexual nature of what happened between you and [Appellant] on June 7th. So I want to ask you: Is it true that you told – one of the statements you made to OSI was that the sex between – anything sexual that happened between you and [Appellant] was consensual?
>
> SJM: Yes, prior to the attack, yes.
>
> DC: Well, you didn't say that. The quote is "any sex that happened between me and him that evening was consensual."
>
> SJM: Yes. As far as like regular vaginal sex, yes.
>
> DC: So when you went on to clarify a few seconds later in the interview that "everything that happened between me and him that night was consensual."
>
> SJM: Yes. As far as regular sex, yes.
>
> DC: You did not say regular sex.
>
> SJM: No, but that is what I was referencing to.
>
> DC: But in that same interview or in a subsequent interview that's when you told them that the anal sex was consensual?
>
> SJM: I said I want to say, yes, but I wasn't sure. I didn't remember. I believe that's what I had said.
>
> DC: They asked you: "Was the anal sex consensual?," and you said "I want to say, yes"?

SJM: I wanted to, yes, but I also expressed I wasn't entirely sure due to the fact I was intoxicated and had spotty memory.

DC: So you're saying that he strangled you and you went unconscious, right?

SJM: Yes.

DC: And you were clothed when he strangled you?

SJM: Yes. To my memory, yes. My shorts were on, yes.

DC: And so he strangled you, and then you woke up, right?

SJM: Yes.

DC: And your pants were off?

SJM: Yes.

DC: He had bitten your hand?

SJM: Yes.

DC: Removed your pants?

SJM: I am only assuming so, yes.

DC: And anally raped you?

SJM: Again, I told them from the beginning I wasn't entirely sure. I just don't recall that specific act happening.

DC: So all these things you're describing just happened while you were unconscious from being strangled?

SJM: I could only assume so. Again, I'm not entirely sure what happened to me when I was unconscious.

(R. at 488-89.)

SrA AO testified that SJM was living with her on 7 June 2022. (R. at 506.) Late that night, SrA AO was asleep when she received a call from SJM. SrA SO did not answer. However, when SJM then immediately called SrA AO's husband's phone, SrA AO picked up

and immediately heard "intense crying and sobbing" from SJM. (R. at 508.) SrA AO said the only thing she got out of SJM was "I thought he was going to kill me." SrA AO said SJM said this "a handful of times." SrA AO said SJM could not catch her breath and was "choking on air." (Id.)

As she was talking to SJM, SrA AO said she saw the text message SJM had sent her earlier. SrA AO testified, "I texted off of my phone 9-1-1 directly because I saw that [SJM] sent me a message of the person she was with, her exact location, and she stated that 'If you don't see me and if you I don't come home tonight,' something along those lines, 'this is the person I was last with . . . ." (R. at 509.) SrA AO identified Prosecution Exhibit 3 as the text message she received from SJM.

Though she could not recall if SJM told her on the phone or not, SrA AO testified that SJM "did end up telling me what happened." (R. at 510.) SrA AO believed the conversation happened on the phone, but could not 100% guarantee, adding that the two talked on the way to the hospital as well. (R. at 512.) SrA AO testified:

> [SJM] provided that while she was with the individual named in that text message, [Appellant], that he had choked her while they were having sexual relations and brought her to the point of passing out; and in order to wake her up, he started hitting her in the face and the chest and beating her. And that afterwards that he forced her to take a shower and watched her do it. That he pretended to hit her in the shower just to watch her flinch and he laughed after he did that; and that as soon as she had a moment where she couldn't see him anymore, she ran to her car and drove immediately to my house.

(R. at 510.) SrA AO testified that when SJM arrived at the house that night, she had "bruise marks on her neck and her thighs." (Id.) SrA AO said the marks on SJM's neck appeared as if a hand was placed on it. (R. at 511.)

On cross-examination, SrA AO highlighted that she specifically asked SJM "if she said stop at any point to which she replied yes, and that she asked him to stop prior to continuing to choke her and beat her." (R. at 514.)

Ms. SK was the SANE nurse who performed the examination of SJM on 7 June 2022. (R. at 518-19.) Ms. SK stated that SJM showed symptoms consistent with strangulation, including injuries on both sides of her neck, the back and front of her neck, as well as the inside of her eye and on her cheek. (R. at 526-27.) Ms. SK also noted injuries to SJM's anus, including a contusion and abrasion, and a bite mark on SJM's hand. (R. at 529-30.) Notably, Ms. SK noted that the bite mark was "patterned," which meant she could "specifically see like teeth marks or I can specifically see that there was a bite mark there." (R. at 530.)

Anal swabs were also taken during the examination. An expert from USACIL confirmed that the swabs contained sperms cells from Appellant. (R. at 560.)

Ms. SK's report is at Prosecution Exhibit 24. (R. at 523.) The report states that SJM told Ms. SK, "I was at a guys house and we were having sex. At first it was consensual, only vaginal." (Pros. Ex. 24 at 6.) The report narrative also states that SJM said Appellant put his hands on her, that she told him to stop, and that he said, "oh you want me to keep doing it," and then proceeded to choke her until she passed out. She was then awoken by Appellant shaking her and screaming at her. (Id.)

During his case-in-chief, Appellant called Dr. PT, who was recognized as an expert in forensics. (R. at 952.) Dr. PT testified that it takes five to 10 seconds for a person to lose consciousness who is being strangled. (R. at 953.) She said that at 15 seconds, a seizure could be caused as well as a loss of bladder control. (R. at 954.) At 30 seconds, a person could lose bowel control and at a minute, death could occur. (Id.)

Once the pressure is released, Dr. PT said a person would regain consciousness in a second or two, adding that the longer the strangle hold was held, the longer it would take to regain consciousness. (Id.)

On cross-examination, however, Dr. PT agreed that pressure could be applied, let go long enough for blood to start going back to the brain, and then pressure reapplied, and that this process could go on for much longer than a minute. (R. at 960.) Dr. PT also agreed that just because someone regained consciousness did not mean that they were aware of what was going on around them. When asked, "When you say that they become conscious within a couple seconds, that doesn't mean that they're jumping up, pulling memories, and everything is just fine, does it," Dr. PT answered, "No." (Id.) Dr. PT testified, "It may take them a minute to refocus." When asked, "And during that minute that it takes time to realize what's going on, if pressure is then reapplied to that person's neck, they could become unconscious again," Dr. PT replied, "Yes, they could." (Id.) Dr. PT also agreed that if this process were to happen multiple times, permanent brain damage would not necessarily occur, even if it lasted more than a couple of minutes. (R. at 961.) Dr. PT also agreed that a victim of strangulation might be impaired as to their sense of time and knowing how long they were unconscious. (Id.)

When asked if it was possible for a person to be raped while unconscious from strangulation, Dr. PT replied, "As long as the pressure is maintained, yes." (R. at 962.) Dr. PT also agreed that all the symptoms mentioned by SJM during her testimony, including severe headache, memory loss, redness on the sides and front of the neck, swelling around the cheeks, petechiae on the face, neck and eyes, were all symptoms of strangulation. (R. at 963-64.)

- ***Offenses involving ACS***

In June 2021, ACS was assigned with Appellant and DMW at Osan AB, Korea. (R. at 578.) All were Security Forces members in the same flight. ACS testified that she met Appellant and DMW around the same time in June 2021. (R. at 580.) ACS and DMW became roommates in the dorms. Each dorm room had two separate bedrooms, but had a common area, kitchen, and bathroom. (R.at 579.) ACS said she and Appellant interacted because he and DMW were in a relationship, so if she was around DMW, Appellant would be there too. (R. at 580.)

On 21 June 2021 at approximately 0200 hours, ACS was coming up to her dorm room from doing her laundry when she encountered Appellant trying to unlock her and DMW's dorm room door – the door was locked by a padlock. (R. at 583.) ACS said Appellant smelled of alcohol and was fumbling with the padlock. (R. at 584.) On cross-examination, ACS agreed that Appellant was very drunk and disoriented. (R. at 594.) ACS said Appellant kept doing the padlock wrong and got frustrated, but when she offered to do it for him, Appellant said, "no," and kept attempting to unlock it. (R. at 584.) Eventually he opened the door.

Once in the common area, ACS told Appellant she was looking for a trash bag. ACS testified, "He just like looks at me kind of weirdly, and then shakes his head, no, and then I'm like, okay, so then like – like that's a little weird, but okay," adding that it was weird because "he was being kind of off, like, wasn't saying anything . . . It was just off." (R. at 585.) Shortly after that, ACS said Appellant "started shoving me against the corner – into the corner with his hands . . . ." (Id.) ACS demonstrated to the court that Appellant made fists with his hands and put them out in front of his body. ACS said Appellant then the upper parts of her arms and "started shoving me into the corner and then shaking me . . . ." (R. at 586.)

When asked how hard he was shaking her, ACS said, "It was pretty hard. I was just, like, kind of nervous and scared." (Id.) Appellant then started asking ACS, "Where is [DMW]?" When ACS said she did not know, Appellant repeated said, "You're lying." ACS explained, "He was shaking me asking where [DMW] is, and then he starts grabbing my face, and then I said 'I don't know where she is.' So it was all simultaneously at the same time." (R. at 587.) ACS said she was still backed into the corner of the room.

ACS said she tried to calm Appellant down and told him that she had to go do her laundry. However, Appellant kept saying ACS was lying. When ACS would attempt to escape by moving to the right, she said Appellant "would step to the right basically not letting me leave the room." (Id.) ACS continued, "whenever I stepped, he would step with me and then the other way too." ACS said she did not try to push her way passed him because she did not want to escalate the situation and because Appellant "seemed unpredictable." (Id.)

At one point, Appellant put his hand on ACS's chest and said, "Are you scared?" (R. at 588.) ACS said that even though she was scared, she told Appellant "no," adding, "I just didn't want to show him that I was scared." (Id.) ACS testified that Appellant kept her in the room for what "felt like 10 minutes," adding that it was "roughly 5-10 minutes." (R. at 588, 595.) ACS said that "after the second time of him shoving me into the wall and then grabbing my face, then, yeah, he let me go eventually." (R. at 588.)

ACS testified that she reported to law enforcement what Appellant did to her the day after the incident. (R. at 589, 595.)

About a week after the incident and after ACS had reported the incident, ACS received some text messages from DMW. (Id.) ACS was in quarantine at the time due to COVID. The text messages from DMW "were basically just telling me that we – I need to pack – like after I

get out of quarantine, I need to pack right away. I need to get out of the room." (R. at 590.) ACS testified, "It was kind of like it came off a little hostile, but it didn't seem like it was coming from [DMW]." (Id.) ACS said, "it just didn't sound like her." ACS continued, "Then when I saw [DMW] again, she was like 'Oh, you don't have to leave,', that was . . . [Appellant]." (Id.)

- ***Offenses involving DMW***

DMW met Appellant in technical school at Lackland Air Force Base. (R. at 609.) The two would meet up again at Osan Air Base. In either March or April of 2021, the two began a romantic relationship. (R. at 610.) The couple dated while both were assigned to Osan Air Base, took a break when Appellant left Osan, but then got back together after DMW PCS'd (Permanent Change of Station) to Hill Air Force Base and Appellant PCS'd to Luke Air Force Base. (R. at 611.) DMW and Appellant were still together on 20 December 2022.

When the couple first began dating in early 2021, DMW said she and Appellant had consensual sex and the relationship seemed normal. (R. at 612-13.) However, about three months into the relationship, DMW testified that Appellant began to show "an aggressive side" to him, stating that he would talk to her rudely, slap her, shove her around, grab her hair, and grab her around her neck. (R. at 613, 615-17.) However, DMW said Appellant would also be "very sweet to me" and tell her "really nice things." (R. at 618.)

DMW then testified about specific instances of sex. In those instances, DMW stated that the sex would begin consensual, but that during the sex Appellant would "just start choking me so hard to a point I wouldn't be able to breathe or I was scared." (R. at 620.) DMW said the sex would start "gentle" and "sweet," but that "in these scenarios, it was more like scary, like, he was just doing it so hard to a point where I would literally be crying, like, or asking him to stop."

(Id.) When Appellant was choking her, DMW said she would try to tell him to stop and that "it would always come out very like squeaky." (R. at 621.) However, DMW said Appellant would not stop when she told him to stop.

DMW said that Appellant would sometimes choke or slap her during sex. She testified, "I was okay with him slapping me sometimes, but sometimes it would just be really hard and I didn't like it." (R. at 615-17, 622.) Sometimes when he would either choke or slap her, DMW said she would begin to cry. Appellant would respond by getting mad and telling her to shut up, but would not stop what he was doing.

DMW testified about an incident where Appellant came into her room late one night. (R. at 625.) Appellant had the padlock code for her room and came in while DMW was laying in her bed. (R. at 625.) DMW was worried that Appellant had been drinking or was mad so she acted like she was asleep. (R. at 626.) DMW said Appellant began touching her genital area with his hand and eventually began having sex with her. (R. at 628-29.) DMW continued to act like she was asleep and testified that she had never told Appellant he could have sex with her while she slept. (R. at 629.) DMW said she never looked at Appellant or opened her eyes while Appellant had sex with her. (R. at 632.) DMW testified this happened multiple times over the course of their relationship. (R. at 634-35.)

On one of those occasions, DMW said she was pretending to act like she was sleep but that she flinched her whole body because "I could feel him trying to like have sex with me, like anally, and I didn't really like that. He knows that." (R. at 636.) When ask how Appellant would know that, DMW replied, "Because I've told him," adding, "We had conversations about it, like, he would ask me if I, like, wanted to try it, but I didn't like it. We have tried it, but I still

didn't like it." (R. at 636-37.) When her body tensed up on this occasion, DMW said Appellant "just kind of stopped for a second." (R. at 637.)

DMW said she was pretending to be asleep during these instances "mostly out of fear" of Appellant being mean to her. (R. at 640.) DMW said she and Appellant eventually talked about him having sex with her while she was asleep, and DMW told Appellant that she was fine with it. (R. at 640.)

The morning Appellant left Korea, DMW said she and Appellant were having an argument in her dorm room. (R. at 642.) DMW could not recall what the argument was about but remembered she and Appellant wanted to have sex. DMW said she wanted to have sex because the two were in a relationship and Appellant was leaving, but at the same time did not want to have sex because the two were fighting. (R. at 642-43.) DMW testified that she told Appellant, "No, I don't want to have sex while you are angry with me," that Appellant got annoyed with her, and that the two eventually began having sex. DMW testified, "I still wanted to have sex, but I was like really upset, so I didn't really want to, but then we started having sex anyways, but I was really sad because I didn't like it when we had sex and he was, like, angry with me, so I was crying because I was sad." (R. at 643.) DMW said Appellant told her to stop crying and to shut up. (R. at 646.)

At some point, DMW got up and walked to the sink. DMW said she was still crying and Appellant was still annoyed at her. DMW told him that she was upset because they were having sex while he was upset with her. (R. at 649.) Appellant responded by said, "Oh, my God, shut up," and "let me finish at least." (Id.) DMW said Appellant brought her back over to the bed and eventually began having anal sex with her. (R. at 647.) DMW said Appellant never asked to

put his penis there, and she never told him that he could. (R. at 647-48.) DMW also said she never stopped crying throughout the encounter. (R. at 649.)

Even after this, DMW said she rode with Appellant to the airport because "I loved him a lot," and "I wanted to be with him still." (R. at 650.) She also said she never reported anything to law enforcement because she did not want Appellant to get into trouble. She also did not think anything was wrong with the sex they were having. DMW testified that Appellant "said that if, like, if even if you're married or if you're in a relationship with someone, like, you can't rape your wife, like, you can't rape your girlfriend." (R. at 651.)

Once Appellant left for Arizona and DMW eventually arrived at Hill Air Force Base, the two were in an on-again, off-again relationship. At one point in the Summer of 2022, DMW traveled to Luke Air Force Base to see Appellant. (R. at 658.) Then, just a few days after she returned from her trip, DMW said she was contacted by AFOSI. (R. at 653, 658.) DMW said AFOSI did not tell her what the investigation involved specifically, but did mention it involved another female, SJM. (R. at 656.) DMW, who was on the phone with Appellant when AFOSI first called, said she got upset and called Appellant back, who told her he did not do anything and that SJM was lying.

DMW said she found SJM on Facebook and began texting her. (R. at 656-57.) Those messages are at Prosecution Exhibit 23. DMW said SJM told her the things Appellant had done to her. (R. at 658.) After that, DMW spoke with AFOSI, told them they should believe SJM, and told them some of the things Appellant had done to her. (R. at 658-59.)

In December 2022, Appellant and DMW had an argument about leather pants she had bought to wear to her squadron Christmas party. Appellant wanted her to return them. (R. at 664.) DMW told Appellant that she had returned them, but she really did not. On the night of

the Christmas party, after DMW returned to her dorm room and had fallen asleep, Appellant showed up are her door unannounced. (R. at 667.) Appellant had traveled from Luke Air Force Base to Hill Air Force Base.

DMW said Appellant began looking around her room for the pants. When Appellant found the pants, DMW said he ripped them and threw them in the trash. Appellant then began going through DMW's phone and became angry. (R. at 669.)

Also, during this trip, the two went to a bowling alley and later to a bar. (R. at 677.) DMW said she did not remember the entire time at the bar or the ride home because she was drunk. (R. at 677-79.) Back at her dorm room, DMW did not have a full memory of what happened. She recalled Appellant putting her on her knees and him ripping out her eyelash extensions. (R. at 679.) She also recalled standing in front of a bathroom mirror and seeing that her face was bleeding and that Appellant was wiping blood off of her. (R. at 679.)

The next morning, when she reported for duty, one of DMW's supervisors, SSgt CJ stopped her because of the marks on her face. (R. at 684.) DMW tried to play it off, but SSgt CJ took her to a separate room to ask her what happened. (R. at 689.) DMW did not want to say what Appellant had done because she still loved him and did not want him to get into trouble. DMW eventually gave her supervisors Appellant's name. (R. at 691.) Once she received medical attention, DMW was told she had a concussion. (R. at 693, 898.)

During this time, DMW was also communicating with Appellant and Appellant's mom. (R. at 693.) DMW testified, "And then one of them, someone said, just say that you got into a fight with the girl at the bar, and I said 'Okay, I will,' like, I was going to go along with it." (R. at 693.)

SSgt CJ testified that he saw a bruise on DMW's nose and what looked like a black eye that morning. (R. at 765.) After initially questioning DMW, SSgt CJ contacted TSgt NV, his supervisor. (R. at 767.) SSgt CJ said DMW did not want to answer their questions and would shy her head away from them and not look at them directly. At one point, DMW said that her boyfriend from Korea had come to visit. (R. at 768.) SSgt CJ explained, "She wouldn't even try to make up a lie. She wouldn't try to do any of that. She would just – she wouldn't lie. She wouldn't say nothing." (R. at 770.) SSgt CJ said DMW eventually said Appellant had assaulted her. (Id.)

TSgt NV testified that he saw injuries on DMW's nose, a bruise under her right eyelid, and a scratch underneath her left eye. (R. at 780.) TSgt NV testified that DMW told them that the boyfriend had physically assaulted her. (R. at 783.)

TSgt CR, another member of Security Forces, searched DMW's room that morning and found a blood-stained while cloth. (R. at 795.) He also spoke with a bystander who stated he head "loud noises and screams" the night before. (R. at 796.) TSgt CR also found out about video surveillance footage from that night in the dorm. The footage, at Prosecution Exhibit 26, shows Appellant and DMW entering DMW's dorm room at approximately 0105. (Id.)

The video shows Appellant and DMW arriving at DMW's dorm at 0103. Appellant immediately goes into the dorm room but DMW says outside leaning against a wall with her hands crossed and appears to be crying. About a minute later, Appellant comes out of the dorm room into the hall and DMW turns to walk away from Appellant and away from her dorm room. The two leave the frame of the video but eventually reappear and go into the dorm room. Over the new couple of hours, the video shows multiple airman looking out of their dorm room doors

towards DMW's dorm room, and shows two airmen talking in the hall and repeatedly looking towards DMW's dorm room.

A1C AK heard an argument that night in the dorms. (R. at 810.) A1C AK said he heard shouting and doors slamming. A1C AK said the argument was between a male and female and that the female sounded more emotional and was at the point of being in tears.

A1C ET also heard the commotion that night in the dorms. (R. at 816.) He said the male's voice sound "very aggressive," adding, "The male's voice sounded like he was angry, and then the female's sounded very distraught." (Id.)

SrA ZW also heard the argument. He said he heard a male and female voice and that "[o]ne seemed threatening and one seemed threatened," adding that it seemed like the female voice was definitely threatened. (R. at 823.) SrA ZW recalled, "I was hearing 'no' repeated. Seemed like crying as well. So just that over and over kind of made it seem like it was threatened." (Id.)

SSgt JT, an investigator, seized a blanket from DMW's dorm room that looked like it had blood on it. (R. at 830.)

AFOSI Special Agent (SA) AC took photos of Appellant's hands the day after the incident. SA AC said Appellant's right hand had "some lacerations" and Appellant's right hand appeared to be swollen. (R. at 838.)

AFOSI SA HK took photos of DMW that day after the incident. SA HK said there was bruising, red marks, and scrapes on DMW's face as well as bruises on her arm and leg. (R. at 849.) The photos taken by SA HK are at Prosecution Exhibit 9. SA HK also searched DMW's dorm room and found "a couple of eyelashes on the counter, as well as her jacket and her tank

top had some kind of what appeared to be blood on them." (R. at 855.) Prosecution Exhibit 11 contains photographs of this evidence.

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

ARGUMENT

I.

APPELLANT CONVICTION FOR ANALLY RAPING SJM, WITHIN CHARGE II, SPECIFICATION 3 IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he 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.

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

Thus, whereas the former Article 66(d)(1), UCMJ, required service courts to conduct a *de novo* review of factual sufficiency in every case, the amended Article 66(d)(1)(B)(i), UCMJ, eliminates that duty absent an appellant (1) asserting an assignment of error, and (2) showing a deficiency of proof. *See* United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024).

Though our superior Court has not yet addressed what constitutes a "specific showing of a deficiency of proof,"[11] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has held that "a general disagreement with a verdict falls short of a specific showing of a deficiency in proof, and thus will not trigger a full factual sufficiency analysis." United States v. Valencia, 85 M.J. 529, 535 (N-M. Ct. Crim. App. 2024).[12] Instead, "an appellant must identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." Id.

The requirement of "appropriate deference" when a Court of Criminal Appeals weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." Harvey, 85 M.J. at 130. This Court has discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at 131. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at 132. First, this Court must decide that the evidence, as it weighs it, "does

[11] *See* Harvey, 85 M.J. at 130.

[12] Our superior Court has granted review of the NMCCA's decision on the following issue: Whether the lower court erred when it concluded Appellant's claim of factual insufficiency did not trigger a factual sufficiency review under Article 66, UCMJ. *See* United States v. Valencia., 2025 CAAF LEXIS 202, *1 (C.A.A.F. 14 March 2025).

not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

The military judge instructed the members as to the elements of the rape, pursuant to Article 120, UCMJ, as follows:

> (1) that on or about 7 June 2022, at or near Luke Air Force Base, Arizona, [Appellant] committed a sexual act upon [SJM] by penetrating her anus with his penis; and
>
> (2) that the accused did so by first rendering [SJM] unconscious by strangling her with his hands.

(R. at 1024.) The military judge defined "sexual act" as "the penetration, however slight, of the penis into the vulva or anus." (R. at 1022.)

As to consent, the military judge instructed that a person cannot consent to being rendered unconscious and an unconscious person cannot consent. (R. at 1023.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of anally raping SJM, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction of Charge II, Specification 3.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not deny having anal intercourse with SJM or that he choked her into unconsciousness. Indeed, DNA evidence shows anal intercourse occurred and that Appellant's DNA was found on anal swabs taken from SJM.

Instead, Appellant contends that there is a "real possibility" that SJM consented to the anal intercourse, either outright or while in a "state of fragmentary alcohol-induced blackout." (App. Br. at 13-14.) Appellant also renews the same unpersuasive argument he made at trial that SJM was an "unreliable witness." (Id. at 15.)

Appellant is mistaken for a variety of reasons. First, Appellant's entire premise for this issue is that SJM consented to the act of anal intercourse. (*See* App. Br. at 13-16.) Appellant states, "SJM's own characterization of the anal intercourse is more than sufficient to create reasonable doubt as to whether it was nonconsensual," and "SJM's own statement presents a 'real possibility' that she consented to the sexual intercourse." (Id. at 13-14.) Appellant continues, "The most reasonable interpretation of her statement is that she thought the anal sex was consensual, but she was not sure because her alcohol intake that night impaired her memory." (Id. at 14.)

However, consent is irrelevant for this particular specification. Here, the Government's theory, and charging mechanism, was that Appellant rendered SJM unconscious by strangling her and then anally raped her. Consent in this charging scheme is not a factor. Indeed, a review of the statutory elements for this offense makes no mention of consent – which makes sense considering the definition of consent states that an "unconscious . . . person cannot consent," and a "person cannot consent to . . . being rendered unconscious." *See* Manual for Courts-Martial, pt. IV, para. 60.a(g)(7)(B).

Here, the issue was not consent. The issue was whether Appellant anally raped SJM after he rendered her unconscious via strangulation. In other words, what Appellant should be arguing, with specificity to this charge is that, consensual or not, no anal intercourse took place while SJM was unconscious from the strangulation. Yet, even if he did make this argument, his claim would still fail as the evidence shows Appellant anally raped SJM after rendering her unconscious.

After having consensual vaginal sex on 7 June 2022, SJM testified that she walked over to the sink with Appellant following her. SJM testified that she had put her shorts back on after intercourse because she was self-conscious about her body. 9r. at 428.) Then, at the sink, Appellant slapped her. (R. at 421.) The two then sat on the bed and Appellant talked about things he and his ex-girlfriend used to do during sex. (R. at 423-25.)

During this conversation, SJM said a "statement like 'You could do anything you wanted," and at trial explained which she envisioned was "like slapping" on her butt or hair pulling – as she put it, "I guess it's just normal rough sex activity, something that's, you know, you're still getting pleasure out of. It's not supposed to hurt you. It's not supposed to scare you." (Id.)

However, Appellant immediately began to choke SJM with one hand, and then with two, eventually rendering her unconscious. Despite SJM asking Appellant to "please stop," Appellant told SJM, "Oh, you don't want me to stop" or "you want me to continue," all while Appellant was in a "scary," "mad," and "irritated" state. (R. at 426, 428.) Importantly, there is no evidence that any anal sex took place prior to Appellant choking SJM into unconsciousness.

SJM testified that Appellant had to shake her to wake her up. (R. at 429.) When she awoke from being strangled to the point of unconsciousness, SJM testified that she no longer had

her black shorts on. (R. at 428.) SJM said she began hyperventilating and crying, and slinked off the bed and cowered into the corner of the bedroom. (R. at 429.) She also testified that she later noticed pain in her anal area and fluid she thought to be semen coming from her anus. (R. at 436.) As previously noted, Appellant's DNA was found on anal swabs taken from SJM.

When SJM eventually spoke to AFOSI, she told them that she had no recollection of anal sex happening. As she told Appellant's trial defense counsel during cross-examination, "I just don't recall that specific act happening." (R. at 489.) When asked if that event happened while she was unconscious, SJM responded, "I could only assume so. Again, I'm not entirely sure what happened to me when I was unconscious." (Id.)

Here, considering the totality of circumstances, the evidence showed beyond a reasonable doubt that Appellant engaged in anal intercourse after rendering SJM unconscious due to him strangling her. There is no evidence the act took place prior to Appellant strangling SJM and SJM repeatedly stated that she did not recall anal sex occurring or what happened to her when she was unconscious. Further, the evidence shows that Appellant had to physically shake SJM to wake her and that SJM began hyperventilating and crying, and then slid off the bed. Thus, there was no opportunity for any supposed consensual anal sex to have taken place *after* SJM regained consciousness either. Thus, the only time anal intercourse could have occurred, or certainly have commenced, was when SJM was unconscious, which, based on the elements of this offense, means Appellant is guilty of anally raping SJM. And even if SJM was not unconscious for the entire act, as long as some penetration, "however slight," Article 120(g)(1)(C), occurred while she was unconscious, the rape was completed.

Perhaps the only way the issue of consent could be potentially relevant for this specification is if Appellant argued that the anal intercourse never took place while SJM was

unconscious, but instead either took place before Appellant choked her out or after Appellant woke her by shaking her. In essence, Appellant could argue that by SJM giving him consent for anal sex, that this would be evidence that the anal sex did, in fact, take place while SJM was conscious.

However, the evidence does not support Appellant on this contention either because the evidence conclusively shows that not only was the anal sex not initiated either before or after Appellant choked her out, but that also SJM never consented to anal sex on the night in question. SJM testified that prior to this night, no slapping, choking, or any physically harmful activity had ever taken place when the two had previously had vaginal sex. (R. at 416-17.) Further, SJM said the two had never had anal intercourse prior to this night. (R. at 420.) In fact, SJM said the two had never even discussed having anal sex prior to that night, and it was not part of their "typical sexual engagements." (Id.)

Further, as noted above, SJM testified that after the couple had consensual, vaginal sex, she put on her black shorts and walked over to the sink. Appellant followed her, slapped her, and then the two went back to the bed where SJM made her "do anything you want" comment. From there, Appellant immediately began choking SJM, and SJM told him to stop – a clear indication there was no consent. Instead of stopping though, Appellant continued and then choked SJM into unconsciousness. Again, there is no evidence that anal sex took place *before* SJM was choked out.

Having gained no consent prior to choking her out, and SJM being legally unable to consent while she was unconscious, this leaves only the aftermath of Appellant's choking SJM for any supposed consensual anal sex to have taken place. However, there is no evidence that

this occurred either. Instead, all the evidence shows that once SJM regained consciousness, the anal sex had already taken place.

As noted above, when she awoke, SJM's black shorts were already off. SJM also testified that she did not recall any anal sex occurred. And, most importantly, she immediately began crying and hyperventilating, all while sliding herself off the bed. Hence, there was no time for any alleged anal intercourse, consensual or otherwise, to have occurred.

Here, considering the totality of circumstances, the evidence showed beyond a reasonable doubt that Appellant engaged in anal intercourse after rendering SJM unconscious due to him strangling her. The evidence also disproves any contention that anal sex was initiated either before or after Appellant strangled SJM into unconsciousness. There is no evidence the act took place prior to Appellant strangling SJM and SJM repeatedly stated that she did not recall anal sex occurring or what happened to her when she was unconscious. Further, the evidence shows that Appellant had to physically shake SJM to wake her and that SJM began hyperventilating and crying, and then slid off the bed. Thus, there was no opportunity for any supposed consensual anal sex to have taken place *after* SJM regained consciousness.

Still, Appellant claims SJM consented to the anal intercourse, either outright or while in a "state of fragmentary alcohol-induced blackout." (App. Br. at 13-14.) Appellant's claim that SJM outright consented to anal intercourse rests solely on SJM's answer to AFOSI of "I want to say, yes," when AFOSI asked if the anal sex was consensual. (Id.)

Appellant's contentions again miss the point, since the real issue is whether any anal penetration occurred while SJM was unconscious. Here though, the evidence shows anal sex was not initiated either before Appellant choked her out or after she woke up, but instead was initiated after Appellant rendered SJM unconscious and while she remained unconscious. Yet,

even if Appellant's arguments about SJM's answer to AFOSI was relevant, SJM addressed this in her cross-examination testimony. SJM said she made that statement but that she also "expressed I wasn't entirely sure due to the fact I was intoxicated and had spotty memory." (R. at 488.) And again, she also said she did not recall the anal sex occurring, and that she assumed that it occurred while she was unconscious. (R. at 489.)

SJM's answer to AFOSI's question in this circumstance is understandable. Here, SJM unquestionably had no recollection of anal sex occurring, so it is natural that SJM may have thought she might have consented to something that she did not remember.

Yet, again, whether SJM thinks she might have consented to something she does not recall even happening is irrelevant because consent is not the issue with this specification – the real issue is whether the anal sex was initiated after Appellant rendered SJM unconscious. And, again, even if consent did matter, the evidence shows and the law holds that SJM could not and did not consent to anal sex that night. As noted above, before Appellant choked out SJM that night, no anal sex had occurred and there is no evidence that anal sex was even discussed. Additionally, when Appellant first began choking her, SJM told Appellant to "stop," which Appellant brushed off by saying she really wanted him to continue. Thus, prior to her being choked out, there was no consent from SJM for anal sex.

Then, once the choking began, the evidence shows that (1) before SJM was choked out, she had her black shorts on; (2) when she woke her black shorts were off; (3) after waking, SJM began hyperventilating, crying, and slid off the bed; and (4) SJM had no recollection of anal sex. Considering these factors, the only time anal sex could have occurred was *after* Appellant strangled her into unconsciousness. Yet, as the military judge instructed the panel, an unconscious person cannot consent. (R. at 1023.) Thus, even if SJM *thought* she might have

consented despite her lack of memory of the anal sex, the law states that, based on these circumstances, SJM had no ability to consent. Thus, even if consent was relevant for this issue, Appellant's claim would still fail.

To this point, the aftermath of this incident does not speak to a consensual sexual encounter either. The evidence shows that upon regaining her awareness, SJM began hyperventilating, crying, and attempting to distance herself from Appellant – none of which are the actions of someone who just got done having consensual anal intercourse.

Appellant's actions show the anal sex was never consensual as well. As SJM testified, and as the injuries on SJM show, at the time or in the immediately aftermath of Appellant anally raping of SJM, Appellant (1) yelled at and shook SJM awake; (2) slapped SJM and pulled her hair; (3) attacked her in a way that left bruises on her neck and thighs, and a bite on her hand that was severe enough to show the pattern of Appellant's teeth; (4) forced SJM to shower to wash what he had left on her off; (5) repeated acted like he was going to punch her; and (6) laughed at her throughout these actions. Importantly, Appellant's actions were so severe that SJM texted her location to her friend *while still in the bathroom*, and made sure to say she was with Appellant "[i]f anything happens to me." (*See* Pros. Ex. 3.)

These are undoubtedly *not* the actions of someone who just got done having a supposed consensual anal intercourse encounter with another person, but instead the actions of a person physically attacking and humiliating another person. Indeed, if SJM had truly consented to anal sex with Appellant, then why would Appellant feel the need to inflict the further harm and degradation he committed against SJM after the anal sex was complete? Why would Appellant force SJM to take a shower to clean herself from what he had left on her? The answer is because SJM never consented to any of this activity.

Finally, there is no evidence that SJM was in a, as Appellant puts it, "fragmentary alcohol-induced blackout." (*See* App. Br. at 14.) While SJM did say she had a "foggy memory" and was "intoxicated," there is no evidence in the record to indicate that she was ever "blacked out" due to alcohol. Moreover, Appellant's attempt to essentially blame SJM and her alcohol intake for any memory loss that night is especially perplexing considering Appellant is the one who choked SJM's neck with two hands, leading her to lose consciousness and, thus, induce a complete memory loss for the time in which he strangled her. There was no "alcohol-induced blackout" here – only Appellant's intentional and malicious strangling of his victim into complete unconsciousness.

Next, Appellant claims Dr. PT's testimony shows the anal intercourse was consensual. (R. at 14.) Yet again, even if consent was relevant, Dr. PT's testimony shows no such consent was ever given. Appellant states that Dr. PT testified that someone who loses consciousness from strangulation typically regains consciousness within a second or two of pressure being released. (Id. *citing* R. at 954-55.) He then states that the evidence "suggests that a considerable amount of time passed between the strangulation incident and the completion of the anal intercourse," because SJM's shorts were removed and Appellant ejaculated in SJM's anus.

Appellant is again mistaken. First, Appellant omits Dr. PT's testimony where she agreed that just because someone had regained consciousness did not mean that they were aware of what was going on around them. (R. at 960.) Appellant also omits Dr. PT's testimony where she stated that even though someone might regain consciousness within a second or two of pressure being released, it still "may take them a minute to refocus." (R. at 960.) Thus, even after releasing his strangle hold on SJM, it could have taken SJM a minute to actually become aware of what was happening to her, which was plenty of time for Appellant to complete his anal

rape of her. As the military judge instructed, once Appellant rendered SJM unconscious, there only had to be a penetration, *however slight*, once SJM was unconscious for the rape to be completed. Given Dr. PT's testimony, Appellant had ample opportunity to complete his anal rape of SJM.

Moreover, Dr. PT also agreed that a person could repeatedly apply pressure to someone's neck, let go, and then reapply pressure so as to keep them in a state of either unconsciousness (by applying pressure) or unawareness (by releasing the pressure before applying it again) for more than a couple of minutes. (R. at 961.) This strangle-release-strangle again method would have also provided Appellant more than sufficient time to take off SJM's shorts and anal rape her until ejaculation.

As to Appellant's mention that SJM told Ms. SK that lubricant was used that night, SJM also told Ms. SK that the couple had consensual, vaginal sex, which is the most reasonable time in which this lubricant was used. Furthermore, while Appellant mentions that one portion of Ms. SK's report that speaks to the use of lubrication, he fails to mention another note on that same page of Ms. SK's report which states that SJM told Ms. SK, "At first it was consensual, *only vaginal*." (Pros. Ex. 24 at 6.) (emphasis added.)

Here, Dr. PT's testimony only highlights how Appellant's strangulation, and the period of time after the strangulation had ended but SJM had not yet fully regained her awareness, provided Appellant with ample time to anally rape SJM.

Finally on this issue, Appellant falls back to another argument that proved unpersuasive to the members at trial – SJM's reliability. However, all of Appellant's arguments here were also all raised at trial before the panel members who had the distinct opportunity to personally see SJM testify on the witness stand and judge her credibility first-hand, live, and in-person.

Despite these same arguments, the panel member still found Appellant guilty, and this Court should not disturb that just finding.

Appellant first claims that SJM "lied to an OSI agent when first questioned about the 7 June 2022 incident. (App. Br. at 15, *citing* R. at 440.) However, he fails to provide the context SJM provided to the members during her testimony regarding why she initially told AFOSI that her assailant was not Appellant. SJM told the members that at the point of her first interview with AFOSI she not willing to report what had happened and did not want to discuss anything related to it, adding that she had not "even processed what happened; and in the moment, there was a lot of just emotions on whether I questioned if I – if it was my fault or like should I have done something differently because, you know, I did say the statement he could do whatever he wanted, so I just had a lot of blame on myself . . . ." (R. at 440-41.)

Appellant next takes aim at testimony SJM had given at a prior hearing on 6 July 2024. (App. Br. at 15, *citing* R. at 470-47.) Again, however, Appellant fails to provide the context SJM provided to the members during her testimony regarding why she testified as she did in that prior hearing. (*See* R. at 497-98.) There, SJM explained that she was still processing the whole experience, and that she believed a coping mechanism was to "to try to forget everything related to that situation as much as possible so I could try to live a normal life." (R. at 497.) She also explained that she became aware of her prior hearing testimony not being accurate a few days before her testimony at trial and agreed that it was not her intention to mislead anyone. (R. at 498.)

Moreover, the issue of SJM's prior testimony, and her explanation for why she previously testified the way she did, were facts well-established before the panel at Appellant's trial who had the distinct advantage of personally seeing SJM on the stand and judging her

credibility as she testified. Yet, despite Appellant making exactly the same argument at trial as he does now, the panel still found Appellant guilty of anally raping SJM.

This Court must give "appropriate deference to the fact that the trial court saw and heard" SJM's testimony and demeanor and convicted Appellant beyond a reasonable doubt of the rape offense. Perhaps recognizing the quandary he faces due to this standard, Appellant next attempts to subvert this "appropriate deference" standard by claiming that the "members' assessment of SJM's credibility was tainted by the special trial counsel's improper vouching during closing argument." (App. Br. at 16.) Appellant then relies on his argument within Issue V of his brief to claim that "[b]ecause of the resulting distortion of the members' credibility determination, in this case, the "appropriate deference" to the members' opportunity to see and hear SJM is none." (Id.)

However, as detailed below within Issue V, the special trial counsel committed no improper vouching for SJM within his closing argument. Thus, there was no "resulting distortion of the members' credibility determination" of SJM. (*See* Id.) Thus, this Court should decline Appellant's plea to disregard the plain language of Article 66, and, instead, follow Article 66's mandate that this Court give "appropriate deference" to the panel member who, after hearing and seeing SJM's testimony, and hearing the same reliability arguments against SJM that he rehashes now to this Court, convicted Appellant of anally raping SJM.

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his rape conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court

should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

II.

APPELLANT'S CONVICTION OF DOMESTIC VIOLENCE WITH CHARGE V, SPECIFICATION 4 IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Additionally, the military judge instructed the members as to the elements of domestic violence through the commission of a violent offense, pursuant to Article 128b, UCMJ, as follows:

> (1) that on or about 7 June 2022 at or near Luke Air Force Base, Arizona, [Appellant] committed a violent offense, to wit: assault consummated by a battery by unlawfully biting [SJM's] hand; and
>
> (2) that the violent offense was committed against [SJM] who was, at the time of the violent offense, an intimate partner of [Appellant].

(R. at 1061.) The military judge further instructed the members as to the elements of assault consummated by a battery in violation of Article 128, UCMJ, as follows:

> (1) that on or about 7 June 2022 at or near Luke Air Force Base, Arizona, [Appellant] did bodily harm to [SJM] by biting her hand;
>
> (2) that the bodily harm was done unlawfully; and
>
> (3) that the bodily harm was done with force or violence.

(Id.)

The military judge further instructed on the defense of "Mistake of fact," stating Appellant that "Mistake of fact" meant that Appellant "held, as a result of ignorance or mistake,

an incorrect belief that the other person consented to the sexual conduct." (R. at 1026.) The military judge continued as follows:

> The ignorance or mistake must have existed in the mind of [Appellant] and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual conduct. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.
>
> You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider [Appellant's] age, education, and experience, along with the other evidence in this case.
>
> The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of these charged offenses, [Appellant] did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude [Appellant] was under a mistaken belief that the alleged victim consented to the sexual conduct, if you are convinced beyond a reasonable doubt that at the time of the charged offenses [Appellant'] mistake was unreasonable, the defense does not exist.

(Id.)

Analysis

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

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not deny biting SJM's hand and does not deny that SJM was an intimate partner. Instead, Appellant contends that the biting was either "not unwelcome" or that "Appellant had a reasonable and honest mistake of fact as to whether the biting was unwelcome." (App. Br. at 17.)

Appellant is mistaken as Appellant's actions were both objectively and subjectively unreasonable under the circumstances of that night.

As detailed in Issue I above, prior to 7 June 2022, Appellant had never slapped, choked, or physically hurt SJM despite them have multiple consensual sexual encounters. (R. at 417.) After having sex on 7 June 2022, SJM walked over to the sink with Appellant following her. Then, Appellant slapped her. (R. at 421.) The two then sat on the bed and Appellant talked about things he and his ex-girlfriend used to do during sex. (R. at 423-25.)

During this conversation, SJM said a "statement like 'You could do anything you wanted," and at trial explained which she envisioned was "like slapping" on her butt or hair pulling – as she put it, "I guess it's just normal rough sex activity, something that's, you know, you're still getting pleasure out of. It's not supposed to hurt you. It's not supposed to scare you." (Id.)

Under those circumstances, considering the couple had neve done anything "rough" or that "physically hurt" prior to this night, SJM's view on what her "do anything you wanted" statement meant was perfectly reasonable. What Appellant did next, however, was both

subjectively and objectively unreasonable, as he proceeded to choke SJM into unconsciousness and, specifically to this specification, bite SJM's hand – all despite SJM asking Appellant to "please stop."[13] (R. at 426.) Instead, Appellant told SJM, "Oh, you don't want me to stop" or "you want me to continue," all while Appellant was in a "scary," "mad," and "irritated" state. (R. at 426, 428.) When she awoke from being strangled to the point of unconsciousness, SJM testified that she had a bite mark on her hand, which she said she did not recall Appellant doing while she was awake. (R. at 434.)

From a subjective standpoint, one has to ask whether Appellant actually thought SJM meant that he could grab her by the throat, strangle her to the point of unconsciousness, and bite her hand, despite SJM telling him to stop prior to him choking her out. That answer is no. There is no evidence in the record that Appellant honestly held the belief that SJM consented to the biting.

Then, from an objective standpoint, would a reasonable person in Appellant's position take SJM's statement of "do anything you want" to include the brutality that Appellant inflicted on SJM immediately after this statement – especially under the context that the couple had *never* done anything physically hurtful before in their sexual relationship. That answer is again a resounding no.

Notably, as the military judge instructed, any ignorance or mistake cannot be based on the negligent failure to discover the true facts and the absence of due care. Here, even in the face of SJM telling Appellant that he could "do anything [he] wanted," a reasonable person would

[13] While Appellant, pursuant to Grostefon, raises a separate factual insufficiency claim to his domestic violence conviction for strangling SJM (Charge V, Specification 2), the circumstances that led to Appellant biting SJM, including his strangulation of her, is discussed here to provide context to his justified conviction for biting SJM.

have, in the simple use of due care, still asked their intimate partner if it was alright to choke them into unconsciousness or bite them so hard that it would leave teeth marks in their partner's skin, especially when that intimate pattern had said "stop" once the choking began. And make no mistake about it – this was not a light nibble on a body part or even a slight pressing of the teeth on SJM's skin. Appellant's bite on SJM's hand was harsh enough that Ms. SK, the SANE nurse labeled the bite as a "patterned mark." (R at 530; *see also* Pros. Ex. 1 at 3.)

The surrounding evidence of Appellant's actions after SJM awoke further shows this was no mistake of fact. Appellant, who was mad and irritated prior to choking SJM out, was even more so when she woke up. Appellant was hitting SJM, yelling at her to stop crying, and laughing at her as he acting like he was about to hit her – none of which are the actions of someone who actually believed what he was doing was consensual, or as Appellant puts it in his brief, "welcomed." Certainly, no reasonable person looking at this situation would think Appellant's overall actions, including him biting SJM's hand, was welcomed.

Yet still, Appellant claims mistake. He first attempts to argue that SJM's "do whatever you wanted" statement alone resulted in a mistake of fact. However, as discussed above, the facts and surrounding circumstances of this night and their prior relationship show that there was neither a subjective or objective mistake of fact based on SJM's statement alone. In no way was SJM's statement an invitation for Appellant to engage in a no-holds-barred, assault free-for-all against her body – Appellant knew this and any reasonable person looking at this situation would recognize this as well, especially considering the couple's relationship, which had never had *any* physically harmful acts prior to this night.

Next, Appellant argues mistake by claiming the bite actually took place *prior* to him choking SJM into unconsciousness by highlighting that SJM testified that she "wasn't sure"

when the bite happened and that she had no memory of Appellant biting her. Appellant also notes that, accordingly to Ms. SK's report, SJM told Ms. SK that Appellant bit her on the hand while he was using one hand to choke her.[14] (App. Br. at 17, 19, *citing* Pros. Ex. 24 at 6.) Appellant concludes, "Given those inconsistent accounts and SJM's self-professed 'spotty' memory of the evening due to her intoxication, . . . the evidence does not establish beyond a reasonable doubt when or how the biting occurred." (App. Br. at 19.) Appellant continues, "In light of SJM's self-professed memory lapse, it is reasonably possible that the biting occurred early in the 'rough sex,' shortly after her fully consensual statement that Appellant could do whatever he wanted to her and before any arguable withdrawal of consent." (Id.)

Appellant is again wrong. Even assuming the bite occurred prior to Appellant actually choking SJM into unconsciousness, the evidence shows that Appellant, immediately after SJM said he could "do anything you wanted," placed his hand one SJM's throat and that SJM immediately both began to struggle to breathe and told Appellant to stop. (R. at 425-26.) At that point, any mistake Appellant actually had, and certainly any reasonable mistake, was extinguished. While Appellant uses the phrased "early in the 'rough sex'," in his brief, there was no such early period. Instead, the evidence shows SJM made her "anything you wanted" statement, Appellant immediately went for her throat, and SJM immediately told him to stop as she struggled to breathe.

All of this happened before any biting occurred. Thus, whether the bite occurred while Appellant was choking her with one hand or after SJM was unconscious, the evidence shows SJM told Appellant to stop his actions before the bite occurred. Thus, there was neither a subjective or objective mistake of fact in this instance.

[14] SJM testified that she did not recall telling Ms. SK this, but added that "a lot of memories from that exact conversation with that nurse are spotty." (R. at 463.)

In sum, there is no fathomable way Appellant had a reasonable and honest mistake of fact as to consent under these circumstances. Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his domestic violence conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

III.

APPELLANT'S CONVICTION OF COMMUNICATING A THREAT WITHIN CHARGE I IS FACTUALLY SUFFICIENT AND ANY POTENTIAL VARIANCE WAS IMMATERIAL AND NONPREJUDICIAL.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Additionally, the military judge instructed the members as to the elements of domestic violence through the commission of a violent offense, pursuant to Article 128b, UCMJ, as follows:

> (1) that on or about 7 June 2022 at or near Luke Air Force Base, Arizona, [Appellant] communicated certain language, to wit: "If you do not stop crying, I will hit you," *or words to that effect*, expressing a present determination or intent to injure the person, property, or reputation of [SJM], presently or in the future;
>
> (2) that the communication was made known to [SJM]; and
>
> (3) that the communication was wrongful.

(R. at 1020.)

Additional Facts

Regarding this specification, SJM had the following exchange during her testimony:

> TC: What does [Appellant] do as you're sitting on the floor crying?
>
> SJM: He starts hitting me on the left side of my face many times and he's telling me to stop crying.
>
> TC: Does he say what will happen if you don't stop crying?
>
> SJM: He said that if I don't stop crying, something along the lines of, like, I'll find out what happens.
>
> TC: That you will find out what happens?
>
> SJM: Yes.
>
> TC: How does that make you feel?
>
> SJM: I was already scared. I think that just in the moment, like, obviously, something like that is not going to make me stop crying, but I was just terrified.

(R. at 430.)

Ms. SK's narrative report states that SJM told her the following:

> After I woke up I was crying and I was scared. He kept raising his first to me when I was in the shower, he was yelling and screaming at me to quit crying. He was hitting me in the face and pulling my hair. My nose started bleeding and my throat hurts. He said if I cried one more time there would be problems for me.

(Pros. Ex. 24 at 6.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of communicating a threat, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample

evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not deny that he (1) communicated certain language to SJM and that part of the certain language included the phrase "If you don't stop crying" (a portion of element 1); (2) that SJM heard the language (element 2); or (3) that the communication was wrongful (element 3). Instead, Appellant takes issue with the specific quoted language within the specification, arguing his conviction is "factually insufficient because no evidence indicated that Appellant uttered the charged language or similar words." (App. Br. at 21.) Appellant states the evidence shows Appellant either said the phrase "you'll find out what happens" or "there will be problems for you" versus the charged quoted language of "I will hit you." (Id. at 22.) Appellant further argues that while the first two statements suggest the possibility of negative repercussions, "neither expresses a current conditional intent to inflict violence." (Id.)

Appellant is mistaken. While Appellant raises this issue as a matter of factual sufficiency, this issue is one of potential variance, not factual sufficiency, and should be reviewed under that context. However, even when viewed under the realm of factual sufficiency, Appellant's has failed to show his conviction is factually insufficient and this Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

To start, Appellant is correct that the evidence at trial bore Appellant telling SJM either "you'll find out what happens" or "there will be problems for you" versus saying "I will hit you."

However, the evidence also showed (1) Appellant prefaced these statements with a direction to SJM to "stop crying;" (2) Appellant hit SJM in her face immediately prior to making these statements; and (3) Appellant continued to abuse SJM after making these statements by repeatedly acting like he was about to strike SJM because she would not quit crying.[15] Moreover, while the specification at issue does includes specific, quoted language, it also provides the phrase "or words to that effect," and the evidence shows that, in the context of Appellant's actions against SJM in that moment, his statement of "stop crying," along with either "you'll find out what happens" or "there will be problems for you" were words to the effect of "I will hit you." This is especially true considering (1) Appellant was angry that SJM was crying; (2) Appellant had *already hit SJM* for failing to stop crying; (3) Appellant in this same time period was making hitting motions at SJM, again, because she would not stop crying; and (4) after telling SJM to stop crying and saying either "you'll find out what happens" or "there will be problems for you," SJM was left "scared" and "just terrified." (R. at 430.)

With that context in mind, the question next turns to how this Court should review this issue. In the past, this Court has employed both a variance analysis and a factual sufficiency analysis to review wording issues within specifications. For the reasons set forth below, this Court should review this case under a variance analysis. However, even under a factual sufficiency standard, this Court should still affirm Appellant's conviction.

- *Appellant's Claim is One of Variance, Not Factual Sufficiency*

In this instance, Appellant's claim is one of variance, not factual sufficiency since conflicts between the pleadings and proof raise the issue of variance rather than one of

[15] As noted previously, Appellant does not challenge his convictions for hitting SJM in the face or acting like he was going to hit her based on factual or legal sufficiency.

sufficiency of the evidence. United States v. Mann, 50 M.J. 689, 699 (A.F. Ct. Crim. App. 1999) (*citing* United States v. Miller, 34 M.J. 598 (A.C.M.R. 1992)). It is well established that in order "to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby." United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014) (*quoting* United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009) (emphasis added). "A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" Treat, 73 M.J. at 336 (*citing* Marshall, 67 M.J. at 420) (*quoting* United States v. Teffeau, 58 M.J. 62, 67 (C.A.A.F. 2003)).

Appellant disagrees and, quoting this Court's recent opinion in United States v. Kershaw, ACM 40455(f rev), 2025 CCA LEXIS 205, at *13 (A.F. Ct. Crim. App. 27 March 2025), argues "'there is no variance' for this Court to consider." (App. Br. at 23.) However, this case is different from Kershaw in that the members in Kershaw were provided a variance instruction but made no changes to the charged timeframe in that case. Kershaw, at *12-13. Because the members in that case received a variance instruction but made no changes, this Court determined "there is no variance issue for this court to consider."[16] Id. However, in this case, the members received no variance instruction, thus this Court's Kershaw reasoning that "there is no variance" to consider in this case does not apply.

[16] This Court's application of a factual sufficiency review versus a variance analysis in Kershaw is currently a certified issue before our Superior Court. *See* United States v. Kershaw, __ M.J. __, No. 25-0177/AF, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025).

Appellant also turns to this Court's opinion in United States v. Patterson, ACM 40426, 2024 CCA LEXIS 399 (A.F. Ct. Crim. App. 27 September 2024), in arguing that factual sufficiency, rather than variance, is appropriate in this case. However, Appellant fails to acknowledge numerous other cases where this Court, as well as the Army Court of Criminal Appeals (ACCA) and our superior Court, has dealt with similar issues involving specific language in a specification, with each being reviewed as a claim of variance. Contrary to Appellant's contention, review under a variance analysis in this case is warranted and is not foreclosed by either Kershaw or Patterson.[17]

In United States v. Packrone, ACM 36389, 2006 CCA LEXIS 271 (A.F. Ct. Crim. App. 19 October 2006), this Court dealt with an appellant who had pled and was found guilty of wrongfully appropriating money from his wife using her government travel card. However, on appeal, the appellant asserted in a legal and factual sufficiency claim that the evidence showed the money was not the property of the appellant's wife, but of the financial institution holding the wife's account. Reviewing for variance and jumping right to a prejudice analysis, this Court found the appellant faced no prejudice because he made no claim that he was misled or surprised by the variance, or that he was open to a future criminal sanction for his conduct. Id., at *3. Notably, citing Mann, this Court stated, "Although the assignment of error is labeled as legal and factual insufficiency, we view it as a claim of variance between the pleadings and the proof adduced at trial." Id. at *2, *citing* Mann, 50 M.J. at 699.

[17] Notably, in its review of Patterson, our superior Court "express[ed] no opinion about whether the AFCCA might have affirmed the finding of guilty notwithstanding the discrepancy between the facts alleged and the facts proved using the type of variance analysis applied in [United States v. Hunt, 37 M.J. 344, 347 (C.M.A. 1993)]." United States v. Patterson, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548, at *13 (C.A.A.F. 14 July 2025).

In Mann, an appellant was convicted of violating an order by one officer (who was named in the specification) when the written order stated the order was "directed" by a second officer (who was not named in the specification). Mann, 50 M.J. at 698. Again, though the appellant there raised the issue via legal sufficiency, this Court stated that "conflicts between the pleadings and proof raise the issue of variance rather than one of sufficiency of the evidence." Id. at 699. Though this Court also found no variance, the Court further found no prejudice because the appellant "presented no evidence of prejudice," was "not misled to the extent that he was unable to prepare[,] and he is protected against another prosecution for the same offense." Id. at 699.

In United States v. Williams, ARMY 20140604, 2017 CCA LEXIS 178 (A. Ct. Crim. App. 21 March 2017), an appellant filed a legal and factual sufficiency claim because the assault offense in that case did not occur at the location alleged. Seeing the issue as an issue of material variance, ACCA found no prejudice and affirmed the conviction. Id. at *1. As an initial matter, ACCA found the evidence was legally and factually sufficient to establish that appellant assaulted the victim in the case, but agreed with the appellate government counsel that the real issue in the case involved a variance as to the location of the assault since the appellant was found guilty of assaulting the victim at a location that was a significant distance away from where the assault actually occurred. Id. at *3-4.

Though ACCA found the difference in location was a material variance, the court found "no possible prejudice to the appellant" because (1) the variance did not "put appellant at risk for another prosecution for the same conduct" as the evidence clearly established the appellant was convicted for an assault perpetrated at the correct location; (2) the appellant was not "misled or

left flat-footed in the preparation of his defense against this assault specification;[18] and (3) the variance did not deny appellant the opportunity to defend against the charge. Id. at *5-6.

Finally, in Treat, our superior court dealt with a guilty verdict by exceptions and substitutions that changed the charged language "Flight TA4B702" to "the flight dedicated to . . . transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." Treat, 73 M.J. at 335. The appellant in that case claimed the change was a fatal variance that "denied him the right to prepare and defend against the specification as convicted." Id. Our superior court disagreed.

First, CAAF found a material variance occurred because "the Government chose to describe the specific aircraft as Flight TA4B702, and thus the specific flight number became an integral part of an element of the offense." Id. at 336. However, CAAF found no prejudice. The Court stated that the defense did not claim in any manner that the appellant "was unaware of the specific aircraft he was supposed to be on." Id. at 337. Additionally, the Court stated, "While trial defense counsel did mention the lack of evidence of the flight number in her closing argument, she did not channel her efforts into disproving the Flight TA4B702 element," adding, "Furthermore, despite citing the lack of proof that it was specifically Flight TA4B702 that Appellant missed, trial defense counsel did not move pursuant to R.C.M. 917 for a finding of not guilty on that particular charge." Id.

Finally, CAAF highlighted that the defense had not identified "any different trial strategy it might have employed," and that "[a]ll indications are that appellant's defense . . . would have remained precisely the same whether or not he was charged per the original specification or per

[18] The Court noted the appellant's defense counsel did not move for a bill of particulars or discovery regarding events that occurred at the charged location (versus the actual location) and did not make a motion for a finding of not guilty as to the specification. Id. at *5-6.

the exceptions and substitutions." Id. Finding "no reasonable possibility that the verdict in this case would have been any different," CAAF found the appellant "was not denied the opportunity to defend against the charge on which he was convicted," and that the variance was not fatal since it did not prejudice the appellant.

For Appellant's case, there is no question that Appellant yelled at Appellant that if she did not "stop crying," she would either "find out what happens" or that there "would be problems" for her. Further, considering the context in which Appellant spoke these words – (1) his previous actions of actually hitting SJM, (2) his later acts of repeatedly threatening to hit her by raising his hand to her, and (3) the fact that SJM was "scared" and "terrified" as a result of his actions – both the phrases "find out what happens" or "there will be problems for you" are words to the effect of "I will hit you." Thus, because the specification included the phrase "words to the effect" and because the two phrases in evidence, given the surrounding context, meant the same thing as "I will hit you," there is no variance here at all.

Yet, even if there is a variance, any such variance is not material and certainly not prejudicial. Thus, any variance is not fatal and Appellant's claim must fail.

Notably, in his brief, Appellant only addresses the issue of variance by arguing it does not apply – he does not analyze the issue itself and offers no argument related to prejudice. However, a review of prejudice similar to the analysis conducted in Treat, Mann, Packrone, and Williams shows there is no prejudice in this case. To start, neither Appellant nor his counsel ever raised this issue at trial and never argued, following SJM's testimony or the introduction of Ms. SK's report, that he was either unaware of the language he was supposed to defend against or that the two phrases at issue were not words to the effect of "I will hit you" in these circumstances. Further, as opposed to the defense counsel in Williams, Appellant's trial defense

counsel never mentioned this issue in their closing argument. In fact, the communicating a threat charge was never specifically mentioned in Appellant's counsel's closing argument or in the 115-slide presentation presented during that argument. (*See* App. Ex. XL.)

Moreover, Appellant's counsel did not move for an R.C.M. 917 finding of not guilty. Further, Appellant has never argued, either at any point in the trial, or now before this Court, that either he or the defense team had been misled, surprised, or left flat-footed by the variance or that they were unable to prepare Appellant's defense or defend against the charge. *See* Mann, 50 M.J. at 698-99; Packrone at *3; Williams at *5-6. Likewise, the defense did not make any alleged failure to prove the exact language of the specification a centerpiece of their closing argument.

Whether at his trial or now before this Court, Appellant has failed to identify "any different trial strategy it might have employed," and all indications are that Appellant's defense strategy for this specification would have remained his defense for this specification even if the two phrases in evidence had been specified in the specification versus the "I will hit you" language. *See* Treat, 73 M.J. at 337.

Finally, due to the clear testimony and documentary evidence presented at trial showing the words said by Appellant to SJM during this encounter, the variance does not put Appellant at risk for another prosecution for the same conduct.

In sum, because the specification included the phrase "words to the effect" and because the two phrases in evidence, given the surrounding context, meant the same thing as "I will hit you," there is no variance at all. Yet, even if there was, any variance in this case did not put Appellant at risk for another prosecution for the same conduct, did not mislead Appellant in any way, and did not deny Appellant the ability to defend against the charge. Accordingly, there is

no possible prejudice to Appellant. Thus, as Appellant has failed to show any prejudice in this variance, and there is "no reasonable possibility that the verdict in this case would have been any different,"[19] the variance in this case is not fatal, and Appellant's claim must fail.

- *Even Under a Factual Sufficiency Review, Appellant's Conviction Should Be Affirmed*

Should this Court choose to instead review this claim for factual sufficiency, the result remains that same – Appellant's conviction should be affirmed.

As detailed above, the two phrases in evidence – "I'll find out what happens" and "there would be problems for you" – are synonymous with the phrase "I'll hit you" in these circumstances. Appellant was in the midst of actually hitting her when he made his threat to SJM. SJM testified that she was "scared" and "terrified" by Appellant's words. And Appellant, during this timeframe, continued to yell at SJM to stop crying and repeatedly raised his arm up as if to strike SJM, all while laughing at her. In this circumstance, "I'll find out what happens" and "there would be problems for you" are one-in-the-same to "I'll hit you," and are certainly "words to that effect." The members at Appellant's trial, who heard SJM's testimony first-hand and saw SJM testify about how Appellant's words made her feel, recognized these phrases all meant the same thing – that Appellant "wrongfully communicated to [SJM] a threat to injure her by hitting her. . . ." (*See* Charge Sheet, Charge I, Specification.)

Appellant's main contention within this issue to support his factual insufficiency claim – besides stating that the two phrases contain different words than "I will hit you" – is that the two phrases are "materially different from "I will hit you" because "neither expresses a current

[19] *See* Treat, 73 M.J. at 337.

conditional intent to inflict violence." In contrast, Appellant says "I will hit you . . . directly suggests such a present conditional intent to inflict violence." (App. Br. at 22.)

Appellant's argument here attempts to place these phrases in a vacuum, undoubtedly wishing to distance himself from the surrounding context to his threat. In doing so, Appellant fails to mention he made his statement after having *already hit* a crying SJM and in the midst of yelling at her. He fails to mention that amidst his threat, he also forced SJM to take a shower, all while, again, yelling at her to stop crying. He fails to mention that while still yelling at her, he repeatedly raised his hand toward SJM *as if to hit her again*, all while laughing at her. Contrary to Appellant's claims, these surroundings circumstances, done at the same time as telling SJM that she will either "find out what happens" or that "there will be problems" for her if she doesn't stop crying, show a "present . . . intent to inflict violence"[20] on SJM, and, thus, are words to the effect of "I will hit you."

Appellant's next argument derides the Government for being "aware of the discrepancy between the specification and the evidence" and "fail[ing] to take any appropriate corrective step." (App. Br. at 22-23, *referencing* Patterson, 2025 CAAF LEXIS 548, at *13.)

However, as already explained, there was no discrepancy between the specification and the evidence to correct. Here, though the specification provided quoted language, it also included the phrase "or words to that effect," and the evidence that was elicited during the trial gave rise to phrases which, under all the circumstances, were tantamount to the "I will hit you" language listed within the specification.

Here, the evidence shows Appellant communicated a threat to injure her by saying *words to this effect* of "If you do not stop crying, I will hit you," and that, based on the circumstance of

[20] *See* App. Br. at 22.

Appellant having already hit SJM and repeatedly acting like he was going to hit her again, Appellant expressed a present determination and intent to injure SJM. Appellant made this threat readily known to SJM by yelling it at her as she cried, and the evidence shows his threat was wrongful.

As a result, considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, even under a factual sufficiency review, Appellant has failed to make a specific showing of a deficiency of proof as to his communicating a threat conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

IV.

APPELLANT'S CONVICTION OF KIDNAPPING WITHIN THE SPECIFICATION OF CHARGE III IS FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

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

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

Additionally, the military judge instructed the members as to the elements of kidnapping, pursuant to Article 125, UCMJ, as follows:

> (1) that on or about 21 June 2021 at or near Osan Air Base, South Korea, [Appellant] seized [ACS];
>
> (2) that [Appellant] then held [ACS] against her will; and
>
> (3) that [Appellant] did so wrongfully.

(R. at 1027.) The military judge defined "held" as follows:

> "Held" means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, for example, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(Id.) The military judge also defined "against the person's will" as follows:

> The term "against the person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. Evidence of the availability or nonavailability to the victim of some means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(Id.)

Analysis

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

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the weight of the evidence does not support Appellant's conviction beyond a reasonable doubt. Further, Appellant has failed to show his conviction is legally insufficient.

Notably, Appellant does not contest that he seized ACS (element 1) or that his actions were wrongful (element 3). Instead, Appellant only concerns himself with element 2, arguing that "the evidence does not establish that Appellant held [ACS] as that term is used for purposes of the kidnapping punitive article. (App. Br. at 25.)

Appellant is incorrect. The evidence here, which Appellant does not dispute, is that Appellant, in a drunken state, came to DMW's and ACS's apartment looking for DMW. Once he entered ACS's apartment and shoved her into a corner with his hands, Appellant began asking, "Where is [DMW]?" (R. at 585-86.) When ACS told Appellant she did not know, Appellant told her she was lying and then moved side to side to prevent ACS from leaving the corner of the room. (R. at 587.) Appellant then put his hand on ACS's chest and asked, "Are you scared?" (R. at 588.) ACS also testified that incident lasted what "felt like 10 minutes," adding that it was "roughly 5-10 minutes." (R. at 588, 595.)

Thus, the evidence shows Appellant both seized ACS by pushing and trapping her into a corner, that his actions were wrongful, and that his actions were against ACS's will. Again, those are not in dispute by Appellant. However, the evidence also shows his actions meet the definition of "held" as defined by the military judge. Unquestionably, Appellant detained ACS by not allowing her to leave the corner of her own apartment for at least five minutes, but up to 10 minutes. This amount of time was not a momentary or incidental detention, as ACS testified that it "felt like 10 minutes." (R. at 588.) Even at five minutes, this was not a quick or fleeting act, but instead a willful action by Appellant to trap ACS in that corner until she told him the information he wanted – namely the location of DMW.

The fact that Appellant used both physical force, physical acts and mental coercion to keep ACS in that corner further showed Appellant detained, or "held," her. He not only pushed her into the corner and shook her, but also mimicked her moves to keep her from getting by him and used mental coercion by looking at her and asking, "Are you scared?" This is all evidence of actual force and threats of force that Appellant used to detain ACS. Thus, the intent and definition of the word "held," as it relates to the kidnapping UCMJ article, is met.

Still, Appellant claims the evidence is factually and legally insufficient because he does not believe his actions meet the "held" definition. Appellant also believes the kidnapping offense "exaggerates the criminality" of his conduct, and instead believes his conduct only constitutes "a series of assaults and assaults consummated by battery."[21] (App. Br. at 25-31.)

[21] Notably, Appellant does not contest his assault conviction within Charge IV involving ACS. Additionally, the military judge sentenced Appellant to three months confinement for the kidnapping conviction and three months confinement for the assault conviction, with the sentences running concurrent with one another. (R. at 1189-90.)

Essentially, Appellant contends his detention of ACS was "incidental" to a separate offense, namely his assault of ACS. In making his argument, Appellant relies on a six-part test. (App. Br. at 29, *citing* United States v. Seay, 60 M.J. 73 (C.A.A.F. 2004).) As Appellant notes, this test was originally used by our former sister court in United States v. Santistevan, 22 M.J. 538, 543 (N.M.C.M.R. 1986), and was subsequently adopted by our superior Court in United States v. Jeffress, 28 M.J. 409, 413 (C.M.A. 1989), United States v. Barnes, 38 M.J. 72, 74 (C.M.A. 1993), and United States v. Newbold, 45 M.J. 109, 112 (C.A.A.F. 1996). The few cases that have reviewed this "holding" issue since 2004 have cited to a hodgepodge of these cases versus using one definitive case for the six-part test. For instance, in United States v. Kowalewski, ACM 36837, 2008 CCA LEXIS 185 (A.F. Ct. Crim. App. 8 May 2008), this Court employed the six-part test and cited to Santistevan, Jeffress, Barnes, and Newbold. However, in United States v. Corralez, 61 M.J. 737, 749 (A.F. Ct. Crim. App. 2005) and United States v. Jennings, ACM 36890, 2008 CCA LEXIS 122 (A.F. Ct. Crim. App. 19 March 2008), this Court cited to Santistevan and Seay. The last time any military appellate court cited to this six-part test appears to be in United States v. Sneed, 74 M.J. 612 (A.C.C.A 2015), which occurred prior to kidnapping receiving its own enumerated UCMJ article (Article 125) as a result of the Military Justice Act of 2016.

The six factors to consider in determine whether detention is merely incidental to another offense are as follows:

> (1) The occurrence of an unlawful seizure, confinement, inveigling, decoying, kidnapping, abduction or carrying away and a holding for a period. Both elements must be present.
>
> (2) The duration thereof. Is it appreciable or *de minimis*? This determination is relative and turns on the established facts.

> (3) Whether these actions occurred during the commission of a separate offense.
>
> (4) The character of the separate offense in terms of whether the detention/asportation is inherent in the commission of that kind of offense, at the place where the victim is first encountered, without regard to the particular plan devised by the criminal to commit it . . . .
>
> (5) Whether the asportation/detention exceeded that inherent in the separate offense and, in the circumstances, evinced a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered. . . .
>
> (6) The existence of any significant additional risk to the victim beyond that inherent in the commission of the separate offense at the place where the victim is first encountered. It is immaterial that the additional harm is not planned by the criminal or that it does not involve the commission of another offense.

See Santistevan, 22 M.J. at 543; Jeffress, 28 M.J. at 413; Barnes, 38 M.J. at 74; Newbold, 45 M.J. at 112; Seay, 60 M.J. at 80-81.

Here, the totality of the factors shows Appellant's offense of kidnapping ACS was not incidental to his assault on ACS. The first factor is met since Appellant seized ACS and held her for a period. Notably, Appellant does not contest either of these facts.

The second factor is also met because the duration in which Appellant held ACS was not *de minimis*. Instead, the duration lasted from 5 to ten minutes and, at least to ACS, "felt like 10 minutes." (R. at 588.) Appellant, however, feels this length is not long enough. In doing so, he cites United States v. Jackson, 24 F.4th 1308, 1312 (9th Cir. 2022), which held that a seven-minute holding weighed against kidnapping since that amount of time "would be quite brief on the spectrum of possible kidnappings." Appellant also cites this Court's opinion in Corralez, where this Court determined two five-minute holdings were not an appreciable duration.

However, as Appellant acknowledges, this Court has also held that a four-minute holding was sufficient for a kidnapping conviction. *See* Jennings, at *5. Additionally, our sister Court held in Sneed that a holding that occurred for "not more than 10 minutes" was an "appreciable amount of time." *See* Sneed, 74 M.J. at 617.

On their faces, each of these cases, and their varying time determinations, appear to be in conflict with one another. However, they are not. Instead, a review of these cases shows that, while time duration plays a role in this determination, the main factor in each of these cases turns on whether the separate offense (in this case, assault) was the overall focus and objective of the appellant's actions, or whether some other objective (in this case, finding out the location of DMW) was the reason the appellant detained someone and the separate offense (in this case assault) was just a means by which to obtain that other objective (which, again in this case was finding out the location of DMW).

For instance, Jackson involved a pure assault by that appellant on his girlfriend. Jackson, 24 F.4th at 1310. There, the entire six-to-seven-minute attack was the appellant punching or dragging his girlfriend. The court there found the "primary conduct here was an assault" and that the "conduct here did not go beyond that." Id. at 1314. Essentially, this incident was *only* about an argument and fight between the appellant and his girlfriend.

The same holds true for Corralez. There, the appellant and his girlfriend had two fights, both of which lasted about five minutes. Corralez, 61 M.J. at 749. The first was an argument between the couple that in a vehicle that involved the appellant hitting, biting, choking, and pulling his victim's hair, and holding her seatbelt so she could not get out of the car. The second fight involved the couple assaulting each other. This Court determined these "offenses involve

the functional equivalent of a feuding couple driving down the road." Like Jackson, these incidents were *only* about arguments and fights between the appellant and his girlfriend.

Jennings was different. There, like here, the appellant claimed the kidnapping was incident to an assault specification. *See* Jennings, at *1. In that case, the appellant approached a van at an intersection holding a rifle and order everyone except the driver to get out of the vehicle. The appellant then ordered the driver to drive to Fairbanks, a nearby town. Approximately four minutes into this drive, the driver was able to grab the rifle and exit the vehicle. Id. at *4.

This Court noted distinct differences between Corralez and Jennings. Id. at *10. This Court noted that "from the start . . . what motivated the appellant was his desire to leave the base and proceed towards Fairbanks," and that the appellant needed "to retain the van's driver" to meet his objective of getting to Fairbanks because he did not know where Fairbanks was. This Court continued:

> Therefore, the assault, consummated by the threat posed by his rifle, becomes the catalyst to achieving the greater end by ensuring the retention of NDW and his cooperation, rather than an end in itself. This is quite the opposite of the situation in Corralez where the continuation of the assault was the objective, and the retention of the victim the means of accomplishing that end.

Id. at *11. In other words, this Court held that the appellant's primary motivation was getting to Fairbanks, and the appellant had to detain the driver to meet that goal. While the appellant did also assault the driver, this Court held that the assault of the driver was just a means to accomplish his greater goal, which was to get to Fairbanks. This was in stark contrast to Jackson and Corralez where the *one and only* goal was assault and any holding of the girlfriend was done *purely* to be able to continue to assault her.

Sneed was also different from Jackson and Corralez. In Sneed, the appellant claimed the kidnapping was incident to an attempted robbery. Sneed, 74 M.J. at 614. In that case, the appellant looked his girlfriend in a closet and told her he would release her when she gave him her debit card. The incident lasted "not more than ten minutes." Id. at 617. Our sister Court held that the kidnapping was not incidental to attempted robbery. Id. at 616. In doing so, the court held that the appellant was "indifferent to the ostensible reason given for confining [his victim] in his closet – that is, to forcibly take her debit card from her. Rather, the demand for [the victim's] debit card was merely pretext to further abuse her." Id. Like in Jennings, the Army Court found that the underlying offense –attempted robbery – was not the primary motivation for the holding. Instead, simply wanting to abuse his victim was the appellant's primary motivation, and the underlying offense was just a way in which to accomplish the appellant's primary goal.

Appellant's case is the same as Jennings and Sneed and in contrast to Jackson and Corralez. Whereas in Jackson and Corralez the primary goal was assault itself, Appellant's primary goal here was not to assault ACS, but instead to obtain information from her – namely the whereabouts of DMW. This is just like Jennings and Sneed where those appellant's each had underlying primary motives separate and apart from the separate offense they committed. And, just like in Jennings, Appellant here used assaulting ACS as a means to obtain his primary motive – again, to obtain information on DMW's location. This is evidenced by Appellant repeated asking ACS where DMW was and then screaming at her that she was lying when ACS said she did not know.

Returning to the second factor, recognizing that this case is more comparable to Jennings and Sneed versus Jackson and Corralez, and the fact that both this Court, in Jennings, and our

sister Court, in Sneed, held that four minutes and "not more than 10 minutes" were appreciable times enough to warrant kidnapping convictions, this Court should find a five-to-10-minute detainment in this case meets the second factor.

For the third factor, Appellant's kidnapping actions did occur during the commission of a separate offense, though, as discussed above, the separate offense (the assault) was not Appellant's primary motivation for the incident. This again stands in stark contrast from Jackson and Corralez.

The fourth factor also favors a kidnapping conviction. Again, the primary motivation behind Appellant's conduct here was *not* the assault, but instead to obtain information from ACS about the whereabouts of DMW. This is in stark contrast to both Jackson and Corralez, where the continuation of the assault was the objective and, thus, the victim's continued detention was inherent in being able to continue to assault. Notably, Appellant here was able to continue detaining ACS without physical force, including by blocking her path of escape and by telling her she was lying and asking if she was scared.

Similarly, the fifth factor warrants a kidnapping conviction as well.[22] Here, Appellant's detention of ACS "exceeded that inherent in" assault, and his actions "evinced a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense" of assault. Again, in additional to physically assaulting ACS to keep her from being able to leave, Appellant also used his body to place a barrier between ACS and an escape route. Appellant also used coercive and non-physical tactics like yelling at ACS, calling her a liar, and asking if she was scared. Each of these factors show that Appellant used more than physical assault to manifest his "holding" of ACS, and they again show that his primary motivation for

[22] Appellant does not address the fifth factor in his brief. (*See* App. Br. at 27-31.)

this whole incident was to detain ACS so that she would tell him where DMW was located – he never detained her *purely* to assault her. And, again, these circumstances are in stark contrast to Jackson and Corralez where the *sole* motivation for the entire incidents was assault. As the Jackson court stated, "the primary conduct here was an assault causing serious bodily injury . . . The conduct here did not go beyond that." Jackson, 24 F.4th at 1314. Here, Appellant's conduct did go beyond assault, thus warranting his kidnapping conviction.

Finally, the sixth factor warrants conviction for kidnapping as well as there was an existence of significant additional risk to ACS beyond that of the assault Appellant committed. ACS testified that Appellant repeatedly told her she was lying and then asked her, "Are you scared?" (R. at 588.) Even though she was scared, ACS told him know she was because "I didn't want to escalate it to make things worse." (Id.) ACS continued that she was "scared trying to leave." (R. at 595.)

At this point, ACS had already been assaulted by Appellant, and she was clearly scared that Appellant would escalate his actions against her beyond only grabbing her arm and face with his hand, which is the assault charge he stands convicted of committing. Indeed, while Appellant was only charged with assault consummated by battery, the potential for this incident to escalate to a far graver version of assault (i.e., aggravated assault), or worse, was a significant risk for ACS.

Here, Appellant's assault on ACS was *not* being inherent to his kidnapping of her. As discussed above, all factors in this case show Appellant's detention, or "holding," of ACS was not "merely incidental" to his assault of her, but instead was a separate and distinct offense warranting its own charge and conviction. Thus, his act of holding ACS falls well within the

scope of kidnapping as defined under Article 125, UCMJ. Therefore, Appellant's claim must fail and this Court should affirm his kidnapping conviction.

In sum, Appellant has failed to make a specific showing of a deficiency of proof as to his kidnapping conviction against ACS. Yet, even if he did, the evidence shows Appellant kidnapped ACS and held her in a fashion consistent with the UCMJ and applicable law. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing SrA ACS testify and seeing all of the surrounding circumstances involving this kidnapping, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

V.

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

Standard of Review and Law

This Court reviews "prosecutorial misconduct and improper argument de novo. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). However, where no objection is made, this Court reviews for plain error. Id. (*citing* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018), where our superior Court stated it will "continue to review unobjected to prosecutorial

misconduct and improper argument for plain error.). The burden of proof under a plain error review is on the appellant. Id.

Our superior Court has explained:

> Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.

Id. (*citing* Andrews, 77 M.J. at 402.)

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Notably, a plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the

first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

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

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

Analysis

From a general standpoint, Appellant has picked small snippets from the trial counsel's over 80-minute-long closing argument, snippets which garnered no objection at trial, and now declares that the trial counsel "committed prosecutorial misconduct." (App. Br. at 31-44.) Such a tactic is a classic example of "surgically carving" out a portion of an argument without regard for context, a tactic frowned upon by our superior Court, and should be dismissed by this Court.

When viewed within the context of the entire court-martial, or simply just within the context of the findings argument itself, the trial counsel did not commit prosecutorial misconduct. The trial counsel's closing argument spanned 33 pages of transcript and lasted over 80 minutes.[23] (R. at 1051-1084.) The trial counsel's rebuttal argument spanned another five pages. (R. at 1121-25.) Throughout this expanse of time, Appellant's trial defense counsel objected to none of the statements he now claims amounts to prosecutorial misconduct. Further, the overwhelming majority of the trial counsel's closing argument is never cited by Appellant in this issue.

- ***Appellant's Rights***

Appellant first claims the trial counsel commented on Appellant's exercise of rights to not testify when he argued the following:

> *This is not a case like he said, she said.* This is not a situation where can people get drunk, something happened, they wake up the next morning, and somebody looks back and says, you know what, whatever happened then, I wouldn't have consented to that if I was sober, so maybe that wasn't consensual. That's not what this is about. This is not a situation when you look at the facts and evidence that we have in this court and we look at and say, you know, reasonable people could disagree of whether any of these three ladies wanted, consented to what was happening to them.
>
> Now, Mr. Board President[sic], Ladies and Gentlemen of the Board[sic], you have been presented with a mountain of evidence, in-court sworn testimony from all three victims, testimony from a multitude of other witnesses. You have documentary, photographic, videographic, audio, medical, DNA forensic evidence; and when you look at this evidence, it all has one common thread. It has one simple and terrible explanation, [Appellant]. He got intoxicated, he instilled fear, and he dominated three young women. *Now, in some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who*

[23] Appellant's court-martial convened at 0732 on 27 October 2023. (R. at 1051.) The trial counsel's argument began immediately thereafter and continued until it ended at approximately 0858 when the court recessed. (R. at 1084.)

> *know what happened, you might only have the testimony of one.* In this case, you don't have to just rely on the testimony of the one person – the one victim in the room because you have a lot more. In many cases, you might not have evidence of them reporting right away, evidence of pictures taken, of reports made, or statements made exactly immediately after it happened. But in this case, we do. There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted in this case, and we'll go through it one at a time.

(R. at 1051-52.) (emphasis on portion of the trial counsel's argument that Appellant now takes issue.) Appellant's counsel made no objection to this portion of the argument.

Appellant claims this statement amounts to a statement by the trial counsel on Appellant's right to not testify because the "implication was clear. While the three alleged female victims took the stand and testified, the male accused did not." (App. Br. at 34.) Appellant is incorrect.

Appellant's highly-selective cherry-picking of the trial counsel's argument fails to consider the entire context. As shown above, when read in context, the special trial counsel here was not trying to "imply" anything related to Appellant's right to testify. Instead, the trial counsel was first highlighting that Appellant's case was not a typical "he said, she said" case where "people get drunk, something happened," the parties wake up the next morning, and there's a question as to whether an act was consensual. Instead, as opposed to this typical "he said, she said" case, Appellant's case represented repeated and purposeful attacks on three women where "no reasonable person could disagree of whether any of these three ladies wanted, consented to what was happening to them." When read in context, the trial counsel's statement here was showing the complexity of Appellant's acts involving three women, and how this was not simply a one-night, "he said, she said," one-off type of sexual assault case. It had nothing to do with Appellant's right to testify.

This fact is highlighted further by the trial counsel's next argument to the members that this case had a "mountain of evidence," "testimony from all three victims," "testimony from a multitude of other witnesses," as well as "documentary, photographic, videographic, audio, medical, DNA forensic evidence." (R. at 1051.) Again, when read in context, the trial counsel's point here was to further highlight why this case was not simply a "he said, she said" case, but instead included a bevy of evidence from multiple sources outside of the three victims.

While the trial counsel then noted that in some cases the panel only had the "testimony of one" if two people were in a room, the trial counsel immediately followed up this statement by saying, "you don't have to just rely on the testimony of the one person – the one victim in the room because you have a lot more," adding that in this case the Government presented evidence of victims reporting incidents right away, as well as pictures, reports and statements made immediately after the acts occurred. (R. at 1052.) Here again, these statements were not an alleged "implicit commentary on Appellant's failure to testify," but instead was an argument by trial counsel that in this case, as opposed to a typical "he said, she said" case, the members did not have to "rely solely on the testimony of one person" (i.e., the victim). Instead, the trial counsel was telling the members that they had multiple other pieces of evidence to rely upon, such a photos, other witness statements, and medical reports. These were no direct, indirect, or innuendo comments on Appellant's rights. Although it was perhaps inartful to mention that the members only had the testimony of one person in the room, the comment could not fairly be understood to be saying that because the members had not heard from Appellant he must be guilty. Instead, it seems clear that trial counsel was attempting to highlight that even if the victim was the only eyewitness who testified to the crime, her testimony was corroborated by a

multitude of other evidence. Since there was an alternate explanation for trial counsel's statement it did not amount to plain and obvious error.

Appellant next jumps a few pages ahead in the closing argument to where the trial counsel is discussing the specifications involving ACS. (App. Br. at 35.) There, citing United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005), Appellant takes issue with the following passage from the trial counsel's argument:

> What about [ACS]? *Nothing refuted what [ACS] said on the stand. She took the stand, swore an oath to tell the truth*, and she told you she was walking doing laundry. [Appellant] made his way into her room. She walked in voluntarily with him. There's no evidence that he grabbed her and yanked her in there. That's not required. But what happened is they went into the room; and once in there, the door shut, alcohol on his breath, he grabs her and shoves her in the corner and shakes her saying "Where is [DMW]?" When she tries to leave, he blocks her. He won't let her leave. He calls her a liar that she doesn't know where [DMW] is, a liar that she has to go do laundry. He doesn't let her leave for five to ten minutes. He puts his hand on her chest and says "Are you scared?" *This is undeniable. This has not been refuted. There is nothing contradicting [ACS's] testimony.*

(R. at 1054.) (emphasis on portion of the trial counsel's argument that Appellant now takes issue.)

Appellant contends this violates Carter because, like in Carter, the specifications involving ACS "involved two adults alone in a private room" where there "were no screams, no injuries, no physical evidence of a struggle, and no other witnesses" and where only the accused "possessed information to contradict the Government's sole witness." (App. Br. at 35, *citing* Carter, 61 M.J. at 33–34.) Appellant contends that there "was no physical evidence concerning AS's allegations and no one was present during the alleged offenses other than AS and Appellant." (Id.) Based on these circumstances, by telling the members that ACS's testimony was not "refuted" and "undeniable," Appellant argues that the trial counsel "repeatedly

commented 'indirectly' and 'by innuendo' on Appellant's failure to testify," and thus violated Carter. (Id.)

In Carter, our superior court found plain error where the trial counsel characterized the complaining witness's account as "uncontroverted" and "uncontradicted" eleven times during argument, in a case where only the accused could be in possession of contradictory evidence "such that the reference to [accused's] decision not to testify became a centerpiece of the closing argument." Carter, 61 M.J. at 34. The Court also noted that even after the military judge instructed the members that they could not draw any adverse inference from the appellant's failure to testify, trial counsel continued that type of argument. Id. The court found the comments "were not isolated or a 'slip of the tongue.'" Id.

However, the Carter court also recognized that, "[u]nder the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." Id. (citations omitted.) Indeed, our superior court has found that the Government "is permitted to make 'a fair response' to claims made by the Defense, even when a Fifth Amendment right is at stake." United States v. Gilley, 56 M.J. 113, 120 (C.A.A.F. 2001) (*quoting* United States v. Robinson, 485 U.S. 25, 32 (1988)). The Carter court also cited to the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 595 (1978), noting that the case involving a "finding that the prosecutor's comments that the evidence was unrefuted and uncontroverted were not improper because petitioner's counsel focused the jury's attention on her silence by promising a defense and telling the jury that petitioner would testify." Id. at 35.

That is exactly what happened in this case. In Appellant's opening statement, his counsel said the following related to the charges involving ACS:

> Now, the government talked a little bit about this [ACS] situation. The situation this one night where it's charged in the specification as kidnapping. Now, this was a drunk, dumb airman looking for his girlfriend that night. Look at the details. Look at your understanding. Look at the common sense and the way of the world. He is looking for his girlfriend. He was drunk. He was acting dumb. But the specification on the charge sheet is kidnapping. I'm not going to go into any more details. *You're going to hear the testimony from the individuals.* You're going to hear kind of what happened that night.

(R. at 402.) Here, as Appellant explicitly states in both this opening statement and now within his brief, the only two "individuals" in play with this incident was ACS and Appellant. Thus, when Appellant's counsel told the members that they were going to hear "testimony from the individuals," his counsel was telling the members they would hear from Appellant to explain "what happened that night" – presumably that he was a "drunk, dumb airman" who was just "looking for his girlfriend." This theme – that Appellant's "dumb" acts did not rise to kidnapping – would persist in their closing argument when Appellant's counsel stated, "Did he kidnap her or do we have a drunken guy – I mean, we all have been around someone – yeah, this is this drinking behavior – this culture of drinking is you hear about in this case and you see every day, it's gotten out of hand, and you have to be drunken kids underage running around the dorms acting stupid. Nobody was kidnapping anybody. Drunk and disorderly maybe." (R. at 1113.)

Here, Appellant's counsel promised the members during opening statement that they would get Appellant's version of "what happened that night" and also an indication of his state of mind that night in ACS's room. Except they never did. Thus, pursuant to Lockett, trial counsel's argument here was not plain error.

Notably, the Carter court held that in that case the "invited response" doctrine did not apply. There, the Government argued there was no error because the defense failed to fulfill a

promise to put on a defense. Carter, 61 M.J. at 35 (*citing* Lockett, 438 U.S. at 595). However, the Carter court disagreed for the following reasons:

> 1. The defense in the present case never focused the members' attention on any facts that it planned to present.
>
> 2. Although the defense at one point noted that they intended to present a witness, defense counsel did not inform the members of the identity of the witness or create any expectation as to the substance of the witness's testimony.
>
> 3. Defense counsel's opening statement made it clear that the defense's theory was to question the credibility of the Government's witness. The opening statement did not refer to evidence or witnesses the defense was going to produce.

Id.

Here, however, Appellant did each of these things. Appellant's counsel specifically focused the members' attention on facts it planned to present and referred to evidence the defense was going to produce – namely "what happened that night" – and told the members who would provide that testimony. Again, Appellant readily admits that the incident involving ACS involved only two people – ACS and Appellant. Thus, when Appellant's counsel told the members they would hear from "individuals," this was a clear indication that they would hear Appellant's side of "what happened that night" and hear about his state of mind at the time of the incident – namely that he was just being "drunk" and "dumb" and "disorderly," but was not kidnapping anyone. But they never did. Appellant's counsel then exacerbated the issue by reinforcing this "drunk" and "dumb" theory after failing to provide "testimony from the individuals" about what happened that night.

Here, though promised, Appellant's side of the story was not presented to the members. Therefore, this Court should find that trial counsel's statement above was an invited reply to trial defense counsel's discussion in opening statements of trial defense counsel promising the

members that they would hear Appellant's account. Appellant's failure to support his claims does not equate to error by trial counsel in commenting on such failure.

Yet, even if this Court finds that this statement was not in fair response to trial defense counsel's opening statement, this comment was still not error. There is no indication that trial counsel was purposely drawing attention to Appellant's right to remain silent. As noted above, this case is distinguishable from Carter where the trial counsel's reference to the words "uncontroverted" and "uncontradicted" eleven times made Appellant's decision not to testify a "centerpiece of the closing argument." Carter, 61 M.J. at 34. 28. Further, Carter also involved this continued "centerpiece" argument even after the military judge instructed the members that they could not draw any adverse inference from the appellant's failure to testify.

The trial counsel's argument in this case simply did not rise to that level – and Appellant's trial counsel seemingly agreed considering the trial defense counsel's (1) lack of objection and (2) not finding it necessary to address the trial counsel's comments in his own closing argument. Finally, the military judge instructed the members that Appellant had an absolute right to remain silent, and the members were not to draw any adverse inference from him not testifying. (R. at 1044.) Thus, given the above, even if this Court finds that trial counsel's argument was not a fair reply to trial defense counsel's opening statement, Appellant still has not met his burden in showing plain error. Appellant has not shown that this was anything but an unobjected to, isolated comment. He has further not demonstrated that the comment was intended to draw attention to Appellant's right to remain silent, or not shown that the military judge's instructions were undermined.

Yet even if there was error in either of the two small portions of the trial counsel's argument that Appellant now complains about for the first time, there is no prejudice. To start,

the panel's findings show the members where not impacted by any alleged errors by the trial counsel. The panel acquitted Appellant of multiple specifications involving SJM and DMW, showing the panel reviewed each and every offense alleged against Appellant individually and made their determinations independent of the trial counsel's argument. The fact that the panel returned a mixed verdict for charges involving SJM and DMW shows the panel was not swayed in any particular fashion, or towards any specific offense, due to the trial counsel's argument. *See* United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017). In Sewell, our superior Court said that "[t]he panels mixed findings further reassured us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments." The Court "presume[d], absent contrary indications, that the panel followed the military judge's instructions that trial counsel's arguments were not evidence and that it must not engage in spillover when determining Appellant's guilt." Id.

Further, just as in Sewell and as noted above, aside from just the testimonies of SJM and DMW, the Government also presented corroborating evidence including pictures of the injuries Appellant inflicted on both SJM and DMW, testimonies of multiple witnesses, and medical reports.

Moreover, while the panel convicted Appellant of the two specifications involving ACS, it is important to note that Appellant's counsel in both his opening statement and closing argument essentially admitted the underlying facts for Appellant's offenses against ACS – that he was looking for DMW, that he was "drunk" and "acting dumb," and that his actions amounted to "Drunk and disorderly, maybe." (*See* R. at 402, 1094-95, 1113.) The main question Appellant's counsel asked the panel to consider was whether the conduct in evidence (which was based on ACS's testimony) rose to the level of kidnapping – essentially arguing that the

Government overcharged the case rather than arguing that ACS's testimony of what happened that night did not actually occur.[24] This sole point of contention by Appellant's counsel to the members on the charges involving ACS had nothing to do with the trial counsel's closing argument or the newfound claims Appellant now makes.

Additionally, any severity of the trial counsel's supposed misconduct was very low, especially considering Appellant and his counsel never objected to any of Appellant's numerous newfound complaints in his brief. This lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (*quoting* United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). Further, as noted above, Appellant's two cited examples of the trial counsel alleging making reference to Appellant's failure to testify account for a very small portion - couple of lines and one paragraph – of the trial counsel's 80-minute-long closing argument.

Next, while Appellant complains that the military judge took no curative actions concerning alleged "indirect commentary on [Appellant's] failure to testify," Appellant does recognize that at one point the military judge did tell the members in curative instruction that "as a reminder, the burden of proof to establish the guilt of [Appellant] beyond a reasonable doubt is on the government. The burden never shifts to [Appellant] to establish innocence or to disprove the facts necessary to establish each element of each offense." (R. at 1083-84.) At another point, the military judge told the panel, "Members, argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state

[24] Appellant takes this same approach in Issue IV above. There, Appellant he makes a technical argument regarding his kidnapping conviction by questioning whether the evidence rises to the level of kidnapping versus questioning the evidence itself.

the facts, it is your memory that controls; but ultimately, it's up to you to make that determination." (R. at 1089.)

Appellant is further forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel to which Appellant now takes issue. Further, as mentioned earlier, the members were told repeatedly that it was their duty, and their duty alone, to determine which witnesses were credible and which witnesses were not. The military judge instructed, "You have the duty to determine the believability of the witnesses," "The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you," that arguments made by counsel were "not evidence," and that the members "must base the determination of the issues in this case on the evidence as you remember it and apply the law as I instruct you." (R. at 1045, 1051.)

Court members are presumed to follow the military judge's instructions absent evidence to the contrary. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). Here, there is no evidence that the court members did not follow the military judge's instructions. In fact, the record shows the members followed those instructions considering their decision to acquit Appellant of various offenses involving both SJM and DMW.

Finally, as shown in the factual sufficiency issue within this brief, the weight of the evidence supporting Appellant's convictions involving all three victims was very strong, including multiple convictions that Appellant does not contest on either a factual or legal sufficiency basis within his brief to this Court. Moreover, for specifications involving SJM and DWM, the Government did not rely solely on the testimony of those victims, but instead had physical evidence, photographic evidence, and other witness testimony establishing Appellant's guilt to those offenses. Finally, Appellant's argument in this section regarding prejudice as it

relates to SJM and DWM simply reiterates the same arguments he presents within his factual sufficiency claims and fail for the same reasons discussed within those respective issues.

Here, Appellant's claims that the trial counsel provided "indirect commentary" on Appellant's failure to testify are unsupported by the evidence and do not rise to plain error. Yet even if it did, any error was harmless beyond a reasonable doubt. As a result, Appellant's claims on this point should fail.

- ***Claimed Credibility Vouching and Personal Opinions***

Appellant next claims the trial counsel "impermissibly expressed personal opinions about the evidence" and "impermissibly vouched for the credibility of each of the three alleged victims." (App. Br. at 36-37.) Appellant believes the trial counsel's argument is comparable to statements made in Voorhees and Fletcher. Appellant is mistaken.

First, Appellant, in his brief, cites to two instances where the trial counsel used the pronoun "I" and two instances (that are within the same paragraph) where the trial counsel said "we know." (App. Br. at 36.) Appellant then cites to three examples, one instance for each victim, to support his claim that the trial counsel "impermissibly vouched for the credibility of each of the three alleged victims."

To start, Appellant's cherry-picked examples are a far cry from Fletcher where there was "more than two dozen instances in which the trial counsel offered her personal commentary on the truth or falsity of the testimony and evidence," and where that trial counsel "repeatedly inserted herself into the proceedings by using the pronouns 'I' and 'we.'" *See* Fletcher, 62 M.J. at 181.

Regarding the use of pronouns, this case is analogous to the argument found in United States v. Causey, 82 M.J. 574 (N-M Ct. Crim. App. 2022). There, our sister Court held that

repeated use of the word "we" and the term "we know" did not constituted improper vouching. Instead, the Court held that the "trial counsel's use of pronouns was clearly directed toward urging conclusions to be drawn from the evidence." Id. at 582. Examples included, "We know it began as an operation," "we know it did not," "we know he intended to send it to her," "We have the language," "We have the request for child pornography," "we know [appellant] did because he was communicating clearly," "we know he knew exactly what was going on," "we know that his browsing history shows he was actually looking for porn," and "We know he wanted pictures." Id. at 582-83. The Court held these statements were "properly focused on drawing reasoned conclusions from the evidence in the record, as opposed to expressing personal opinions regarding the credibility of witnesses or other evidence." Id.[25]

Here, Appellant complains of statements that are quite similar to those in Causey, including "we know she didn't freely give agreement to the sex" and "we know that she actively told him, 'No, I don't want to have sex with you,' and he did it anyway." (App. Br. at 36, *citing* R. at 1069.) Just as in Causey, the trial counsel's argument was not expressing personal opinions on the credibility of the witnesses or evidence but instead was "properly focused on drawing reasoned conclusions from the evidence in the record." *See* Causey, 82 M.J. at 583.

Finally, while the Appellant cites to two times where the trial counsel used the word "we" to allegedly vouch for the evidence, the trial counsel also used the phrases "you have," "you

[25] *See also* United States v. Smith, ACM 40202, 2023 CCA LEXIS 196 at *32 (A.F. Ct. Crim. App. 5 May 2023) (unpub. op.) (this Court, citing Causey, found various "we know" and "we have heard" comments did not amount to prejudicial error were used to reference matters in evidence and how the members should consider such evidence in light of the military judge's instructions); *see also* United States v. Champion-Flores, No. 202100088, 2022 CCA LEXIS 564, at *34 (N-M Ct. Crim. App. Sep. 30, 2022) (following Causey, our sister Court held statements such as "How do we know," and "We all know the reality," were properly focused on drawing reasonable conclusions from the evidence as opposed to expressing personal opinions regarding the credibility of the witnesses or other evidence.")

hear," "you heard," "you see," "you saw," or "you watched" over 40 times. When viewed as a whole, Appellant did not impermissibly vouch for the evidence in this case.

Regarding Appellant's claim that the trial counsel "impermissibly vouched for the credibility of each of the three alleged victims," Appellant provides one example for each victim. However, the context of the trial counsel's arguments shows the trial counsel was simply rebuffing any insinuation by Appellant that his victims were liars. This is particularly true for SJM and DMW, both of whom were deemed liars by Appellant throughout the trial, and are again called liars to this Court. In his closing argument, Appellant's counsel repeatedly attacked SJM and DMW as liars who could not be trusted. Even now before this court, Appellant accuses SJM of committing perjury and testifying untruthfully, and he calls DMW an "admitted liar." (*See* App. Br. at 5, 15.)

Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (*quoting* United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1994)). This could occur, for example, by a prosecutor saying that the government would not call a witness to the witness stand who was lying. However, a trial counsel is allowed to argue that a witness should be found to be credible and explain why an appellant's attacks against that witness's credibility are unpersuasive. *See* United States v. Blackburn, 2024 CCA LEXIS 129 (A.F. Ct. Crim. App. 4 April 2024) (finding a trial counsel did not vouch for a victim's credibility when the trial counsel argued in general that the victim was a credible witness, highlighted the evidence and testimony supporting this conclusion, and the argument was in direct response to the trial defense counsel's focused attacks against the victim's credibility).

Here, when reading in context and as a whole, the trial counsel was doing just that. Regarding SJM, the trial counsel stated the following:

> This is something defense spent a lot of time on asking her about what she said in a previous hearing. Now, I want to address that. She did testify in an earlier hearing that she didn't remember spending that time with him. When she said that, she believed that to be the truth. And do you know how we know that? The way we know that is because those text messages that she reviewed that you heard the defense counsel gave to her so she could look over these things, all these messages that are out there, those messages she gave to OSI. We heard from [an AFOSI SA]. The messages that they got from [SJM], she chose to give those to them. She chose to say, hey, here are all the messages I got with – I had with [Appellant]. Do you think if she was trying to hide that fact and lie that she would have just voluntarily given to OSI all of those messages spending time with [Appellant]? She wouldn't have. Those messages that refreshed her memory and she realized, oh, goodness, when she reviewed it a few days before trial, she realized that wasn't true what I had said to the judge the last time. *So she came in here and she told the truth.* She looked at those messages that she had voluntarily given to OSI, not trying to hide anything, and she said, yes, I was mistaken before. This is what actually happened. She wasn't trying to hide the ball. She was honestly mistaken. And the fact that she gave OSI those messages, those very messages showing that she spent time with [Appellant], shows she's not trying to gain the system or something. She honestly forgot.

(R. at 1076-77.) (emphasis on portion cited by Appellant in his brief.)

Here, the trial counsel was not "vouching" for SJM, but instead was explaining to the members (1) why SJM had previously testified as she did in a prior hearing ("When she said that, she believed that to be the truth"), (2) how she realized her recollection was wrong when she refreshed her memory by reviewing messages, and (3) that upon realizing her prior testimony was incorrect, she "came in here and she told the truth." (R. at 1076.)

The same is true for DMW. There, the trial counsel argued:

> I also want to point out the defense counsel asked [DMW], "Hey, isn't it true that you didn't tell OSI about the specific instance in March of 2022 as your boyfriend was leaving Osan when he raped

> you there in that room?" And after viewing all those hours of footage and looking through all those hundreds of pages of text messages, she goes, "Yeah, I guess I didn't." Do we expect her to remember that? And then when she had an opportunity to review the transcript from the actual interview I handed it to her and she read it and goes, "Oh, yeah, yeah, I did tell them about that." She did tell them about these things. And slight changes in memory – even as she here, she didn't remember telling about that until she looked at the transcript. So don't let yourself be persuaded that she must be lying simply because there are some things that happened before or she may have said before that she doesn't remember now. That means she is a human being. She *sat here and took an oath and was as honest as she possibly could be with all of us*.

(R. at 1080.) (emphasis on portion cited by Appellant in his brief.)

Here again, the trial counsel was not "vouching" for DMW, but instead was explaining to the members why DMW (1) did not remember something she'd previously said to AFOSI under the circumstances, (2) had recognized that she had said that once being reminded, and (3) why her misremembering this was simply her being human rather that being a "liar" as the defense had insinuated during the trial.

Finally, for ACS, the context of the trial counsel's argument was simply to cut off any inclination that ACS had a motive to lie. The trial counsel argued:

> The only thing that came out about this, I suppose, is that she didn't tell Security Forces right there while he was present with her. I mean, do you think maybe she didn't want Security Forces to know – or she didn't want [Appellant] to know right there that she was ratting on him about what he had just done to her? Now, she told them later, but not right then while he was there with her. That's, I suppose, about it. *I don't know any other explanation of why she would have been lying.* She had no other motive to lie.

(R. at 1077.) (emphasis on portion cited by Appellant in his brief.) Again, the trial counsel was not "vouching" for ACS, but simply dispelling any notion that ACS had a motive to lie. "The government may argue that the jury can or should infer from relevant facts that a witness does not have a reason to lie." United States v. Martinez-Larraga, 517 F.3d. 258, 271 (5th Cir. 2008).

When witness credibility is a contested issue in a litigated case, a prosecutor must explain to the trier of fact why they should judge a government witness to be credible and why defense's attacks against witnesses are unpersuasive. The impermissible argument is for a prosecutor to convey that the members should believe a witness *because* the prosecutor is saying she is credible. But that is not what trial counsel did in this case. Instead, the trial counsel tied arguments about the victim's credibility to the evidence. *See* United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984) ("While a prosecutor may not vouch for the credibility of witnesses based on facts personally known to the prosecutor but not introduced at trial, 'that does not mean the prosecutor cannot argue that the fair inference from the facts presented is that a witness had no reason to lie.'"). As a result, there was no plain error.

- ***No Prejudice***

Here, the trial counsel's closing argument was not in plain error. However, if this Court assumes error, Appellant fails to show how any of his complaints resulted in prejudice against him.

To start, as noted above, the panel's findings show the members where not impacted by any alleged errors by the trial counsel. Again, the panel here returned a mixed verdict that involved acquittals on various specifications involving two of the three victims. The fact that the panel returned a mixed verdict shows the panel was not swayed in any particular fashion, or towards any specific offense, due to the trial counsel's argument.

Additionally, as noted from the outset of this issue, this case is not comparable to the trial counsel's argument in Voorhees, where the prosecutor made "a spectacle of himself" by relaying and bolstering the government's case by touting his personal position and achievements. *See* Voorhees, 79 M.J. at 13-14. Nothing of that sort occurred in this case. Instead, the trial

counsel's arguments were centered on sustained attacks against Appellant's victims throughout the trial and did not result in objections from the defense.

Further, while he does cite Fletcher and its prejudice test, Appellant's justification that he was actually prejudiced is lacking. Looking at those factors, any severity of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to any of Appellant's numerous newfound complaints in his brief. Again, this lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." Gilley, 56 M.J. at 123. Further, as noted above, Appellant's complaints account for a very small portion (seven sentences) of an 80-plus minute closing argument. And again, despite the trial counsel's argument, the panel still acquitted Appellant of multiple specifications involving multiple victims. Thus, this factor should weigh in the Government's favor.

Next, as detailed above, while Appellant complains that the military judge took no curative actions concerning his newfound complaints, Appellant does recognize that the military judge provided multiple curative instructions throughout closing arguments. Appellant is also forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel to which Appellant now takes issue. Finally, as mentioned earlier, the members were told repeatedly that it was their duty, and their duty alone, to determine which witnesses were credible and which witnesses were not. Again, court members are presumed to follow the military judge's instructions absent evidence to the contrary. Taylor, 53 M.J. at 198. Here, there is no evidence that the court members did not follow the military judge's instructions, but instead followed those instructions, which is shown by their decision to acquit Appellant of various offenses involving both SJM and DMW.

Finally, as shown in the factual sufficiency issue within this brief, the weight of the evidence supporting Appellant's convictions involving all three victims was very strong, including multiple convictions that Appellant does not contest on either a factual or legal sufficiency basis. Also, again, for specifications involving SJM and DWM, the Government did not rely solely on the testimony of those victims, but instead had physical evidence, photographic evidence, and other witness testimony establishing Appellant's guilt to those offenses. And again, Appellant's argument in this section regarding prejudice as it relates to SJM and DWM simply reiterates the same arguments he presents within his factual sufficiency claims.

Here, Appellant's claim that the trial counsel committed prosecutorial misconduct is unsupported by the evidence and does not rise to plain error. Yet even if it did, Appellant has failed to show any prejudice. Therefore, this claim must fail.

VI.

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

Additional Facts

Appellant was sentenced at his court-martial on 28 October 2023. Appellant's case was docketed with this Honorable Court on 3 May 2024, 188 days later. Appellant never asserted a right to speedy post-trial processing during this time.

In the next 10 months, Appellant's counsel submitted nine enlargement of time motions. In the second, third, fourth, fifth, sixth, seventh, eighth, and ninth motions, Appellant's counsel wrote that Appellant was advised on his right to a timely appeal, "the request for this enlargement of time," and that Appellant "consented to the request for this enlargement of time. (See App. Motions, dated 21 August 2024, 20 September 2024, 18 October 2024, 19 November 2024, 19

December 2024, 16 January 2025, 14 February 2025, 21 March 2025.) Appellant never asserted a right to speedy post-trial processing during this time.

On 28 March 2025, 329 days after docketing, Appellant filed a motion to remand the case for correction of the record. After this Court ordered the remand, this case was re-docketed with this Court on 18 June 2025.

Appellant filed his brief to this Court on 18 August 2025, 61 days after re-docketing. Within his brief, Appellant never explicitly asserts a right to speedy post-trial processing.

Standard of Review

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

Law

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

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

requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

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

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

Independent of any due process violation, this court may provide appropriate relief where there is "excessive delay in the processing of the court-martial after the judgment was entered into the record." United States v. Valentin-Andino, 85 M.J. 361, 364 (C.A.A.F. 2025) (*citing* Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2)). If a CCA decides relief is warranted for excessive post-trial delay under Article 66(d)(2), UCMJ, "that relief must be 'appropriate,' meaning it must be suitable considering the facts and circumstances surrounding that case." Id. at 367. "This does not require a [CCA] to provide relief that is objectively meaningful, and it does not obligate a [CCA] to explain its reasoning regarding the relief it does provide." Id.

After the Valentin-Andino decision, it remains unclear as to whether the Gay factors still apply to determine whether Appellant is entitled to relief under Article 66(d)(2). United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). However, assuming arguendo the Gay factors apply in deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court in Gay considered a non-exhaustive list of factors, including:

> (1) How long the delay exceeded the standards set forth in Moreno;

(2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;

(3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;

(4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;

(5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and

(6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

Gay, 74 M.J. at 744.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied. In his brief, Appellant's attempts to lump two separate and distinct timeframes – (1) the timeframe between into sentencing and original docketing; (2) the timeframe from original docketing to re-docketing after remand – into one large timeframe to claim that it took the Government 599 days to docket his record. However, as discussed below, Appellant's contention is contrary to multiple recent cases issued by this Court and should be disregarded. From a Moreno and Livak standpoint, the only timeframe at issue is the 188 days that elapsed between Appellant's sentencing and the original docketing of this case with this Court.

- ***Moreno and Livak Only Applies to the Timeframe Between Appellant's Sentencing and the Original Docketing of this Case***

Here, Appellant claims his right to timely post-trial processing was violated in this case by calculating the time between his sentencing and the re-docketing of his case with this Court and claiming this timeframe exceeds this Court's Livak standard. Appellant here asks this Court to find that docketing an incomplete record of trial amounts to no docketing at all. In do so, Appellant's invites this Court to disregard multiple cases in which this Court has clearly held that the Livak standard only applies to the timeframe between an appellant's sentence and initial docketing with this Court. *See* United States v. Gammage, ACM S32731 (f rev), 2023 CCA LEXIS 528 (A.F. Ct. Crim. App. 15 December 2023); United States v. Donley, ACM 40350 (f rev), 2024 CCA LEXIS 228 (A.F. Ct. Crim. App. 11 June 2024).

However, like in Donley, this Court should decline Appellant's invitation as doing so "would be contrary to the plain meaning of" Moreno and Livak. *See* Donley, at *36. Indeed, Moreno states the that presumption of unreasonable delay applies "where the record of trial is not docketed" by the CCA within the specified timeframe. Moreno, 63 M.J. at 142.

Unlike Donley, Appellant's case was not originally docketed within the 150-day Livak standard. Instead, the case was docketed on Day 188, exceeding the standard by 38 days. As discussed below, that 38-day delay should be reviewed under Moreno.

However, the ensuing 411 days – 329 of which was due to Appellant's requested and consented-to enlargements of time – should not be included in a Moreno/Livak analysis. Like in Donley, Appellant is unable to "direct our attention to any ruling by the CAAF or this court holding that a subsequent remand by the CCA to correct one or more errors in the record effectively extends or reopens the period under consideration for facially unreasonable delay until the corrected record is re-docketed." *See* Donley, at *36.

Here, this Court should decline Appellant's invitation to disregard its recent decisions and, instead, continue to find that the standards discussed in Moreno and Livak apply only to a case's original docketing with this Court.

- ***Exceeding the Livak Standard By 38 Days Does Not Warrant Relief In This Case***

As noted above, the Livak standard was exceeded by 38 days in this case. However, no relief is warranted, and certainly not the windfall request of 449 days of confinement credit prayed for by Appellant in his brief. (App. Br. at 54.)

The first factor, the length of delay, weighs in Appellant's favor since this case exceeded the Livak standard of sentence to action by 38 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, weighs slightly in the Appellant's favor. However, a review of the timeline of Appellant's post-trial processing shows Appellant's record of trial was processed on a consistent basis, and the main delay in this case arose from transcribing the record.

The transcript for this case was certified on 13 February 2024, 108 days after Appellant was sentenced. The court reporter's chronology shows the court reporter was continually transcribing transcripts from multiple other cases during this timeframe. Notably, during this time, the base legal office was continually processing the case during this timeframe. (*See* Dec.

of SSgt DP.) Additionally, once the transcript was complete, the base chronology shows there was some delay in obtaining appellate Special Victims Counsel elections.

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

Appellant never asserted his right to timely appellate review prior to his case being docketed with this Court. Moreover, Appellant never asserted it during the 329 days in which his counsel was preparing to file his brief to this Court, while at the same time specifically agreeing to nine enlargements of time. Most importantly, Appellant fails to specifically assert his right to timely appellate review within his brief to this Court. In fact, Appellant essentially admits as much by stating, "In this case, notwithstanding the absence of an assertion of the right to timely review . . . ." (App. Br. at 48.)

Here, Appellant has never asserted a right to timely review and consented to nine enlargement of time being filed in his case that amount to 329 days – an amount over eight times the 38 days the Government exceeded the Livak standard. Further, while Appellant claims this time should not be counted against him because it was "no fault" of his own,[26] Appellant nonetheless consented to those nine enlargement of time motions and also has *never* asserted his right to timely appellate review. This factor weighs heavily against Appellant.

[26] *See* App. Br. at 51-52.

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

Notably, Appellant provided this Court no declaration addressing any alleged prejudice he has faced and fails to even address prejudice in his brief except to crucially concede that this case has an "absence" of "specific prejudice." (App. Br. at 48, "In this case, notwithstanding the absence of an assertion of the right to timely review or specific prejudice . . . .") Thus, this factor weighs completely against Appellant.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[27] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

[27] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

The same can be said in this case. To start, Appellant's entire argument for relief via Toohey again rests with the time period between his sentencing and the *re-docketing* of his case. However, Toohey credit is only available through the Barker/Moreno lens where there is no finding of Barker prejudice. Yet, as mentioned above, a Moreno analysis only applies to the sentencing-to-original docketing timeframe, not a timeframe between sentencing and the re-docketing of a case.

Looking at the proper Moreno/Barker/Toohey timeframe that was exceeded by 38 days, none of that delay shows any indication of bad faith on the part of any Government actor and, again, there is no indication of prejudice. Further, the time between sentencing and docketing in this case, 188 total days, is 293 days less than the delay in Anderson. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

- ***Article 66(d)(2) Analysis***

Appellant's case does not warrant relief under Article 66(d)(2) either. As discussed above, a significant portion of the post-trial processing time in this case was due to the transcript. However, the court reporter's chronology shows this was not due to an indifference or

lackadaisical approach to this case. There is no showing in this case of either bad faith or gross indifference in the overall post-trial processing of this case.

To this point, Appellant talks at great lengths about the loss of a portion of Appellant's audio recordings. While unfortunate, the loss of a portion of Appellant's audio recordings did not render Appellant's record of trial incomplete. Notably, Appellant has not raised an issue challenging the completeness of his record of trial or whether his record of trial is substantially verbatim.

Appellant also claims an "overall pattern of institutional neglect and indifference," by citing to eight instances in the last year where a record of trial had to be remanded for correction and that this Court has decided "at least fourteen cases" in the last twelve months that exceeded the Livak standard. (App. Br. at 49-50.)

As of 15 September 2025, according to this Court's website, this Court currently has over 170 cases on its court docket.[28] Assuming eight of those cases are remanded in the next year (the same number that Appellant states were remanded in the last year), that would amount to 4.7% of this Court's docket requiring remand. While certainly the goal for that number should be as close to 0% as possible, a 4.7% remand rate does not signify an overall pattern of institutional neglect or indifference.

Here, Appellant has failed to show any "gross indifference" or "systemic institutional neglect" on the part of the base legal office who processed Appellant's case or the Government overall. Further, there is no evidence that the delay has lessened the disciplinary effect of any particular aspect of Appellant's sentence.

[28] *See* https://afcca.law.af.mil/content/docket.html, last accessed on 15 September 2025.

Finally, any granted relief would be inconsistent with the dual goals of justice and good order and discipline. Notably, Appellant asks this Court for the windfall of granting 449 days of confinement credit, confinement Appellant well-deserved for the rape, sexual assault, and other physical acts of violence against three victims. The extreme step of granting any confinement credit, let alone 449 days, would be wholly inconsistent with the dual goals of justice and good order and discipline, especially considering the rape, sexual assault, domestic violence, and kidnapping offenses at issue in this case. Accordingly, this Court should deny Appellant's claim.

VII.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert denied*, No 23-437, 144 S. Ct. 1003 (2024). *see also* United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), *cert denied*,

No 23-666, 144 S. Ct. 1096 (2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict and Appellant's claim must fail.

VIII.[29]

APPELLANT'S CONVICTIONS FOR SEXUALLY ASSAULTING DMW WITHIN CHARGE II, SPECIFICATIONS 2 AND 4 ARE FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Additionally, though Appellant was originally charged with raping DMW within Specification 2 of Charge II, the military judge also instructed the members as to the elements of sexual assault, pursuant to Article 120, UCMJ, as follows:

> (1) that between on or about 1 March 2022 and on or about 31 March 2022, at or near Osan Air Base, South Korea, [Appellant] committed a sexual act upon [DMW] by penetrating her anus with his penis; and
>
> (2) that the accused did so without the consent of [DMW].

(R. at 1024.) Appellant was convicted of the lesser-included sexual assault offense.

The military judge also instructed the members as to the elements of Specification 4 of Charge II, which was also a sexual assault offense pursuant to Article 120, UCMJ, as follows:

> (1) that, on divers occasions, between on or about 1 March 2021 and on or about 31 March 2022, at or near Osan Air Base, South Korea, [Appellant] committed a sexual act upon [DMW] by penetrating her vulva with his penis; and

[29] This issue is raised pursuant to Grostefon and is listed as Issue I in the Appendix to Appellant's brief.

(2) that the accused did so without the consent of [DMW].

(R. at 1025.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexually assaulting DMW both anally and vaginally, and there is no credible basis in the record for this Court to disturb Appellant's just verdicts and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's sexual assault convictions.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the findings of guilty was against the weight of the evidence.

As shown by the evidence, Appellant anally penetrated DMW without her consent in the dorm room on the day he left Osan Air Base. The evidence also showed Appellant, on divers occasions over the course of a year, vaginally penetrated DMW on occasions when she told him to stop as well as the times when she was in fear of Appellant and pretended to be asleep.

During her testimony, DMW recounted multiple instances of consensual intercourse where the sex would begin "gentle" and "sweet," but become physically hurtful to the point that it "was more like scary," and where DMW would get to point where she "would literally be crying" and "asking him to stop." (R. at 620.) However, Appellant would not stop, and, instead, would respond by getting mad and telling DMW to shut up.

On other occasions, Appellant would come into DMW's room and, thinking DMW was asleep, begin having sex with her. (R. at 625-29.) However, DMW would actually not be asleep, but be fully awake but remain quiet because she feared Appellant would be mean to her. (Id.) These instances show that on divers occasions between March 2021 and 2022, Appellant vaginally penetrated DMW without her consent.

The evidence also shows Appellant anally penetrated DMW without her consent on the day he left for Korea. Importantly, DMW testified that prior to this day that she and Appellant had spoken about anal sex, that she "really didn't like" it, and that Appellant knew this. (R. at 636-37.) On the day in question, however, Appellant did it anyway.

That day, the two were having an argument and eventually began having sex despite DMW crying during it. (R. at 642-46.) DMW eventually got up and walked away from Appellant while she continued to cry. She also told Appellant that she was "upset because we're having sex while he's upset with me, and that it didn't make me feel good." (R. at 649.) Appellant responded by saying, "Oh, my God, shut up," and "let me finish at least," before grabbing her and putting her back to the bed, where he began having anal sex with her. (R. at 647, 649.) DMW said she never stopped crying during the entire encounter and that Appellant never asked to put his penis in her anus and she never told him that he could. (R. at 647-49.) Here again, this evidence shows that Appellant anally penetrated DMW without her consent.

Still, pursuant to Grostefon, Appellant claims these convictions are factually insufficient. Notably, Appellant does not deny that anal sex occurred on the day he left for Korea or that he and DMW had vaginal sex on divers occasions from March 2021 to 2022. Instead, Appellant only appears to take issue with whether these acts were consensual, and, in doing so, Appellant renews various arguments he previously raised at trial. Appellant first renews his attack on

DMW, calling her a liar. (App. Appx. at 5.) He next argues that DMW's "allegations against Appellant were stale." (Id. at 6.) He also highlights that DMW told AFOSI that Appellant was a "good boyfriend" and that DMW "chose to reestablish an intimate relationship with Appellant even after he victimized her in Korea." (Id.) Finally, Appellant claims one of DMW's former flight sergeants testified that she had a character for untruthfulness. (Id.)

Appellant is mistaken. First, all of Appellant's attacks on DMW's credibility were all previously raised at trial, and all proved unpersuasive to the member panel who had the distinct opportunity to see and hear DMW testify in person. Further, DMW's testimony provides needed context as to why DMW took various actions. For instance, Appellant calls DMW an "admitted liar" because she "confessed on the stand to making a false official statement to her commander concerning certain allegations against Appellant." (Id.) This related to a letter DMW provided her command regarding an alleged discussion DMW had with ACS. DMW gave a statement to command that said ACS was joking around about the encounter that happened between ACS and Appellant in the dorm room, and that ACS had told DMW that ACS could have left the room during that incident. (R. at 712-13.)

However, DMW later testified that she wrote the letter at Appellant's request, that Appellant reviewed the letter after she wrote it, and that Appellant "helped me word things." (R. at 756.) DMW also explained that this was her attempt to do "everything in my power in that situation to keep [Appellant] from getting in any kind of more trouble than he was already going to get into from that." (R. at 755.) Here, the very letter Appellant now derides DMW for writing was actually written, in part, *by him*, was written *at his request*, and it was all done in an attempt to better his own situation. Furthermore, DMW's testimony shows she was still very much in love with Appellant despite his actions and was trying to help him the best she could.

DMW's mentality here is also why she did not initially report what Appellant did to her (which explains Appellant's staleness argument), why she told AFOSI Appellant was a "good boyfriend," and also why DMW wanted to maintain her relationship with Appellant despite how he treated her. Additionally, DMW testified that she initially did not think anything Appellant had done to her was wrong because Appellant "said that if, like, if even if you're married or if you're in a relationship with someone, like, you can't rape your wife, like, you can't rape your girlfriend." (R. at 651.) Furthermore, all of this relationship background and context was readily provided to the member panel who still found Appellant guilty of sexually assaulting DMW.

This Court must give "appropriate deference to the fact that the trial court saw and heard" DMW's testimony and demeanor and convicted Appellant beyond a reasonable doubt of the sexual assault offenses. Just as in his previous issues, Appellant attempts to subvert this "appropriate deference" standard by claiming, much like he did in Issue I above, that the "members' assessment of [DMW's] credibility was tainted by the special trial counsel's improper vouching during closing argument." (App. Appx. at 7.) Appellant then relies on his argument within Issue V of his brief to claim that "[b]ecause of the resulting distortion of the members' credibility determination, in this case, the "appropriate deference" to the members' opportunity to see and hear [DMW] is none." (Id.)

However, as detailed below within Issue V, the special trial counsel committed no improper vouching for SJM within his closing argument. Thus, there was no "resulting distortion of the members' credibility determination" of DMW. (*See* Id.) As a result, this Court should decline Appellant's plea to disregard the plain language of Article 66, and, instead, follow Article 66's mandate that this Court give "appropriate deference" to the panel member who, after

hearing and seeing DMW's testimony, and hearing the same reliability arguments against DMW that he rehashes now to this Court, convicted Appellant of sexually assaulting DMW.

Finally, Appellant claims that one of DMW's former flight sergeants, TSgt BM, testified that DMW had a character for untruthfulness. (App. Appx. at 4, 6, *citing* R. at 981-82.) However, a review of TSgt BM's testimony shows that his testimony centered on another witness in this case, not DMW. (*See* R. at 981.) DMW is never mentioned in TSgt BM's testimony. Accordingly, Appellant's attempt to disparage DMW's character here should be disregarded.[30]

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his sexual assault convictions against DMW. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

[30] In fact, TSgt BM's character testimony regarded SJM, not DMW. However, TSgt BM's "opinion" on SJM's character for truthfulness proved to be wholly unsupported as TSgt BM was forced to admit on cross-examination that SJM had never told him anything that was untrue. (*See* R. at 983.)

IX.[31]

APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE BY HITTING DMW IN THE FACE, WITHING CHARGE V, SPECIFICATION 9, IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Additionally, the military judge instructed the members as to the elements of domestic violence through the commission of a violent offense, pursuant to Article 128b, UCMJ, as follows:

> (1) that on or about 20 December 2022 at or near Hill Air Force Base, Utah, [Appellant] committed a violent offense, to wit: assault consummated by a battery by unlawfully striking her face with his hand; and
>
> (2) that the violent offense was committed against [DMW] who was, at the time of the violent offense, an intimate partner of the accused.

(R. at 1036.) The military judge further instructed the members as to the elements of assault consummated by a battery in violation of Article 128, UCMJ, as follows:

> (1) that on or about 20 December 2022 at or near Hill Air Force Base, Utah, [Appellant] did bodily harm to [DMW] by striking her face with his hand;
>
> (2) that the bodily harm was done unlawfully; and
>
> (3) that the bodily harm was done with force or violence.

(Id.)

[31] This issue is raised pursuant to Grostefon and is listed as Issue II in the Appendix to Appellant's brief.

Analysis

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

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the findings of guilty was against the weight of the evidence.

Here, the evidence shows Appellant and DMW went out on the night in question and returned to her dorm room afterwards. (R. at 677-79.) Multiple airmen interviewed by law enforcement stated the following was heard: (1) shouting; (2) doors slamming; (3) an argument between a male and female; (4) the female sounded more emotional and was crying; (5) the male was "very aggressive" and "angry;" (6) the female sounded "very distraught;" (7) the female voice sounded "threatened" and the male voice "seemed threatening;" (8) the word "no" was repeated along with crying. (R. at 810, 816, 823.)

DMW had no full memory of what happened, but recalled Appellant putting her on her knees, Appellant ripping out her eyelash extensions, and standing in front of a mirror where she saw her face bleeding, and Appellant wiping blood off of her. (R. at 679.) Additionally, TSgt NV testified that DMW told her leadership that her boyfriend (i.e., Appellant) had done this to her. (R. at 783.)

The next day, investigators found the following in DMW's room: (1) a blanket with blood on it; (2) DMW's tank top with blood on it; and (3) DMW's eyelashes on the counter. (R. at 830, 849, Pros. Ex. 11.) AFOSI also took photos of Appellant's hands the day after and testified that his right hand had "some lacerations" and appeared swollen. (R. at 838.)

Further, a litany of witnesses, including law enforcement and DMW's leadership, testified that they saw bruising, red marks, and scrapes on DMW's face, arms, and leg. (R. at 765, 780, 849.)

Finally, in relation to this incident, Appellant was convicted of obstructing justice by instructing DMW to provide false information to law enforcement about show sustained facial injuries caused by Appellant. DMW testified that Appellant and his mother called her and the story of a fictitious "fight with the girl at the bar" story was concocted. (R at 693, 753-55.) This story would later be repeated by Appellant to law enforcement. Notably, Appellant raises no issue related to the factual or legal sufficiency of this obstruction of justice conviction that directly relates to this specification and the cover-up story he concocted.

Here, all evidence provided to the members on this specification show that Appellant brutally assaulted DMW when the two returned back to her dorm room that night. Evidence of a struggle inside the dorm room, including a crying female, was heard by multiple airmen that night. DMW's bloody clothes and blanket, as well as her ripped out eyelash extensions, were found in her room. DMW recalled Appellant ripping her eyelashes out and bleeding while in her room. Appellant's hand the next day had scrapes on it and was swollen. And, in the aftermath, Appellant concocted a false story to deflect what he did in that room – an act which resulted in a conviction that he does not contest and one which shows a clear consciousness of guilt. The

panel had more than sufficient evidence to find Appellant guilty beyond a reasonable doubt on this specification.

Still, pursuant to Grostefon, Appellant claims his conviction for domestic violence is factually insufficient because, according to Appellant, "[DMW] herself testified that she 'didn't know' whether the allegation that Appellant hit her in the face 'was true or not.'" (App. Appx. at 10.) Appellant concludes, "If [DMW] did not know if that was true, then her testimony is insufficient to prove the allegation beyond a reasonable doubt."

Appellant is again mistaken. First, DMW always testified that her memory of that night was spotty and that she only remembered certain pieces – namely Appellant ripping her eyelash extensions out of her eyes, having her on her knees, and wiping blood off of her. Just these memories alone, when coupled with the photos of her injuries, are sufficient evidence to show Appellant is the person who assaulted her that night. However, contrary to Appellant's insinuation that DMW's testimony was the only evidence that proved this allegation, there was much more evidence that proved this specification beyond a reasonable doubt, including (1) camera footage showing Appellant and DMW going into her dorm room; (2) multiple witnesses hearing an argument in DMW's room between an aggressive male and a crying female; (3) DMW's bloody clothes and blanket found in her dorm room; (4) DMW's eyelash extensions found in her dorm room; (5) Appellant's hand the next day was swollen and scraped; and (6) Appellant and his mother concocting a fictitious story to cover up his actions. Thus, while DMW may not specifically remember Appellant actually hitting her, all evidence shows that he did.

Next, Appellant presents an alternate theory of what happened that night – a phantom bar fight that allegedly occurred between DMW and some unknown person. (Id.) Appellant's

problem here is that there is zero evidence that such a bar fight occurred. All evidence, however, points to the fact that this bar fight story was concocted all by Appellant and his mother to cover up Appellant's attack on DMW.

As a basis for his claim, Appellant first points to cross-examination testimony from TSgt NV, DMW's supervisor, who, upon initially seeing DMW's injuries that morning, answered "Yes," when asked, "And at that point in time before she disclosed about [Appellant], was that a possibility in your mind that she had gotten in a fight at a bar?" (Id., *citing* R. at 788.) However, Appellant then fails to cite TSgt NV's later testimony where he specifically said, "We had *no substantiating proof or any kind of suspicion* that she may have been involved in a bar fight." (R. at 788.) (emphasis added.) Appellant's omission of TSgt NV's testimony here undercuts any insinuation that DMW's supervision believed she had actually been in a bar fight.

The rest of Appellant's argument here is complete speculation of what happened that night based purely on DMW's inability to recall all of the night's events. None of it is based on facts or evidence presented at Appellant's trial.

Evidence that was presented at trial, however, was that Appellant, along with his mother, originated this whole concocted bar fight story as a way to shield Appellant from being held accountable for his attack on DMW. As DMW testified, it was during a call with Appellant and his mom when DMW was told, "Hey, we should all just say that that you had gotten into a fight with some girl at the bar?" (R. at 753.)

Worse still for his argument here, Appellant stands convicted of obstructing justice based on this very lie he instructed DMW to tell law enforcement – a conviction he does not contest. That Appellant would now turn to this Court and rely on this same lie as a "reasonable

possibility of an alternative cause of her injuries" should be easily disregarded by this Court. (*See* App. Appx. at 7.)

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his domestic violence conviction against DMW. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

X.[32]

APPELLANT'S CONVICTION OF DOMESTIC VIOLENCE WITHIN CHARGE V, SPECIFICATION 5 IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Additionally, the military judge instructed the members as to the elements of domestic violence through the commission of a violent offense, pursuant to Article 128b, UCMJ, as follows:

> (1) that on or about 7 June 2022, at or near Luke Air Force Base, Arizona, [Appellant] assaulted [SJM], the intimate partner of the accused;

[32] This issue is raised pursuant to Grostefon and is listed as Issue III in the Appendix to Appellant's brief.

(2) that [Appellant] did so by strangling [SJM] with his hands; and

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

(R. at 1029.)

Analysis

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

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not deny strangling SJM and does not deny that SJM was an intimate partner. Instead, Appellant believes the "prosecution failed to prove beyond a reasonable doubt either that SJM did not consent to being strangled or that Appellant did not reasonably and honestly believe that SJM consented to being strangled." (App. Appx. at 13.) Just as in Issue II above, however, Appellant is mistaken as Appellant's actions were both objectively and subjectively unreasonable under the circumstances of that night.

As discussed previously, prior to 7 June 2022, Appellant had never slapped, choked, or physically hurt SJM despite them have multiple consensual sexual encounters. (R. at 417.) After having sex on 7 June 2022, SJM walked over to the sink with Appellant following her.

Then, Appellant slapped her. (R. at 421.) The two then sat on the bed and Appellant talked about things he and his ex-girlfriend used to do during sex. (R. at 423-25.)

Also, as previously discussed, during this conversation, SJM said a "statement like 'You could do anything you wanted," and at trial explained which she envisioned was "like slapping" on her butt or hair pulling – as she put it, "I guess it's just normal rough sex activity, something that's, you know, you're still getting pleasure out of. It's not supposed to hurt you. It's not supposed to scare you." (Id.)

Under those circumstances, considering the couple had never done anything "rough" or that "physically hurt" prior to this night, SJM's view on what her "do anything you wanted" statement meant was perfectly reasonable. What Appellant did next, however, was both subjectively and objectively unreasonable as he proceeded to choke SJM into unconsciousness – all despite SJM asking Appellant to "please stop." (R. at 426.) Instead, Appellant told SJM, "Oh, you don't want me to stop" or "you want me to continue," all while Appellant was in a "scary," "mad," and "irritated" state. (R. at 426, 428.)

From a subjective standpoint, one has to ask whether Appellant actually thought SJM meant that he could grab her by the throat and strangle her to the point of unconsciousness, despite SJM telling him to stop prior to him choking her out. That answer is no. There is no evidence in the record that Appellant honestly held that belief.

Then, from an objective standpoint, would a reasonable person in Appellant's position take SJM's statement of "do anything you want" to include the brutality that Appellant inflicted on SJM immediately after this statement – especially under the context that the couple had *never* done anything physically hurtful before in their sexual relationship? That answer is again a

resounding no, especially when adding in the fact that SJM told Appellant to "stop" when he began choking her.

Notably, as the military judge instructed, any ignorance or mistake cannot be based on the negligent failure to discover the true facts and the absence of due care. Here, even in the face of SJM telling Appellant that he could "do anything [he] wanted," a reasonable person would have, in the simple use of due care, still asked their intimate partner if it was alright to choke them into unconsciousness, especially, again, when adding in the fact that SJM told Appellant to "stop" when he began choking her.

Further, as previously discussed in Issue II, the surrounding evidence of Appellant's actions after SJM awoke further shows this was no mistake of fact. Appellant, who was mad and irritate prior to choking SJM out, was even more so when she woke up. Appellant was hitting SJM, yelling at her to stop crying, and laughing at her as he acting like he was about to hit her – none of which are the actions of someone who actually believed what he was doing was consensual, or as Appellant puts it in his brief, "welcomed." Certainly, no reasonable person looking at this situation would think Appellant's strangulation of SJM was welcomed.

Yet still, Appellant claims mistake. He first attempts to argue that SJM "offered two mutually exclusive accounts of the strangulation incident." (App. Appx. at 13.) Appellant says that during direct examination SJM said the choking occurred after the consensual sex but that, during cross-examination, "agreed that she had previously said the strangulation occurred during vaginal intercourse rather than following it." (Id.) However, SJM's answer during cross-examination was distorted by Appellant's trial defense counsel's own confusion over the evidence. The exchange between SJM and Appellant's trial defense counsel on this point went as follows:

> SJM: I don't believe – I don't ever remember seeing a SANE report being given to me.
>
> DC: So do you deny this statement: "We were having sex. At first, it was consensual, only vaginal"?
>
> SJM: Yes, that is true.
>
> DC: And then as you were having vaginal sex, he put his hands on my throat, and it was hard to breathe
>
> SJM: Yes, that is true.

(R. at 462.)

Here, the context makes it clear that SJM thinks Appellant's trial defense counsel is simply reading to her from the SANE report and is agreeing to what he says, bearing in mind that she just told the defense counsel that she did not remember ever seeing the actual report.

The problem for Appellant and his defense counsel, however, is that the defense counsel's quote of "As you were having vaginal sex, he put his hands on my throat, and it was hard to breathe" was not in the SANE report. Instead, that portion of the report reads, "At first it was consensual, only vaginal. He puts his hands on my throat and it was hard for me to breathe, I told him to stop." Here, the SANE report never said that SJM had told Ms. SK that Appellant put his hands on her throat during the consensual vaginal sex. (See Pros. Ex. 24 at 6.) Thus, the defense counsel's question to SJM insinuating that is what the SANE report actually said was, at the very least, misleading and not an accurate representation of what was actually in the report. It also provides little credence to Appellant's contention here that SJM's story was inconsistent since SJM's testimony makes it quite clear that Appellant began to choke her well after the consensual vaginal sex was over.

Next, Appellant claims that SJM actually consented to being strangled. However, the overall circumstances, as discussed above, show this is not the case, with the most important fact

being that SJM specifically told Appellant to "stop" strangling her when he put his hand on her throat. But instead of stopping, Appellant not only continued, but told SJM that she *wanted him* to continue. There was no actual consent here.

Finally, Appellant renews his mistake of fact argument for Issue II above, that SJM's "do whatever you wanted" statement alone resulted in a mistake of fact. However, as discussed above, the facts and surrounding circumstances of this night and their prior relationship show that there was neither a subjective or objective mistake of fact based on SJM's statement alone. In no way was SJM's statement an invitation to Appellant for a no-holds-barred, assault free-for-all against her body – Appellant knew this and any reasonable person looking at this situation would recognize this as well, especially considering the couple's relationship, which had never had *any* physically harmful acts prior to this night.

Further, the evidence shows that Appellant, immediately after SJM said he could "do anything you wanted," placed his hand one SJM's throat and that SJM immediately both began to struggle to breathe and told Appellant to stop. (R. at 425-26.) At that point, any mistake Appellant acting had, and certainly any reasonable mistake, was extinguished. Here, the evidence shows SJM made her statement, Appellant immediately went for her throat, and SJM immediately told him to stop as she struggled to breathe. Additionally, while Appellant cites to testimony from Dr. PT about "consensual 'erotic asphyxiation' and 'sexual gratification,'"[33] Appellant continually fails to account for the evidence that SJM told him to "stop" when he began choking her and, instead of stopping, Appellant told SJM, "Oh, you don't want me to stop" or "you want me to continue." (R. at 426, 428.)

[33] App. Appx. at 14-15.

In sum, there is no fathomable way Appellant had a reasonable and honest mistake of fact as to consent under these circumstances for strangling SJM in unconsciousness. Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his domestic violence conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 17 September 2025 via electronic filing.

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S REPLY BRIEF**
v.	)	
	)	Before a Special Panel
Airman (E-2) **CODY L. KINDRED,** United States Air Force, *Appellant*.	)	No. ACM 40607 (f rev)
	)	24 September 2025

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant replies to the United States' answer filed on 17 September 2025.

Assignment of Error I

Because it is reasonably possible that SJM and Appellant engaged in consensual anal intercourse while SJM was conscious and consenting, the evidence supporting Charge II, Specification 3, is factually insufficient.

Appellant and SJM engaged in anal intercourse at some point during the evening of 7 June 2022. When asked by an Air Force Office of Special Investigations agent if that anal intercourse was consensual, SJM responded, "I want to say, yes," and added that she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. 489. In light of that statement and other evidence presented at trial, the most likely scenario is that the anal intercourse occurred while SJM was conscious and consenting but in an alcohol-induced fragmentary blackout. Because that is a reasonable possibility, the finding of guilty to rape is factually insufficient.

In its answer, the Government presents an improbable but *possible* scenario in which Appellant engaged in anal intercourse with SJM while she was unconscious. Gov't Answer at 39–40. That scenario would involve Appellant using a "strangle-release-strangle again method" at the same time he engaged in such other acts such as removing SJM's shorts, probably applying a

lubricant to her anus, inserting his penis into her anus, and engaging in anal intercourse to the point of ejaculating for the second time over a relatively brief period. *Id.* And, according to the Government's theory, he did all that while cutting off SJM's air supply for five to ten seconds at a time but avoiding cutting off her air supply for longer than fourteen to fifteen seconds, which would have caused her to lose bladder control. *See* Trial Tr. 953–54. But it is not enough for the Government to establish a scenario under which the charged offense *could have* occurred. If there is any reasonable possibility that is inconsistent with guilt, then the rape conviction is factually insufficient. The evidence—including SJM's own assessment offered much closer to the events at issue—presents such a reasonable possibility.

The gap between what the Government is arguing and what the record actually shows boils down to the Government overrelying on selected portions of SJM's testimony. The Government argues that SJM "did not recall the anal sex occurring" and that she "assumed" it occurred while she was unconscious. Gov't Answer at 37 (citing Trial Tr. 489). An assumption is not proof beyond a reasonable doubt. And baked into SJM's assumption of what happened is her underlying assumption that she was unconscious, even though her description that she "was intoxicated and had spotty memory" points in a different direction. Trial Tr. 489. That is because the events as described by SJM create a reasonable possibility that gaps in her memory resulted from an alcohol-induced fragmentary blackout rather than unconsciousness due to strangulation. It is reasonably possible that she engaged in anal intercourse while conscious but with an alcohol-impaired ability to transfer short-term memories to her long-term memory. That is far more likely than that she remained unconscious during the extended time required for the two to engage in anal intercourse to the point of Appellant's ejaculation. And although the Government objects to "Appellant's attempt to essentially blame SJM and her alcohol intake for any memory loss that night," Gov't

Answer at 39, it was SJM who volunteered on the stand "the fact I was intoxicated and had spotty memory." Trial Tr. 489.

The possibility of a fragmentary alcohol-induced blackout is bolstered by SJM's response to the question about whether she consented to the anal intercourse. She said she "wasn't entirely sure." Trial Tr. 488. That suggests the possibility of a *partial* memory that informed her answer, "I want to say, yes," but without sufficient clarity to be certain. Yet the Government argues that "the only time anal intercourse could have occurred, or certainly have commenced, was when SJM was unconscious." Gov't Answer at 34. That argument ignores the reasonable possibility that SJM's own self-characterization as being intoxicated with a spotty memory creates: the anal intercourse occurred while she was conscious and consenting but not forming long-term memories. *See* Trial Tr. 489.

The Government strains common sense in its effort to suggest that it is not reasonably possible that the two engaged in consensual anal intercourse while SJM was conscious but not forming long-term memories. When conducting factual sufficiency review, this Court—no less than civilian jurors or court-martial members—may apply "common sense and knowledge of the ways of the world." *United States v. Henderson*, No. ACM 40419, 2025 CCA LEXIS 172, at *12 (A.F. Ct. Crim. App. Apr. 18, 2025) (citing *United States v. Green*, 52 M.J. 803, 805 (N-M. Ct. Crim. App. 2000)). Common sense warrants rejecting the Government's counterintuitive argument that it is more "reasonable" that lubricant was used during vaginal intercourse than anal intercourse. Gov't Answer at 40. The Government does not say why this is "the most reasonable" conclusion, creating uncertainty about whether it is arguing that vaginal sex is inherently more likely than anal sex to involve lubricant or that the consensual nature of the vaginal sex made lubricant use more likely. *Id.* This uncertainty concerning the implications of a lubricant's use

sometime that evening is the exact sort of thing the Government could have cleared up at trial. But the reason why the Government now offers its implausible argument concerning the relatively likelihood of a lubricant's use during vaginal or anal intercourse is apparent: the Government realizes that if Appellant took the time to apply a lubricant to facilitate the anal intercourse, then SJM remaining unconscious and unaware throughout the sex act would be even more improbable.

Yet even if the Government's counterintuitive assertion that the use of lubricant is more likely during vaginal than anal intercourse were true, that comparative likelihood would not eliminate the reasonable possibility that the anal intercourse lasted too long for SJM to remain unconscious throughout it. First, it is reasonably possible that a lubricant was used during *both* the vaginal and anal intercourse. Second, regardless of which act is more likely to be facilitated by a lubricant as a general matter, it is reasonably possible that, in this instance, lubricant was used during the anal intercourse and not the vaginal intercourse. Finally, if no lubricant were used during the anal intercourse, it probably would have taken Appellant longer to ejaculate, particularly since he had ejaculated a short time earlier during vaginal intercourse. And the longer the anal intercourse lasted, the less likely it is that SJM would have remained unconscious or unaware throughout the act. Thus, on balance, it is highly improbable that SJM would have remained either unconscious or unaware throughout the entire act of anal intercourse. A more likely explanation for her lack of memory is a blackout state rather than unconsciousness. A blackout state does not equate to incapacity to consent to sexual activity. *United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, at *20 (A.F. Ct. Crim. App. Sep. 30, 2019). Nor is it the charged means of committing rape in this case.

The finding of guilty to Charge II, Specification 3, is further undermined by SJM's unreliability as a witness. As she was forced to concede at trial, she had repeatedly provided false

testimony during an earlier hearing. Trial Tr. 468–86. And that false testimony concerned matters that a reasonable person would be expected to remember—her reinitiation of her relationship with Appellant after the events of 7 June 2022, her subsequent feelings of rejection by him, her surprise at learning that Appellant had another girlfriend, and her communications with that girlfriend. *Id.* The Government attempts to explain that false testimony by relying on SJM's assertion that, as a coping mechanism, she "tr[ied] to forget everything related to that situation as much as possible so I could try to live a normal life." Gov't Answer at 41 (citing Trial Tr. 497). She apparently succeeded in purging her memory all too well when she testified on 6 July 2023. But that offers no reason to be confident that her testimony three months later was accurate. Humans' memory does not improve over time. Rather, it becomes increasingly vulnerable to distortion. *See generally* Joyce W. Lacy & Craig E. L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NATURE REVIEWS NEUROSCIENCE 649 (2013).

In conducting its factual sufficiency review, this Court should decline to grant deference to the findings below because of the trial counsel's improper vouching for SJM. When conducting factual sufficiency review, this Court must accord "*appropriate* deference to the fact that the trial court saw and heard the witnesses and other evidence." Article 66(d)(1)(B)(ii)(I), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(1)(B)(ii)(I), as enacted by the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611–12 (2021) (emphasis added). The Government argues that Appellant asks this Court "to disregard the plain language of Article 66" by suggesting that no deference is appropriate for purposes of Charge, II, Specification 3.[1] On the contrary, Appellant does not ask

[1] The Government makes a similar erroneous argument with respect to Appendix Issue I. Gov't Answer at 108–09.

this Court to "disregard" the governing standard. Rather, Appellant asks this Court to *apply* that standard by determining how much deference is "appropriate." Here, because of the improper vouching, none is.

In *United States v. Norwood*, the Court of Appeals for the Armed Forces specifically identified "claiming that [a witness] was telling the truth" as a form of improper vouching. 81 M.J. 12, 18–19 (C.A.A.F. 2021). The Government nevertheless argues that "the special trial counsel committed no improper vouching for SJM within his closing argument." Gov't Answer at 41. Yet, during closing argument, the special trial counsel stated that SJM "came in here and she told the truth." Trial Tr. 1076. That is precisely what *Norwood* identified as a form of improper vouching and precisely why this Court's appropriate deference to the fact-finder should be calibrated to discount for the prosecution's error.

Because the evidence at trial presents a reasonable possibility other than rape, the finding of guilty to Charge II, Specification 3, is factually insufficient.

Assignment of Error II

SJM's self-characterized spotty memory concerning the events of 7 June 2022 precludes determining beyond a reasonable doubt when and how her hand was bitten.

SJM herself testified that she had a "spotty memory" concerning the events of 7 June 2022. Trial Tr. 489. Yet the Government treats her testimony as if it establishes a precise timeline of everything that occurred that night. Gov't Answer at 45–49. SJM's testimony that she did not remember being bitten on the hand provides little insight as to when or how that bite occurred, since her memory of that night was "spotty." Trial Tr. 434, 489. The Government's answer to this factual sufficiency challenge depends on SJM's purported unconscious state being the only period

that she could not recall. Gov't Answer at 45–49. That approach is inconsistent with SJM's own testimony.

On appeal, the Government argues that "[t]here is no evidence in the record that Appellant honestly held the belief that SJM consented to the biting." *Id.* at 46. The Government's trial-level representative disagreed. Despite arguing that the evidence did not raise a reasonable and honest mistake defense as to some of the domestic violence specifications, the special trial counsel said, "I believe that some evidence is before the court as to" four domestic violence offenses, including this one. Trial Tr. 995. The special trial counsel was right.

As set out in Appellant's opening brief, in light of all the evidence presented during the merits phase, the finding of guilty to Charge V, Specification 4 is factually insufficient. *See* Appellant's Brief at 18–20.

Assignment of Error III

The Government's request that this Court apply a variance analysis to the discrepancy between Charge I's specification's language and the evidence presented at trial is inconsistent with controlling caselaw.

The Government charged Appellant with communicating a threat by saying to SJM, "'If you do not stop crying, I will hit you,' or words to that effect." Charge Sheet, Charge I, Specification. But the Government never presented evidence at trial that Appellant said, "I will hit you." The Government's answer tacitly admits that failure by pointing to no evidence that Appellant used that phrase. Instead, at trial, the Government presented evidence that Appellant told SJM that if she did not stop crying, "something along the lines of, like, [SJM would] find out what happens," or "there would be problems for" her. Trial Tr. 430; Pros. Ex. 24 at 6.

Consistent with this Court's approach in *Patterson*[2] and *Kershaw*,[3] Appellant argued on appeal that the inconsistency between the charged language and the evidence means that the findings of guilty to Charge I and its specification are factually insufficient. Appellant's Brief at Assignment of Error III. In response, the Government offers the same argument that this Court rejected in *Kershaw*: that this Court should analyze the issue as a variance rather than under a factual insufficiency standard.

In *Kershaw*, this Court held that when a finding of guilty was entered without exceptions and substitutions, "there is no variance" for this Court to consider. *Kershaw*, 2025 CCA LEXIS 205, at *13. That rejection of a variance analysis is mandated by controlling Court of Appeals for the Armed Forces precedent.

In *United States v. Lubasky*, the court observed that "the question whether a variance was fatal would be the one we would answer *if the factfinder had made findings by exceptions and substitutions*." 68 M.J. 260, 264 (C.A.A.F. 2010) (emphasis added). But in *Lubasky*, that analysis did not apply because the findings "were made based on the charges and specifications *as drafted*. There were no exceptions and substitutions by the military judge—the factfinder in this case." *Id.* at 265. The court emphasized that a "nonfatal variance" analysis is unavailable on appeal. *Id.* at 261. Under both the UCMJ and Rules for Courts-Martial (R.C.M.) "'variance' occurs at trial, not the appellate level." *Id.*

---

[2] *United States v. Patterson*, No. ACM 40426, 2024 CCA LEXIS 399, *aff'd*, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 548 (C.A.A.F. July 14, 2025), *recon. denied*, __ M.J. __, 2025 CAAF LEXIS 681 (C.A.A.F. Aug. 14, 2025).

[3] *United States v. Kershaw*, No. ACM 40455 (f rev), 2025 CCA LEXIS 205 (A.F. Ct. Crim. App. Mar. 27, 2025), *certificate for review filed*, __ M.J. __, No. 25-0177/AF, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025).

In this case, just as in *Lubasky* and *Kershaw*, "there is no variance issue for this court to consider," *Kershaw*, 2025 CCA LEXIS 205, at *12–13, because the findings "were made based on the charges and specifications *as drafted*." *Lubasky*, 68 M.J. at 265. The Government attempts to distinguish *Kershaw* by observing that in that case the members were given an exceptions-and-substitutions instruction but nevertheless returned a finding of guilty to the specification as drafted. Gov't Answer at 53. But that is a distinction without a difference. As the Court of Appeals for the Armed Forces' *Lubasky* decision makes clear, the absence of findings by exceptions and substitutions forecloses a variance analysis. 68 M.J. 264–65; *see also United States v. Patterson*, No. 25-0073, 2025 CAAF LEXIS 548, at *12–13 (C.A.A.F. July 14, 2025) ("The government also could ask the military judge to instruct the panel members on findings by exceptions and substitutions as is permitted under R.C.M. 918. But here, the Government declined to take any of these corrective steps despite being aware of the discrepancy between the specification and evidence presented at trial."). In *Lubasky*, a military judge made a finding of guilty to the specification as drafted. 68 M.J. at 65. In *Patterson*, members made a finding of guilty to the specification as drafted without having received an exceptions-and-substitutions instruction. 2025 CAAF LEXIS 548, at *12–13. In *Kershaw*, the members made a finding of guilty to the specification as drafted despite having received an exceptions-and-substitutions instruction. 2025 CCA LEXIS 205, at *12–13. Variance was inapplicable in all those scenarios. This Court should reject the Government's invitation to violate controlling Court of Appeals for the Armed Forces caselaw by applying a variance analysis here.

This Court should also reject the Government's fallback argument that its evidence of what Appellant said was close enough to the specification as drafted. Gov't Answer at 59. In attempting to salvage the conviction, the Government argues that "during this timeframe," Appellant

"continued to yell at SJM to stop crying and repeatedly raised his arm up as if to strike SJM, all while laughing at her." Gov't Answer at 59; *see also id.* at 60 ("[A]midst his threat, he also forced SJM to take a shower, all while, again, yelling at her to stop crying."). But according to SJM's testimony, Appellant held his hand up as if to strike her and laughed when she flinched (1) only *after* he had said that if she did not stop crying, she would find out what happened, (2) only *after* he took her into the bathroom, and (3) only *after* the two got into the shower. Trial Tr. 431–32. Communicating a threat is not a continuing offense. Those actions after the words were uttered are irrelevant to assessing whether the evidence of what Appellant said to SJM was close enough to Charge I's specification as drafted. The Government is mistaken when it contends that Appellant's actions in the shower were "done at the same time as telling SMJ that she will either 'find out what happens' or that 'there will be problems' for her if she doesn't stop crying." Gov't Answer at 60. Those actions occurred *after* he uttered that phrase, not "at the same time." *Contrast id.*, *with* Trial Tr. 431–32. When viewed in its proper timeframe, the evidence was factually insufficient to prove that Appellant "communicate[d] to [SJM] a threat to injure her by hitting her, to wit: 'If you do not stop crying, I will hit you,' or words to that effect." Charge Sheet, Charge I, Specification.

Assignment of Error IV.

The evidence supporting Charge III, kidnapping, and its specification is factually and legally insufficient because it did not establish that Appellant held the alleged victim as that term is used for purposes of the kidnapping punitive article.

Appellant's opening brief applied the Court of Appeals for the Armed Forces' six-factor balancing test to determine whether an act constitutes kidnapping in situations during which a separate offense is committed. Appellant's Brief at 30–31; *see generally United States v. Seay*, 60 M.J. 73, 80–81 (C.A.A.F. 2004). Appellant demonstrated that the short duration of the holding, the gravamen of the offenses committed, and the absence of any significant additional risk to the

victim other than the underlying assaults and batteries weigh strongly against a kidnapping conviction. Appellant's Brief at 30–31. The Government's attempt to rebut that analysis fails.

As Appellant's brief demonstrates, published opinions from this Court and the United States Court of Appeals for the Ninth Circuit indicate that a holding of five minutes' duration weighs against concluding that a kidnapping occurred. Appellant's Brief at 30 (citing *United States v. Corralez*, 61 M.J. 737, 748–49 (A.F. Ct. Crim. App. 2005); *United States v. Jackson*, 24 F.4th 1308, 1313 (9th Cir. 2022) ("the duration of the holding[] weighs against kidnapping, as a seven-minute holding would be quite brief on the spectrum of possible kidnappings")). The Government retorts that the second factor is met "because the duration in which Appellant held ACS was not *de minimis*." Govt's Answer at 66. Yet both *Jackson* and *Corralez* indicate that a five-minute holding is on the "*de minimis*" rather than "appreciable" side of *Seay*'s duration factor. *See Seay*, 60 M.J. at 80. The Government attempts to distinguish *Jackson* and *Corralez*, but on bases other than the duration of the holding, which is what the second *Seay* factor assesses. Gov't Answer at 67–68. Just as in *Jackson* and *Corralez*, the duration of the holding here strongly supports a conclusion that no kidnapping occurred.

The Government also offers the counterintuitive argument that Appellant's motive "to obtain information on DMW's location"—which would be perfectly legal absent the assaults and batteries—is somehow more aggravating than the facts in *Jackson* and *Corralez*, where "the primary goal was assault itself." Gov't Answer at 69. The lawfulness of Appellant's underlying motive weighs against a kidnapping conviction.

Finally, the absence of "significant additional risk to the victim beyond that inherent in the commission of the separate offense" also weighs against a kidnapping conviction. *Seay*, 60 M.J. at 81. The Government cavils that ACS testified that she was "scared" and "didn't want to escalate the situation." Gov't Answer at 71. But ACS's understandable fear does not establish any

"significant additional risk" beyond that inherent in the series of assaults and batteries that Appellant committed. On the contrary, she was in the kitchen of her own suite in a military housing building. Trial Tr. 591, 596. She was unbound. And there is no suggestion that Appellant possessed, brandished, or improvised a weapon.

On balance, applying kidnapping—an offense punishable by up to confinement for life without eligibility for parole[4]—to ACS's five-to-ten-minute encounter with Appellant is not "a sensible construction." *United States v. Jeffress*, 28 M.J. 409, 413 (C.M.A. 1989). Rather, it constitutes an "overzealous" application of that offense. *Corralez*, 61 M.J. at 749. Under the *Seay* balancing test, this Court should conclude that there was no holding separate from ACS's seizure and confinement and set aside the finding of guilty to Charge III and its specification.

Assignment of Error V.

The special trial counsel committed prosecutorial misconduct by engaging in multiple forms of improper argument.

As the Court of Appeals for the Armed Forces has held, "it is black letter law that a trial counsel may not comment directly, *indirectly, or by innuendo*, on the fact that an accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (emphasis added) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). The special trial counsel did just that when he *began* his closing argument by stating, "This is not a case like he said, she said." Trial Tr. 1051. The Government now tries to argue that was not an implicit comment on the accused's failure to testify because what the special trial counsel was supposedly trying to convey was that, "as opposed to a typical 'he said, she said' case, the members did not have to 'rely solely on the testimony of one person' (i.e., the victim)." Gov't Answer at 77. Yet the very nature of a

[4] Pt. IV, ¶ 74.d, *Manual for Courts-Martial, United States* (2019 ed.).

"typical 'he said, she said' case" is not reliance on "the testimony of one person," but rather the presentation of conflicting accounts, one by a man and one by a woman. The special trial counsel's argument emphasized the absence of the "he said" portion of that dichotomy. That is an implicit comment on the accused's silence.

Lest there be any doubt about his meaning, the special trial counsel drove the point home by emphasizing the "one person" from whom the members heard testimony. Trial Tr. 1052. The Government suggests that the special trial counsel was "perhaps inartful" when he "mention[ed] that the members only had the testimony of one person in the room." Gov't Answer at 77. Actually, the special trial counsel was all too artful when he made that implicit reference to the accused's failure to testify.

The special trial counsel committed still further prosecutorial misconduct concerning the kidnapping specification when he argued, "Nothing refuted what [ACS] said on the stand," and "This is undeniable. This has not been refuted. There is nothing contradicting [ACS's] testimony." Trial Tr. 1054. The Government attempts to defend this clear violation of controlling caselaw by contending that, during opening statement, the defense counsel promised the members that Appellant would testify. Gov't Answer at 79–80. Of course, the defense counsel never said Appellant would testify, which would have been an extraordinary promise to make during opening statement. *See* Trial Tr. 400–08. But, according to the Government, the defense counsel made such a promise when he said, in connection with the kidnapping charge, "You're going to hear the testimony from the individuals." Gov't Answer at 80 (quoting Trial Tr. 402). The Government characterizes that one sentence as "Appellant's counsel promis[ing] the members during opening statement that they would get Appellant's version of 'what happened that night' and also an indication of his state of mind that night in ACS's room." Gov't Answer at 80.

Carter forecloses that imaginative interpretation of what the defense counsel said. There, the Court of Appeals for the Armed Forces stated, "Although the defense at one point noted that they intended to present a witness, defense counsel did not inform the members of the identity of the witness or create any expectation as to the substance of the witness's testimony." *Carter*, 61 M.J. at 35. Here, the defense counsel did not even do that much during opening statement. He merely told the members that they would hear testimony "from the individuals"—he did not identify those individuals or even promise that it would be the defense who would call them to the stand. And the members *did* hear testimony from "individuals" about that incident, specifically ACS *and* DW, both of whom the prosecution called as witnesses. Trial Tr. 577–605 (testimony of ACS); *id.* at 711–14, 754–55 (DW testifying about the "[ACS] incident" and "[ACS's] alleged kidnapping"). The individuals to whom the defense counsel referred were certainly ACS and DW, both of whom did testify. The defense counsel never suggested, much less promised, that Appellant would testify. The defense did not open the door to the special trial counsel's clear violation of *Carter*.

As a fallback position, the Government argues that, in *Carter*, the trial counsel made eleven references to the evidence being "uncontroverted" or "uncontradicted." Gov't Answer at 82 (citing *Carter*, 61 M.J. at 34). Here, the special trial counsel made four such references in connection with the kidnapping offense. Trial Tr. 1054. It would have been impermissible had he done so once; the fact that he did so four times is aggravating, not mitigating.

As to the special trial counsel's improper vouching, the Court of Appeals has specifically pointed to a prosecutor's use of "*we know*" as a form of improperly "vouch[ing] for the credibility of the Government's witnesses and evidence." *Fletcher*, 62 M.J. at 180. In arguing to the contrary, the Government relies on a decision by the Navy-Marine Corps Court of Criminal Appeals. Gov't

Answer at 86–87 (citing *United States v. Causey*, 82 M.J. 574 (N-M. Ct. Crim. App.), *petition denied*, 83 M.J. 25 (C.A.A.F. 2022)). This Court is bound to follow the precedent of the Court of Appeals for the Armed Forces, not the Navy-Marine Corps Court. *Fletcher*, not *Causey*, is the controlling authority.

The Government once again argues that the special trial counsel did not improperly vouch for SJM when he told the members, "So she came in here and she told the truth." Gov't Answer at 89 (quoting Trial Tr. 1076). But, as discussed in Assignment of Error I, above, the Court of Appeals for the Armed Forces has identified just such a "claim[] that [a witness] was telling the truth" as impermissible vouching. *Norwood*, 81 M.J. at 18–19.

The Government also seeks to defend the special trial counsel's statement that DW "sat here and took an oath and was as honest as she possibly could be with all of us." Gov't Answer at 90 (quoting Trial Tr. 1080). That assurance to the members is merely a synonym for saying that DW was telling the truth. And, as *Norwood* held, that is impermissible. *Norwood*, 81 M.J. at 18–19.

The Government even seeks to defend the double-whammy of the special trial counsel using a personal pronoun to vouch for ACS when he said, "I don't know any other explanation of why she would have been lying." Trial Tr. 1077. The Government posits that "the trial counsel was not 'vouching' for ACS, but simply dispelling any notion that ACS had a motive to lie." Gov't Answer at 90. A prosecutor offering a personal assurance that a witness had no motive to lie *is* vouching. *Norwood*, 81 M.J. at 19. While the Government cites a case for the unremarkable proposition that a prosecutor "may argue that the jury can or should infer from relevant facts that a witness does not have a reason to lie," that is not what happened here. Gov't Answer at 90 (citing *United States v. Martinez-Laraga*, 517 F.3d 258, 271 (5th Cir. 2008)). Rather, the special trial

counsel offered the members a statement about his personal knowledge. Trial Tr. 1077. That is impermissible.

Despite the Court of Appeals for the Armed Forces rejecting pre-argument instructions as an adequate cure, *United States v. Fletcher*, 62 M.J. 175, 185 (C.A.A.F. 2005), the Government seeks solace in the military judge "instruct[ing] the members that Appellant had an absolute right to remain silent, and the members were not to draw any adverse inference from him not testifying." Gov't Answer at 82 (citing Trial Tr. 1044). In this case, that instruction was even less effective than the pre-argument instructions in *Fletcher* because it was delivered the day before closing arguments. *See* Trial Tr. 1044. Such a temporally attenuated instruction is hardly an adequate cure for the myriad examples of impermissible argument that occurred the following day.

The Government bears the burden to prove beyond a reasonable doubt that the impermissible comments about the accused's failure to testify were harmless. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). In attempting to carry that burden, the Government now argues that because the panel acquitted Appellant of some charges involving SJM and DMW, the panel must not have been swayed by the trial counsel's argument.[5] When the 2017 Houston Astros stole opposing teams' signs, not every Houston at bat resulted in a base hit. But the integrity of every at bat in which an Astro communicated the sign to the batter was compromised. Similarly, here, the fact that the prosecution's case as to some charges was so weak that the members acquitted despite the special trial counsel's improper arguments does not mean that those arguments played no role as to the findings of guilty the prosecution did obtain.

The Government also attempts to rely on the existence of "corroborating evidence" to argue

[5] The Government makes a similar argument as to the other improper arguments, for which the defense has the burden to show prejudice. Gov't Answer at 91.

that the prosecutorial misconduct was harmless. Gov't Answer at 83. Significantly, however, there was no corroborating evidence for the findings of guilty to Charge II, Specifications 2 and 4, which involved alleged offenses against DW in South Korea. Those findings of guilty are thus especially prone to having been influenced by the special trial counsel's improper arguments. That said, SJM's credibility problems made the improper bolstering of her testimony particularly problematic, especially as to Charge II, Specification 3.

The special trial counsel engaged in an array of improper arguments. This Court should remedy that prosecutorial misconduct by setting aside the findings of guilty and remanding this case for a retrial at which the prosecution will adhere to the law governing permissible closing arguments.

Assignment of Error VI.

The Department of the Air Force's institutional neglect in providing complete records of trial for docketing with this Court in a timely manner warrants relief in this case, where the Government offered an incomplete "record" for docketing and caused further delay by irretrievably losing a portion of the audio recording of Appellant's court-martial, necessitating a certificate of correction.

"Excellence In All We Do" is an Air Force core value. AIR FORCE HANDBOOK 1 AIRMAN, ¶ 1.3.3 (15 Feb. 2025). But according to the Government's answer, excellence in 95.3% of what the Air Force does is good enough. Gov't Answer at 102. It is not. Moreover, the Air Force's post-trial processing success rate is well below that figure.

The Department of the Air Force has "a systemic problem indicating institutional neglect"[6] in providing complete records of trial to this Court in a timely manner. Appellant's opening brief identified eight cases, including Appellant's, in which this Court remanded the record for

[6] *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024), *aff'd*, 85 M.J. 361 (C.A.A.F. 2025).

correction during Fiscal Year 2025. Appellant's Brief at 50 n.27. In its answer, the Government assumes that those eight cases constitute the entire universe of remands for a year and, based on that assumption, calculated a 95.3% annual non-remand rate. Gov't Answer at 102. But this Court remanded three more cases for correction of the record between when Appellant filed his opening brief and the Government filed its answer. *United States v. Bush*, No. ACM 40783, 2025 CCA LEXIS 394 (A.F. Ct. Crim. App. Aug. 21, 2025) (order); *United States v. Mabida*, No. ACM 40682 (A.F. Ct. Crim. App. Sep. 2, 2025) (order); *United States v. Pettigrew*, No. ACM 40790 (A.F. Ct. Crim. App. Sep. 2, 2025) (order). Even though the Government knew of those additional remands, it excluded them from its calculation. And the fiscal year is not over yet. There is still time for more remand orders during Fiscal Year 2025, such is in *United States v. Fundis*, No. ACM 40689, a case with a pending motion for remand in which the trial transcript is missing a portion of the guilty plea inquiry.[7]

Even that is not a full picture of the Government's post-trial failures. Appellant's opening brief identified fourteen cases docketed over the previous year in which the Government failed to meet the 150-day *Livak* standard. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); Appellant's Brief at 50–51 n.29. This Court has issued opinions in at least two more such cases since Appellant filed his brief. *United States v. Cassilas*, No. ACM 40551, 2025 CCA LEXIS 445, at *69 (A.F. Ct. Crim. App. Sep. 18, 2025); *United States v. Slayton*, No. ACM 40583, 2025 CCA LEXIS 427, at *3 (A.F. Ct. Crim. App. Sep. 8, 2025).

This is an especially virulent case in the pandemic of Department of the Air Force post-trial processing failures. Not only did the Government offer for docketing a "record of trial"

[7] This Court may take judicial notice of its own records to note the existence of that pending motion and the basis for its filing. *See United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957) ("An appellate court . . . can take judicial notice of its own records.").

missing audio recordings of two days of court-martial proceedings, it irretrievably lost some of that missing audio. That required a remand for record correction, plus the preparation of a certificate of correction, further delaying appellate review of this case. *See* Certificate of Correction IAW R.C.M. 1112(d), *United States v. AMN Cody L. Kindred*. This case is, therefore, a particularly appropriate vehicle for this Court to send the message that the Department of the Air Force must do better.

Further demonstrating the need for a wake-up call, the Government's answer attempts to insulate itself from any responsibility for delay occurring because of an incomplete record or the necessity for a certificate of correction due to lost audio recordings. Gov't Answer at 96–103. This Court should reject that attempt.

Appellant's opening brief demonstrated that what the Government submitted to this Court at the time of the case's originally docketing does not qualify as a record of trial as the President defined that term. Appellant's Brief at 48. In its answer, the Government offers two unpublished, non-precedential decisions of this Court that allowed the filing of an incomplete record of trial to stop the *Livak* clock. Gov't Answer at 97 (citing *United States v. Gammage*, ACM S32731 (f rev), 2023 CCA LEXIS 528 (A.F. Ct. Crim. App. 15 December 2023); *United States v. Donley*, ACM 40350 (f rev), 2024 CCA LEXIS 228 (A.F. Ct. Crim. App. 11 June 2024)). Those decisions are inconsistent with other unpublished, non-precedential decisions of this Court starting the eighteen-month *Moreno* docketing-to-decision clock on the date of re-docketing. *See United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006); *e.g.*, *United States v. Phillips*, No. ACM 38771 (f rev), 2019 CCA LEXIS 102, at *28 (A.F. Ct. Crim. App. Mar. 8, 2019); *Valentin-Andino*, 2024 CCA LEXIS 223, at *15. The *Moreno* standards contemplate only one docketing date. *See Moreno*, 63 M.J. at 142. As *Phillips* and *Valentin-Andino* correctly determined, that is the date on which a complete record is docketed. Moreover, accepting the Government's position would be bad public policy. It would

incentivize the Government to offer for docketing shoddy "records of trial" to stop its *Livak* clock. Consistent with Congress placing the authority on the Courts of Criminal Appeals to promote both timely and correct post-trial processing, UCMJ art. 66(d)(2), 10 U.S.C. § 866(d)(2), this Court should insist that the Government file complete records of trial within the *Livak* standard. Interpreting the relevant date for *Moreno* purposes as the date on which a complete record of trial is docketed, as this Court did in *Phillips* and *Valentin-Andino*, would promote the values that Article 66(d)(2) is designed to protect.

When correctly calculated, the delay in docketing this case was 599 days from sentencing. That extended delay and the reasons for it warrant relief under both the Fifth Amendment's Due Process Clause and Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

While attempting to foist responsibility for a portion of that 599-day delay onto Appellant, the Government's answer does not even attempt to explain why, under *Vermont v. Brillon*, 556 U.S. 81, 94 (2009), the entire period of delay is not attributable to the Government. *See* Gov't Answer at 97, 99. The Government controls the Air Force Appellate Defense Division's staffing level. Where, as here, a detailed counsel's workload makes it impossible for her to analyze an appellant's record of trial and prepare a brief on the appellant's behalf for more than a year after docketing, the responsbility for that delay rests with the Government.

The length of the sentence in this case provides this Court with the opportunity to provide relief that is both proportionate to the delay and "meaningful," a factor this Court has identified as a relevant consideration when deciding whether granting relief for post-trial delay is appropriate. *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). The appropriate remedy in this case is to order 449 days of additional confinement credit. *See* Appellant's Brief at 53–54.

Appendix, Issue I.

The Government correctly notes a mistake in Appendix, Issue I.

The Government correctly notes that Appendix, Issue I of Appellant's brief includes a description of TSgt BAM's testimony that erroneously referred to DW's character for untruthfulness when he actually testified concerning SJM's character for untruthfulness. Gov't Answer at 107; Appellant's Brief, Appx. at 4, 6. Counsel regret the error.

Respectfully submitted,

[redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

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 Air Force Government Trial and Appellate Operations Division on 24 September 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

17 September 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	)))))))))	MOTION TO EXCEED PAGE LIMIT Special Panel ACM 40607 (f rev)

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's page length limitations. This Answer requires exceeding this Honorable Court's page length limitation due to the nature and number of issues raised by Appellant in his Assignments of Error brief.

On 18 August 2025, Appellant filed his Assignments of Error brief, which also exceeded this Court's page length limitations. The 70-page brief raises a total of ten issues, seven raised through counsel and three raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Appellant raises multiple factual and legal sufficiency claims involving his numerous convictions, each of which require in-depth discussions of the facts and witness testimonies regarding those respective convictions. Appellant also raises issues regarding prosecutorial misconduct and post-trial processing, requiring in-depth analysis on opening statements, closing arguments, and Appellant's record of trial and post-trial processing.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

[redacted]

G. MATT OSBORN, Colonel, USAF
Government Trial and Appellate Operations Division
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 17 September 2025 via electronic filing.

[redacted]

G. MATT OSBORN, Colonel, USAF
Government Trial and Appellate Operations Division
[redacted]

17 September 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	)))))))))	MOTION TO ATTACH DOCUMENT Special Panel ACM 40607 (f rev)

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following document in support of the government's Answer to Appellant's Assignment of Error brief in the above referenced case:

- Declaration of SSgt DP, dated 12 September 2025, 2 pages.

This document provides additional information and context outside the record but is relevant and necessary for the United States to answer Appellant's brief. Specifically, SSgt DP's declaration provides this Court necessary background and context regarding Appellant's claim that he is entitled to relief due to post-trial processing delay. The declaration provides needed context necessary to address Appellant's claims.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here, Appellant's claim of post-trial delay is directly raised by materials in the record. This

declaration is relevant to address Appellant's claims of prejudice due to post-trial processing delay. Thus, this Court may consider it under Jessie.

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

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 17 September 2025 via electronic filing.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	)	Before a Special Panel
Airman (E-2) **Cody L. Kindred**, United States Air Force, *Appellant*.	)	No. ACM 40607 (f rev) 2 October 2025

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, Appellant, Airman Cody L. Kindred, moves to cite supplemental authority.

Six days after Appellant filed his reply brief, the Court of Appeals for the Armed Forces issued its opinion in *United States v. Downum*, __ M.J. __, No. 24-0156 (C.A.A.F. Sep. 30, 2025) (attached). In that opinion, the court observed that "neither [*United States v. Harvey*, 85 M.J. 127 (C.A.A.F. 2024),] nor the text of Article 66(d), [Uniform Code of Military Justice (UCMJ)], forecloses the possibility that—based on the type of evidence presented at trial—a service court might owe little to no deference to the trial court in performing its factual sufficiency review." *Downum*, slip op. at 10 n.4. That observation supports Appellant's arguments that this Court may determine that, because of the special trial counsel's improper vouching for the credibility of SJM and DW, it would not be "appropriate" to defer to the members' apparent crediting of portions of their testimony. *See* Appellant's Br. at 16, Appx. at 7; Appellant's Reply Br. at 5–6.

Downum also rejected the notion that members' apparent disbelief of an accused's testimony precludes a finding of factual insufficiency. *Downum*, slip op. at 12. The court explained that "under the new version of Article 66, UCMJ, the service courts are still authorized to 'weigh the evidence and determine controverted questions of fact.' Article 66(d)(1)(B)(ii), UCMJ." *Id.*

That analysis supports Appellant's argument that this Court can and should find SJM's testimony insufficiently credible to prove Appellant's guilt to Charge II, Specification 3, beyond a reasonable doubt. *See* Appellant's Br. at 15–16; Appellant's Reply Br. at 4–5. *Downum* further supports the permissibility of such a determination by quoting *Harvey*'s conclusion that "[b]ecause the [Court of Criminal Appeals] does not have to give complete deference to the court-martial, . . . the CCA, during a factual sufficiency review in a particular case, might weigh the evidence differently from how the court-martial weighed the evidence." *Downum*, slip op. at 12 (alteration in original) (quoting *Harvey*, 85 M.J. at 131). Thus, this Court may assess the credibility of SJM's testimony and conclude that she is an insufficiently reliable witness to prove the factual predicate for Charge II, Specification 3, beyond a reasonable doubt.

Appellant respectfully requests that this Court grant this motion.

Respectfully submitted,

[redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel
[redacted]

[redacted]

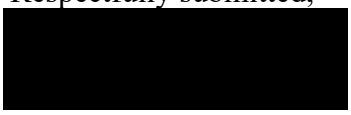
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 October 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellant

v.

Ross E. DOWNUM, Captain
United States Army, Appellee

No. 24-0156
Crim. App. No. 20220575

Argued October 23, 2024—Decided September 30, 2025

Military Judge: Scott Z. Hughes

For Appellant: *Captain Anthony J. Scarpati* (argued); *Colonel Christopher B. Burgess*, *Major Chase C. Cleveland*, and *Major Timothy R. Emmons* (on brief); *Colonel Richard E. Gorini*.

For Appellee: *Captain Amber Bunch* (argued); *Major Matthew S. Fields* and *Daniel Conway*, Esq. (on brief); *Scott Hockenberry*, Esq., and *Major Beau O. Watkins*.

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON and Judge MAGGS joined. Judge SPARKS filed a dissenting opinion, in which Judge JOHNSON joined.

Judge HARDY delivered the opinion of the Court.

The Government charged Captain Downum, Appellee in this case, with the wrongful use of cocaine under Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). Although the Government had the machine-generated results of Appellee's urinalysis test in its possession, it declined to seek admission of those results into evidence. Instead, the Government relied solely on the testimony of an expert witness, Dr. CO, who was recognized by the military judge as an expert in the field of forensic toxicology and drug testing. Dr. CO did not personally test Appellee's urine sample, but she had reviewed the test results in preparation for trial and opined that Appellee's urine sample tested "positive for BZE at 295 nanograms per milliliter."[1] Based on this testimony and other evidence, a panel of officers sitting as a general court-martial found Appellee guilty of one specification of violating Article 112a, UCMJ.

Finding the evidence both legally and factually insufficient, the United States Army Court of Criminal Appeals (ACCA) reversed. *United States v. Downum*, No. ARMY 20220575, 2024 CCA LEXIS 156, at *6, 2024 WL 1829153, at *3 (A. Ct. Crim. App. Mar. 29, 2024) (summary disposition on reconsideration) (unpublished). The Judge Advocate General of the Army exercised his authority under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2018), to certify three issues directly to this Court:

> I. Whether the Army Court erred in conducting its legal sufficiency analysis when it held that *United States v. Campbell*, 50 M.J. 154, 160 (C.A.A.F. 1999), requires not only expert testimony interpreting urinalysis results but the admission of the underlying paper urinalysis results as well.

[1] Dr. CO had previously testified that BZE, short for benzoylecgonine, is a metabolite of cocaine, the presence of which indicates that the provider of the urine sample has ingested cocaine.

> II. Whether the Army Court erred when it held that unobjected-to expert testimony interpreting the urinalysis results lacked relevance without the admission of the paper urinalysis results.
>
> III. Whether the Army Court failed to conduct a proper factual sufficiency analysis under Article 66(d)(1)(B).

United States v. Downum, 84 M.J. 463 (C.A.A.F. 2024) (docketing notice).

For the reasons explained below, we begin with the second certified issue. We disagree with the factual presumption embedded within the question presented—that the ACCA disregarded Dr. CO's expert testimony interpreting the urinalysis results after stating that the testimony lacked relevance—and instead conclude that the ACCA only found that Dr. CO's testimony provided little probative value in the absence of the underlying test results. Because this conclusion was within the ACCA's Article 66(d) authority, we find no error.[2] Turning next to the third issue, we find that there is an open question as to whether the ACCA applied the proper standard of review. Nevertheless, even assuming that the ACCA misunderstood the requirement to provide appropriate deference to the fact that the trial court saw and heard the witnesses testify, we find no prejudice to the Government's case and therefore affirm the ACCA's conclusion that Appellee's conviction was factually insufficient. Having affirmed the ACCA on this basis, we decline to answer the first certified issue, which has been rendered moot by our resolution of the third issue.

I. Background

The specification at issue in this case alleged that Appellee "did, at or near Fort Hood, Texas, between on or about 10 September 2021 and on or about 13 September 2021, wrongfully use cocaine." To obtain a conviction under Article 112a, UCMJ, the Government was required to

[2] *See* Article 66(d), UCMJ, 10 U.S.C. § 866(d) (defining the duties of the service courts of appeal).

prove both: (1) that Appellee used cocaine; and (2) that Appellee's use of cocaine was wrongful. *Manual for Courts-Martial, United States* pt. IV, para. 50.b.(2) (2019 ed.). Appellee's defense was that he did not knowingly ingest cocaine, and that he likely tested positive on his urinalysis because someone spiked his drink with cocaine at a bar.

To prove Appellee's wrongful use of cocaine, the Government relied primarily on the testimony of four witnesses who detailed the urinalysis process, the chain of evidence for Appellee's urine sample, and the results of Appellee's urinalysis. As mentioned above, despite having the paper urinalysis results in its possession at trial, the Government declined to place those results into the record. As noted by the ACCA, this appeared to be a deliberate choice rather than an oversight by trial counsel. Instead, Dr. CO, the director of the lab that performed the urinalysis test, offered her expert testimony that—based on her review of Appellee's urinalysis test results—Appellee's urine "was positive for BZE at 295 nanograms per milliliter." Dr. CO further explained that this was above the Department of Defense "cutoff" level of 100 nanograms per milliliter that indicates a positive test result. Based on this evidence, the general court-martial found Appellee guilty, contrary to his plea, of one specification of violating Article 112a, UCMJ, and sentenced him to thirty days of restriction, $1,000 in forfeitures for one month, and a written reprimand.

Frustrated by the Government's failure to enter the paper test results into the record, the ACCA held that the finding of guilty was both legally and factually insufficient. The ACCA's opinion stated:

> Without the admission of the test results, commonly accomplished by offering them as non-testimonial business records under Mil. Rule Evid. 803(6), the expert's testimony *lacked relevance*. Beyond [Dr. CO] stating a ng/ml level, there were no facts in evidence for her to explain, and no test results for her to interpret.

Downum, 2024 CCA LEXIS 156, at *6, 2024 WL 1829153, at *3 (emphasis added) (footnote omitted). The Judge Advocate General certified the case to this Court for review.

II. Standards of Review

When this Court reviews a service court's factual sufficiency analysis, we ask whether the court applied "correct legal principles" in performing its factual sufficiency review. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024). This Court reviews a CCA's decision as to what level of deference is appropriate for its factual sufficiency review of a court-martial's findings for abuse of discretion. *Id.* at 131.

III. Discussion

The Judge Advocate General certified three issues to this Court. We first address whether the ACCA erred in stating that the testifying expert's testimony "lacked relevance." *Downum*, 2024 CCA LEXIS 156, at *6, 2024 WL 1829153, at *3. We then review the ACCA's factual sufficiency analysis to determine whether that court applied correct legal principles.

A. Relevance of Dr. CO's Expert Testimony

We begin with the second certified question: whether the ACCA erred when it held that Dr. CO's expert testimony interpreting the urinalysis results lacked relevance without the admission of the paper urinalysis results. We understand the Government to be arguing that when the ACCA stated that Dr. CO's expert testimony "lacked relevance," it was concluding that her testimony failed to qualify as relevant evidence under Military Rule of Evidence (M.R.E.) 401. *See, e.g.*, Brief for Appellant at 26-27, *United States v. Downum*, No. 24-0156 (C.A.A.F. June 14, 2024) ("That the government did not admit the machine generated data should go to the weight of the expert testimony rather than its relevance.").

We agree that the ACCA would have erred if it had ruled that Dr. CO's testimony was not relevant under M.R.E. 401 and had disregarded it entirely. To be relevant,

evidence need only have any tendency to make a fact of consequence more or less probable than it would be without the evidence. M.R.E. 401(a)-(b). Dr. CO's testimony easily clears this low bar. Dr. CO's testimony was relevant to establishing both that Appellee used cocaine and that that use was wrongful.

But contrary to the Government's assertion, we do not interpret the ACCA to have held that Dr. CO's testimony was not relevant under the rules of evidence. If the ACCA had done so, Dr. CO's testimony would have been inadmissible, *see* M.R.E. 402(b) ("Irrelevant evidence is not admissible."), and the ACCA could not have considered it at all. Because Dr. CO's testimony about the urinalysis results was the only evidence that Appellee had used cocaine, the exclusion of Dr. CO's testimony would have ended the ACCA's analysis at the first element of the offense. Appellee's conviction would not have been legally or factually sufficient because there would have been no evidence that he had used cocaine at all.

But this is not how the ACCA analyzed the sufficiency of Appellee's conviction. To the contrary, the ACCA focused on whether Dr. CO's testimony established the second element of the offense, whether Appellee's use of cocaine was wrongful. When the government seeks to prove that a defendant's use of a controlled substance was wrongful based solely on scientific evidence, this Court has held that one way by which the government may establish an inference of wrongfulness is by offering expert testimony interpreting the urinalysis tests that prove the defendant's use of the controlled substance. *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001); *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000) (per curiam) (on reconsideration). If the Government seeks to obtain an inference of wrongfulness through the process set forth in *Campbell*, the expert testimony proffered by the government must establish multiple facts about the testing, including that the metabolite is not naturally produced by the body or any substance other than the drug in question, that the cutoff level and reported concentration are high enough to reasonably

discount the possibility of unknowing ingestion, and that the testing methodology reliably detected the presence and concentration of the drug or metabolite in the sample. 52 M.J. at 388.[3]

Applying this precedent, the ACCA found Dr. CO's testimony lacking, stating that Dr. CO "offered virtually no information about the test itself, whether it is regarded as scientifically sound, and whether it was conducted in accordance with prescribed procedures in this case." *Downum,* 2024 CCA LEXIS 156, at *4, 2024 WL 1829153, at *2. The ACCA acknowledged that Dr. CO testified that the level of BZE in Appellee's urine sample exceeded the cutoff level and that BZE does not occur naturally in the body. *Id.*, 2024 WL 1829153, at *2. However, the ACCA also noted that Dr. CO failed to explain the cutoff level's significance or explain how the urinalysis test controls for the possibility of innocent ingestion—the very defense raised by Appellee. *Id.*, 2024 WL 1829153, at *2.

Despite the ACCA's inartful statement that Dr. CO's testimony "lacked relevance," the ACCA conducted a detailed analysis of Dr. CO's testimony, rather than disregarding it as not relevant under M.R.E. 401. Viewed in the context of the ACCA's entire opinion, we interpret the

[3] We disagree with the dissent's assertion that *Campbell* is no longer the controlling precedent. *United States v. Downum*, __ M.J. __, __-__ (2-4) (C.A.A.F. 2025) (Sparks, J., dissenting). In *Green*, the Court clarified that an Article 112a conviction would still be legally sufficient if the expert testimony did not address whether the defendant would have experienced the physiological effects of the controlled substance, 55 M.J. at 81, but otherwise left the *Campbell* permissible-inference factors intact. The Court did present three nonexclusive *Campbell*-like factors that military judges should consider when determining whether scientific evidence about urinalysis testing should be *admitted* (in addition to any other factors that the military judge finds relevant to determining the admissibility of scientific evidence), *id.* at 80, but nothing in *Green* suggests that those factors replaced the *Campbell* factors for the distinct purpose of determining whether the Government established a permissible inference of wrongfulness.

ACCA's statement that Dr. CO's testimony "lacked relevance" merely to indicate that the ACCA found that Dr. CO's testimony provided diminished probative value without the underlying urinalysis results. Because we conclude that this was within the ACCA's Article 66 authority, the ACCA did not err when it stated that Dr. CO's testimony lacked relevance.

B. The ACCA's Factual Sufficiency Analysis

We turn next to the third certified issue, which asks whether the ACCA erred when conducting its factual sufficiency analysis. The Government argues that the ACCA erred by applying a de novo standard of review and by failing to provide "appropriate deference" to the results of the court-martial as now required under Article 66(d)(1)(B), UCMJ.

As this Court discussed at length in our opinion in *Harvey*, 85 M.J. at 130-32, Congress recently amended Article 66(d), UCMJ, in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542, 134 Stat. 3388, 3611, altering the service courts' statutory authority to perform factual sufficiency reviews. Although it was long settled that the service courts applied a "de novo" standard of review under the earlier versions of Article 66(d), UCMJ, *see, e.g.*, *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002), the proper label for the standard of review under the newly amended Article 66(d)(1)(B), UCMJ, is more difficult to describe. As the Court noted in *Harvey*, the United States Navy-Marine Corps Court of Criminal Appeals, the government, and the appellant in that case all provided different descriptions of the new standard of review when a service court performs a factual sufficiency analysis. 85 M.J. at 130. Although this Court explained how the new standard should be construed and applied in *Harvey*, we declined to place a label on it, neither endorsing nor rejecting the continued use of the phrase "de novo" to describe the standard of review. *Id*. at 130-31.

The ACCA issued its opinion in this case on March 29, 2024, more than five months before this Court issued its opinion in *Harvey*. *Downum*, 2024 CCA LEXIS 156, at *1, 2024 WL 1829153, at *1. In describing the underlying law and standard of review, the ACCA began by stating, "We review factual sufficiency de novo." *Id.* at *2, 2024 WL 1829153, at *1 (first citing *United States v. Scott*, 84 M.J. 583, 584 (A. Ct. Crim. App. 2024); and then citing *Washington*, 57 M.J. at 399). The ACCA proceeded to expressly recognize that Congress amended Article 66, UCMJ, and then block quoted the new text in Article 66(d)(1)(B), UCMJ, including the key provision mandating that the service courts give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." *Id.*, 2024 WL 1829153, at *1-2 (quoting Article 66(d)(1)(B)(ii)(I)).

The Government points to this portion of the ACCA's opinion to argue that the ACCA misapplied the newly amended Article 66(d)(1)(B), UCMJ. The Government focuses on the fact that the ACCA described the standard of review as "de novo," which means "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Appeal*, *Black's Law Dictionary* (12th ed. 2024) (defining "appeal de novo"). Essentially the Government argues that the ACCA could not have simultaneously "assess[ed] the evidence in the entire record without regard to the findings reached by the trial court," *Washington*, 57 M.J. at 399, and provided appropriate deference to the fact that the trial court saw and heard the witnesses as Article 66(d)(1)(B)(ii)(I) requires.

The Government's argument highlights a tension that has long existed between this Court's factual sufficiency jurisprudence and the text of Article 66, UCMJ. When Congress originally enacted Article 66, UCMJ, the statute authorized the service courts to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact" but to do so while also "recognizing that the trial court saw and heard the witnesses." Act of Aug.

10, 1956, ch. 1041, Pub. L. No. 84-1028, 70A Stat. 59 (codifying the UCMJ as Title 10 of the United States Code). Nevertheless, this Court and our predecessor have long described the standard of review for factual sufficiency simply as "de novo." *See, e.g.*, *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (describing then-Article 66(c) as an "awesome, plenary, *de novo* power of review" that authorizes a service court to " 'substitute its judgment' for that of the military judge"); *Washington*, 57 M.J. at 399 (holding that the service courts are "required to conduct a *de novo* review of the entire record of trial").

Congress's recent amendments to Article 66, UCMJ, exacerbated the tension between our precedent and the text of the article. As we explained in *Harvey*, depending on the type of evidence presented at trial, the level of deference owed by a service court to certain factual determinations by the trial court might be materially more than one would expect under de novo review.[4] Because of this, it is no longer appropriate to describe the service courts' standard of review when performing factual sufficiency review simply as "de novo." Instead, when stating the standard of review and performing factual sufficiency review, service courts should cite and follow this Court's guidance in *Harvey*, 85 M.J. at 130-32, instead of the Court's prior guidance in *Washington*, 57 M.J. at 399.

In its opinion below, the ACCA's stated that it was applying de novo review and cited our decision in *Washington*. *Downum*, 2024 CCA LEXIS 156, at *2, 2024 WL 1829153, at *1. To be fair, the ACCA also acknowledged Congress's amendment to Article 66, UCMJ, and recited the new language requiring it to give appropriate deference to the trial court. *Id.*, 2024 WL 1829153, at *1-2. This contradiction raises an open question whether the ACCA's

[4] To be clear, neither *Harvey* nor the text of Article 66(d), UCMJ, forecloses the possibility that—based on the type of evidence presented at trial—a service court might owe little to no deference to the trial court in performing its factual sufficiency review.

analysis was consistent with our decision in *Harvey*. To resolve this question, we examine the ACCA's factual sufficiency analysis to determine whether the ACCA failed to provide appropriate deference as the Government claims. *See United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998) (determining that remand for a new factual sufficiency review was unnecessary despite finding there was an open question whether the lower court applied an "inaccurate standard" because it was "satisfied that any misconception regarding the correct standard was harmless"), *abrogated on other grounds by United States v. Gutierrez*, 74 M.J. 61, 66 (C.A.A.F. 2015).

In support of its argument, the Government notes that Appellee took the stand and testified in his own defense, claiming that he never intentionally ingested cocaine during his time in the Army, and speculating that "some type of substance" that was in his drink at a bar after he had returned from the bathroom may have been the cause of his testing positive. The Government asserts that the panel—which had the opportunity to see and hear Appellee's testimony firsthand—must have rejected his explanation for the positive urinalysis results to find him guilty beyond a reasonable doubt. The Government argues that the Article 66 appropriate deference standard required the ACCA to defer to the panel's rejection of Appellee's testimony and affirm the finding of guilt, even if the ACCA harbored its own doubts about the factual sufficiency of the conviction.

We do not think that the appropriate deference requirement constrained the ACCA's review in this way. In this case, when Appellee testified in his own defense, he adamantly denied that he had ever intentionally ingested cocaine:

> [CDC]: Captain Downum, did you knowingly or intentionally ingest cocaine at any time in September of 2021?
>
> A: I did not intentionally ingest cocaine.
>
> [CDC]: Okay. At any time in—since your Army career from West Point to the present day, did you

> ever knowing intent—intentionally ingest what you believed to be cocaine?
>
> A: Absolutely not.

So the Government is correct that the panel must have believed the Government witnesses over Appellee to have found him guilty. But under the new version of Article 66, UCMJ, the service courts are still authorized to "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii), UCMJ. The new Article 66(d) appropriate deference requirement does not prohibit a service court from concluding that a finding of guilt is factually insufficient simply because the defendant took the stand and denied that he committed the charged offense. To conclude otherwise would be to impose a presumption of guilt similar to the one that this Court rejected in *Harvey*, 85 M.J. at 132.

Ultimately, the ACCA's factual sufficiency analysis did not turn on the veracity or the credibility of the witnesses who testified at trial or whether the ACCA provided appropriate deference to the fact that the trial court heard and saw those witnesses testify. Instead, the ACCA's decision rested on the simple fact that—without the admission of the urinalysis test results into the record—the ACCA found the proffered evidence insufficient to prove that Appellee wrongfully used cocaine beyond a reasonable doubt. *See Downum*, 2024 CCA LEXIS 156, at *1, 2024 WL 1829153, at *1 ("This is the proverbial 'paper' urinalysis case, but in this case without the paper."). Even under the new version of Article 66(d)(1)(B), UCMJ, that conclusion was within the ACCA's discretion to reach. *See Harvey*, 85 M.J. at 131 ("Because the CCA does not have to give complete deference to the court-martial, . . . the CCA, during a factual sufficiency review in a particular case, might weigh the evidence differently from how the court-martial weighed the evidence."). Nothing in the newly amended Article 66(d)(1)(B), UCMJ, requires a service court to give deference to the trial court about the *absence* of evidence that the service court believes is critical for a conviction to be factually sufficient.

To be clear, our decision signifies nothing more than that the ACCA did not abuse its discretion in performing its factual sufficiency analysis. As the ACCA itself noted, it is not the case that "the introduction of the test results in documentary form is the *only* method of proving" the wrongful use of controlled substances. *Downum*, 2024 CCA LEXIS 156, at *6 n.7, 2024 WL 1829153, at *3 n.7. But a conviction cannot stand if *either* a court-martial (in the first instance) *or* a CCA (on factual sufficiency review) finds the evidence factually insufficient to support a finding of guilty. As this Court noted in *United States v. Graham*, 50 M.J. 56, 60 (C.A.A.F. 1999), this is especially true when courts consider an Article 112a specification based on a failed urinalysis test:

> [O]ur service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.

Id. By declining to enter the paper urinalysis results into the record, the Government assumed the risk that either the court-martial or the ACCA might find the remaining evidence factually insufficient to establish Appellee's guilt beyond a reasonable doubt. Although the Government cleared the first hurdle and obtained a conviction from the court-martial in this case, Article 66(d)'s appropriate deference requirement did not prevent the ACCA from reaching a different conclusion on appeal.

IV. Conclusion

The decision of the United States Army Court of Criminal Appeals is affirmed.

Judge SPARKS, with whom Judge JOHNSON joins, dissenting.

The lower court appears to have taken the view that admission of the underlying paper urinalysis results is required before the government is permitted use of the permissive inference of wrongfulness in a urinalysis case. This view runs counter to my reading of *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001), *United States v. Campbell* (*Campbell I*), 50 M.J. 154 (C.A.A.F. 1999), and *United States v. Campbell* (*Campbell II*), 52 M.J. 386 (C.A.A.F. 2000) (per curiam) (on reconsideration). Furthermore, I am aware of no other basis in the law for adopting such a requirement in urinalysis cases. Consequently, because I view this as a failure on the part of the United States Army Court of Criminal Appeals (ACCA) to apply correct legal principles, I am unable to join the majority's decision to affirm the lower court's factual insufficiency conclusion.

A. Relevance of the expert's testimony

Because the majority began its analysis of the case by first addressing the second certified issue, I too will begin there. The second certified question asks the Court to determine whether the lower court erred when it held that, absent the test results, Dr. CO's expert testimony "lacked relevance." *United States v. Downum*, 84 M.J. 463 (C.A.A.F. 2024) (certificate for review). The majority characterizes this language as an "inartful statement" and in turn, interprets this statement "merely to indicate the ACCA found Dr CO's testimony provided diminished probative value without the underlying urinalysis results." *United States v. Downum*, __ M.J. __-__ (7-8) (C.A.A.F. 2025). I, on the other hand, have a less charitable view of this statement. Appellate military judges are seasoned senior judge advocates, who can presumably distinguish between the fairly simple legal concepts of relevance and probative value. The majority concedes that the lower court "would have erred" had it disregarded Dr. CO's testimony as irrelevant under Military Rule of Evidence (M.R.E.) 401. *Downum*, __ M.J. at __ (5). Yet, it is my view that is exactly what it did.

To be relevant, evidence needs to have any "tendency to make a fact more or less probable than it would be without the evidence." M.R.E. 401(a). The lower court found that Dr. CO's testimony was irrelevant and therefore inadmissible. *See* M.R.E. 402(b) ("Irrelevant evidence is not admissible."). I disagree and find that Dr. CO's testimony easily cleared this low bar. The testimony was relevant to establishing both that Appellee used cocaine and that said use was wrongful. The lower court's statement is at best ambiguous, and "[t]he appropriate remedy for *incomplete or ambiguous* rulings is a remand for clarification." *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994) (emphasis added). As such, this case should be remanded.

B. Appellee's conviction was legally sufficient without the paper urinalysis results

Although I understand the majority's resolution of the case rendered the first certified question moot, I feel compelled to address this issue. The first certified question asks this Court whether the ACCA erred in holding that *Campbell I* requires the admission of paper test results. *Downum*, 84 M.J. 463. I would hold that the ACCA erred because *Green* is the applicable precedent, and *Green* makes it clear that the admission of paper test results is not required to sustain a conviction. Because *Green* modified the legal landscape for these cases, neither *Campbell I* nor *Campbell II* applies. Furthermore, an important point to be made here is that the ACCA erred in its application of *Campbell I* because the *Campbell I* test only applies where the government's only evidence for drug use derives from novel scientific methodologies.

A conviction is legally sufficient when a "rational factfinder . . . could have found all essential elements of the offense [at issue] beyond a reasonable doubt." *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023) (first alteration in original) (internal quotation marks omitted) (quoting *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019)). The reviewing court is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (internal quotation marks omitted) (citation omitted). "As such, the standard for legal

sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted) (citation omitted).

Campbell II states that the prosecution may[1] demonstrate the relationship between the paper urinalysis results and the permissive inference of knowing, wrongful use through expert testimony showing:

> (1) that the metabolite is not naturally produced by the body or any substance other than the drug in question; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

52 M.J. at 388 (internal quotation marks omitted) (citation omitted).

However, as numerous lower court opinions recognized, it is not possible to definitively state that the user "experienced the physical and psychological effects of the drug." *See, e.g.*, *United States v. Barnes*, 53 M.J. 624, 228-29 (N-M. Ct. Crim. App. 2000) (Anderson, J., concurring dubitante) (internal quotation marks omitted) (citation omitted), *vacated,* 55 M.J. 236 (C.A.A.F. 2001) (summary disposition) (remanding in light of *Green*).[2] As a

---

[1] The majority cites *Campbell II* for the proposition that the Government's expert testimony "must" establish certain factors. *Downum,* __ M.J. at __-__ (6-7). However, *Campbell II* says expert testimony "may" establish these factors. 52 M.J. at 388 ("the prosecution may demonstrate the relationship between the test result and the permissive inference" through the *Campbell* factors).

[2] Academic literature supported this conclusion. *See, e.g.*, David A. Berger, *Campbell and Its Progeny: The Death of the Urinalysis Case*, 47 Naval L. Rev. 1, 30 (2000); Michael R. Stahlman, *New Developments on the Urinalysis Front: A Green*

result, this Court created a new framework in *Green*.[3] *See, e.g.*, *United States v. Mahoney*, No. NMCCA 9900147, 2003 CCA LEXIS 102, at *2, 2003 WL 1895472, at *1 (N-M. Ct. Crim. App. Apr. 17, 2003), *aff'd*, 59 M.J. 147 (C.A.A.F. 2003) (summary disposition).

In a footnote, the majority states that the *Green* Court presented "three nonexclusive *Campbell*-like factors that military judges should consider when determining whether scientific evidence about urinalysis testing should be *admitted*." *Downum*, __ M.J. at __ (7 n.3). However, *Green* states that this process is for "novel scientific evidence." 55 M.J. at 80. *Campbell I* and *Campbell II* likewise limited the application of the three-factor test to novel scientific procedures. 50 M.J. at 155, 160; 52 M.J. at 388. In *Campbell I*, there was only one lab in the entire United States using the gas chromatography tandem mass spectrometry (GC/MS/MS) methodology. 50 M.J. at 156. Since no other lab conducted that test, other scientists could not reproduce the results. *Id*. at 156-58. For the same reason, the test was not peer reviewed and had not gained acceptance as scientifically valid in the field. *Id*. While this methodology may have been a "novel scientific procedure" prior to 1999, after twenty-five years of utilization in urinalysis cases the GC/MS/MS methodology is no longer novel or unique.

When the military judge is considering evidence of a test that does not involve a novel scientific procedure, different considerations apply. If the expert testimony has "an established scientific, technical, legal, judicial, or evidentiary foundation" regarding reliability and relevance, it may be appropriate to take judicial notice

---

Light in Naked Urinalysis Prosecutions?, Army Law., April 2002, at 14.

[3] Subsequent to the ruling in *Green*, this Court affirmed the two cases where the lower court declined to apply *Campbell*. *See United States v. Pugh*, 55 M.J. 357 (C.A.A.F. 2001) (summary disposition); *United States v. Tanner*, 55 M.J. 357 (C.A.A.F. 2001) (summary disposition). It also summarily vacated and remanded every certified case (nine cases) where the lower court applied *Campbell*.

under M.R.E. 201 without further litigation. *Green*, 55 M.J. at 81. "If the military judge determines that the scientific evidence—whether novel or established—is admissible, the prosecution may rely on the permissive inference during its case on the merits." *Id.* The key distinction is that the decision rests with the military judge.

A further point to be made is that the rules of evidence allow for an expert to testify to the underlying facts and data of an opinion substantively. M.R.E. 703 provides as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

There is no question that M.R.E. 703 allows an expert to bring in the contents of a urinalysis report. *See, e.g.*, *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) ("We further hold that an expert may, consistent with the . . . rules of evidence, (1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generated data . . . ."). There is also no question that Dr. CO was "aware of or personally observed" Appellee's urinalysis. Due in large part to its misreading of *Green* and *Campbell*, the lower court was so focused on the paper results that they gave little to no weight to Dr. CO's testimony. Dr. CO testified that, based on her review, Appellee's sample tested positive for cocaine on the initial screening. She also testified that "based on [her] review of . . . the litigation packet" further testing, via gas chromatography mass spectrometry, had been conducted, and that this confirmatory test "was positive for BZE at 295 nanograms per milliliter." Dr. CO was reciting the results from nonhearsay, machine-generated data. *Cf. Smith v.*

Arizona, 602 U.S. 779, 783 (2024) (holding "an absent lab analyst's factual assertions" are admitted "into evidence for their truth"). Thus, Dr. CO was not merely giving an opinion. Her recitation of the BZE level was a fact that supported her opinion that Appellee had consumed cocaine.

To a layperson "BZE at 295 nanograms per milliliter" may sound a bit like unintelligible science speak. This unfamiliarity with the data is the very reason we have experts explain this information, which Dr. CO did extensively. And, just as we rely on toxicologists to explain the significance of the technical terms, we rely on the military judge to decide whether the prosecution has met its burden to give the permissive inference instruction. Here, the military judge decided the issue in accordance with *Green*. The lower court's reliance on *Campbell I* created substantive hurdles the Government never needed to surmount.

It is true, as the majority states, that Dr. CO's testimony was the only direct evidence of drug use, *Downum,* __ M.J. at __ (6), but in the absence of an objection, the facts Dr. CO relied on and testified to were in evidence and the members were free to consider them substantively. Furthermore, Appellee's defense strategy revolved around conceding to the presence of cocaine. Appellee only contested whether the use was wrongful, in other words, the innocent ingestion defense. Trial defense counsel's opening statement admitted Appellee had cocaine in his system and that its presence was "high enough to go over the cutoff level that the lab reports as being forensically defensible." His cross-examination of Dr. CO concedes: "[a]ll we can say is for certain [sic], [Appellee] consumed enough cocaine, then [sic] in the metabolic process it produced the metabolite that passed . . . the cut-off level that the lab sets?" Dr. CO responded, "Yes." On his own direct examination, Appellee admitted he could have been exposed to "a small amount of cocaine" during the weekend in question.[4] Finally, trial defense counsel in his

[4] The question presented to Appellee by his counsel was as follows:

closing argument not only admits Appellee's "urine had somehow had cocaine in [his] system at least a few days prior," but also concedes this case is "not whether or not there was a metabolite for cocaine in his system, that's a red herring if the government comes up in their second argument and says[,] we're arguing that, no."

Beyond that, Appellee chose to testify in his own defense. It was the responsibility of the panel to evaluate his credibility and determine whether to apply the permissive inference. *United States v. Bond*, 46 M.J. 86, 89 (C.A.A.F. 1997). Additionally, both of his fact witnesses contradicted his story. Immediately after Appellee's testimony, the defense's first fact witness, BL, *twice* contradicted Appellee's version of events, denying Appellee ever mentioned any concerns about his drink. He went so far as to say, "[i]t seems like I would have remembered that. And I don't off the top of my head, sir." His next fact witness, KG, testified that Appellee confessed to testing positive for cocaine before the drug test results were even available. This was despite Appellee testifying earlier that he did not know whether his drink had been spiked with drugs, let alone know what substance could have been in his drink, be it amphetamines, ecstasy, or cocaine. The defense's case and the introduction of extrinsic evidence of drug use place this case outside the realm where the *Campbell* test would ever apply.

In addition, there is a strong argument to be made that Appellee waived any objection to the permissive inference instruction. "Whether an appellant has waived an issue is

---

> Q. Okay, and having heard the testimony of Dr. [CO], the forensic toxicologist, in her testimony about how a small amount of cocaine can produce a positive . . . above what you produced on the urinalysis with your urine, . . . can you say for sure that you weren't somehow exposed to a very small amount in some other setting that weekend?
>
> A. I cannot say that I was not exposed in any other setting.

a legal question that this Court reviews de novo." *United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023) (internal quotation marks omitted) (quoting *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)). Trial defense counsel did not object when the Government stated it would not be admitting the paper urinalysis results into evidence. Finally, defense counsel did not object when the permissive inference instruction was given.[5]

This is because there was never any question as to the presence of cocaine in his system, the contents of the paper urinalysis results, or the value of Dr. CO's testimony. The failure to object indicates one of two things: either there was an understanding at trial that the paper urinalysis results were not necessary, or defense counsel saw some benefit in waiving the issue.

C. The ACCA incorrectly applied the new Article 66(d)(1)(B)(ii)(II)

Because the lower court erred with regards to Issue I and Issue II, their factual sufficiency review was flawed. By determining that the contents of the urinalysis could only come into the trial through the paper results, the lower court essentially struck the contents of Dr. CO's testimony from consideration because it believed there were no facts in evidence for her to interpret. Thus, her testimony became irrelevant. This is incorrect for all the reasons previously stated.

Further, the majority relies on *United States v. Weatherspoon*, 49 M.J. 209 (C.A.A.F. 1998), in applying a

---

[5] At the close of the Government's case, defense counsel did make a somewhat perfunctory and vague motion for a finding of not guilty under Rule for Courts-Martial 917, challenging the sufficiency of the evidence as follows:

> [W]e will make a motion under Rule for Court-Martial 917, particularly under the element of knowing use. There has, based on the testimony and evidence presented thus far, there is not sufficient evidence in that be (sic) given to the members allowing reasonable infer[ences]—or permissible inferences to the government that would support the element of knowing use.

harmless error standard to the CCA's factual sufficiency analysis. I would simply note that we have said, "when the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." *Harvey*, 85 M.J. at 129 (internal quotation marks omitted) (quoting *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022)). This Court has also remanded when it was "an open question" whether a lower court correctly applied the law. *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010).

This case should be remanded to the Army court to conduct a new factual sufficiency review. In my view evidence introduced on the merits through the expert's testimony without objection were matters properly considered by the members. And, because the ACCA's factual insufficiency conclusion was based on a misapplication of the *Campbell* and *Green* trilogy of cases, a remand should be in order.

D. Conclusion

For the foregoing reasons, I respectfully dissent.

8 October 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) CODY L. KINDRED, USAF, *Appellant*.	))))))))	RESPONSE TO APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY Special Panel ACM 40607 (f rev)

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

Pursuant to Rule 23 of this Honorable Court's Rules of Practice and Procedure, the United States files this Response to Appellant's Motion to Cite Supplemental Authority. The Government does not oppose Appellant's motion to cite to a supplemental authority, namely United States v. Downum, __ M.J. __, No. 24-0156 (C.A.A.F. Sep. 30, 2025). The Government, however, disagrees with Appellant's assertion that our superior Court's decision in Downum changes the legal landscape of Appellant's case in any fashion.

Appellant first highlights a footnote from Downum that states that a service court is not foreclosed from the possibility that it might "owe little to no deference to the trial court in performing its factual sufficiency review." (App. Mot. at 1, *citing* Downum, *slip op.* at 10 n. 4.) Appellant contends that this supports his argument that "this Court may determine that, because of the special trial counsel's improper vouching for the credibility of SJM and DW, it would not be 'appropriate' to defer to the members' apparent crediting of portions of their testimony." (Id.)

However, unlike in Downum, whether or not this Court *can* give less deference to the members is not the issue in this case. The issue in this case is whether this Court *should* give less deference based on Appellant's claimed issue of improper vouching. As the Government has repeatedly argued, the special trial counsel committed no improper vouching for either SJM

or DW within his closing argument, and, thus, there was no distortion to the members' credibility determination of either SJM or DW. Accordingly, this Court should decline Appellant's plea to lessen any deference based on his claim and, instead, follow Article 66's mandate to give "appropriate deference" to the panel members who, after hearing and seeing SJM's and DW's testimony, and hearing the same reliability arguments against each, convicted Appellant of offenses involving the two victims.

Appellant also states that Downum "supports Appellant's argument that this Court can ***and should*** find SJM's testimony insufficiently credible to prove Appellant's guilt to Charge II, Specification 3, beyond a reasonable doubt." (App. Mot. at 2.) (emphasis added.) Again, Downum does not change the legal landscape here – a service court under the amended Article 66, UCMJ, certainly retains the ability to weigh a witness's credibility when determining whether it is clearly convinced that a finding of guilty is against the weight of the evidence, so long as it provides appropriate deference to the factfinder in doing so.[1] *See* Article 66(d)(1)(B)(iii). If this Court finds that a lesser degree of deference is warranted, even though the members saw and heard the witnesses, it should explain why. The Government also takes issue with Appellant's assertion that Downum implies or directs that a service court "should" find a witness's testimony insufficiently credible in any given case, including Appellant's. Again, that is a power left to the service court to decide on any given case based on that case's particular facts and circumstances.

[1] That is, assuming that issues with the witness's credibility were part of an appellant's "specific showing of a deficiency of proof" to warrant a factual sufficiency review in the first place. *See* Article 66(d)(1)(B)(i), UCMJ.

CONCLUSION

WHEREFORE, the United States requests this Honorable Court deny Appellant's claims and affirm and his findings and sentence.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 8 October 2025 via electronic filing.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Cody L. KINDRED	)	**CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

The record of trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40607 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Cody L. KINDRED	)	**CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 27th day of January, 2026,

ORDERED:

The record of trial in the above-styled matter is withdrawn from a Special Panel and referred to another Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal