UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40746**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tylir D. CUNNINGHAM,	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 7 February 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed the motion.

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

Accordingly, it is by the court on this 12th day of February, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **22 April 2025**.

Each request for an enlargement of time will be considered on its merits. 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.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM 40746 7 February 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 an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **22 April 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 46 days have elapsed. On the date requested, 120 days will have elapsed since docketing.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Capt, USAF
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 Air Force Government Trial and Appellate Operations Division on 7 February 2025.

[redacted]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
[redacted]

11 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) TYLIR D. CUNNINGHAM, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40746 Panel No. 1

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

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

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[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 February 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40746 10 April 2025

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

Pursuant to Rule 23.3(m)(1) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **22 May 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 1[illegible]J; and One Charge with One Specification of assault consummated by a battery, in [illegible]rticle 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
11 APR 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1249 pages long. Appellant is currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

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 10 April 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 1 No. ACM 40746 11 April 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 general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[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 April 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 1 No. ACM 40746 15 May 2025

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

Pursuant to Rule 23.3(m)(1) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **21 June 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
16 MAY 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1249 pages long. Appellant is currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

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 15 May 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 1 No. ACM 40746 15 May 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 general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]
JOCELYN Q. WRIGHT, 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 15 May 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	9 June 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **21 July 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
11 JUN 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 27 cases; 22 cases are pending before this Court (18 cases are pending AOEs). Eight cases have priority over the present case:

1. *United States v. Ingram*, No. ACM S32781– The record of trials is three volumes consisting of two Prosecution Exhibits and four Appellate Exhibits. The transcript is 86 pages. On 6 June 2025, this Court ordered briefs on a specified issue, due not later than 20 June 2025. Undersigned counsel is currently drafting this brief.
2. *United States v. Hedgepeth*, No. ACM 40681– The record of trial is four volumes consisting of three Prosecution Exhibits, one Court Exhibit, three Defense Exhibits, and five Appellate Exhibits; the transcript is 115 pages long. Undersigned counsel is currently drafting the AOE for this case.
3. *United States v. Rockrich*, No. ACM 40666 – The record of trial consists of two Prosecution Exhibits, one Defense Exhibit, and sixteen Appellate Exhibits; the transcript is 96 pages long. Appellant is currently confined. Undersigned counsel has completed her review of the record in this case but has not yet drafted the AOE.

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

4. *United States v. Hilson*, No. ACM 24063 – The record of trial consists of one E-ROT with two volumes. It contains two Prosecution Exhibits, one Court Exhibit, eight Defense Exhibits, and four Appellate Exhibits. The transcript is 156 pages long. Undersigned counsel has completed her review of the record in this case but has not yet drafted the AOE.
5. *United States v. Fundis*, No. ACM 40689- The record of trial consists of six volumes, with eight Prosecution Exhibits, two Court Exhibits, eighteen Defense Exhibits, and eighteen Appellate Exhibits. The transcript is 377 pages long. Undersigned counsel has not yet completed her review of the record in this case.
6. *United States v. Reese*, No. ACM 24069 – The record of trial consists of one E-ROT containing two volumes, with twelve Prosecution Exhibits, four Court Exhibits, fourteen Defense Exhibits, and fifty-six Appellate Exhibits. The transcript is 1,310 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.
7. *United States v. Castillo,* No. ACM 40705- The record of trial consists of seven volumes, with five Prosecution Exhibits, one Court Exhibit, one Defense Exhibit, and thirty-four Appellate Exhibits. The transcript is 470 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.
8. *United States v. Heilig*, No. ACM 40740 – The record of trials consists of one e-ROT with six volumes, three Prosecution Exhibits, eight Defense Exhibits, and six Appellate Exhibits; the transcript is 135 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 9 June 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	11 June 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 general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

KATE E. LEE, 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 June 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	13 July 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **20 August 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article

ıd One Charge with One Specification of assault consummated by a battery, in ticle 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED

15 JULY 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 30 cases; 24 cases are pending before this Court (20 cases are pending AOEs). Five cases have priority over the present case:

1. *United States v. Hilson*, No. ACM 24063 – The record of trial consists of one E-ROT with two volumes. It contains two Prosecution Exhibits, one Court Exhibit, eight Defense Exhibits, and four Appellate Exhibits. The transcript is 156 pages long. Undersigned counsel has completed her review of the record in this case but has not yet drafted the AOE.
2. *United States v. Fundis*, No. ACM 40689- The record of trial consists of six volumes, with eight Prosecution Exhibits, two Court Exhibits, eighteen Defense Exhibits, and eighteen Appellate Exhibits. The transcript is 377 pages long. Undersigned counsel has not yet completed her review of the record in this case.
3. *United States v. Reese*, No. ACM 24069 – The record of trial consists of one E-ROT containing two volumes, with twelve Prosecution Exhibits, four Court Exhibits, fourteen Defense Exhibits, and fifty-six Appellate Exhibits. The transcript is 1,310

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.

4. *United States v. Castillo,* No. ACM 40705- The record of trial consists of seven volumes, with five Prosecution Exhibits, one Court Exhibit, one Defense Exhibit, and thirty-four Appellate Exhibits. The transcript is 470 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.
5. *United States v. Heilig*, No. ACM 40740 – The record of trials consists of one e-ROT with six volumes, three Prosecution Exhibits, eight Defense Exhibits, and six Appellate Exhibits; the transcript is 135 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 13 July 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	15 July 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 general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[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 15 July 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 1 No. ACM 40746 11 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 (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **19 September 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
12 Aug 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 29 cases; 23 cases are pending before this Court (19 cases are pending AOEs). Five cases have priority over the present case:

1. *United States v. Gale*, Crim. App. Dkt. No. 2025-01/ USCA Dkt. No. XX-XXXX-AF – Undersigned counsel is working with civilian counsel to draft the Supplement to the Petition for Grant of Review in this Art. 62, UCMJ case. Civilian counsel in this case filed a Motion for Enlargement of Time to file the Supplement, which is currently pending before the CAAF.
2. *United States v. Fundis*, No. ACM 40689- The record of trial consists of six volumes, with eight Prosecution Exhibits, two Court Exhibits, eighteen Defense Exhibits, and eighteen Appellate Exhibits. The transcript is 377 pages long. Undersigned counsel has completed her review of the record in this case, however civilian counsel is drafting this AOE.
3. *United States v. Reese*, No. ACM 24069 – The record of trial consists of one E-ROT containing two volumes, with twelve Prosecution Exhibits, four Court Exhibits, fourteen Defense Exhibits, and fifty-six Appellate Exhibits. The transcript is 1,310

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

pages long. Appellant is not currently confined. Undersigned counsel is currently drafting this AOE, contemporaneous with drafting the Supplement in *United States v. Gale*.

4. *United States v. Castillo,* No. ACM 40705- The record of trial consists of seven volumes, with five Prosecution Exhibits, one Court Exhibit, one Defense Exhibit, and thirty-four Appellate Exhibits. The transcript is 470 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.
5. *United States v. Heilig*, No. ACM 40740 – The record of trials consists of one e-ROT with six volumes, three Prosecution Exhibits, eight Defense Exhibits, and six Appellate Exhibits; the transcript is 135 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]
JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 11 August 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	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 general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[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,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 1 No. ACM 40746 12 September 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **19 October 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
16 SEP 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 29 cases; 23 cases are pending before this Court (18 cases are pending AOEs). Two cases have priority over the present case:

1. *United States v. Castillo,* No. ACM 40705- The record of trial consists of seven volumes, with five Prosecution Exhibits, one Court Exhibit, one Defense Exhibit, and thirty-four Appellate Exhibits. The transcript is 470 pages long. Appellant is not currently confined. Undersigned counsel is drafting the AOE in this case.
2. *United States v. Heilig*, No. ACM 40740 – The record of trials consists of one e-ROT with six volumes, three Prosecution Exhibits, eight Defense Exhibits, and six Appellate Exhibits; the transcript is 135 pages long. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record for this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 12 September 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	15 September 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 leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[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 15 September 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 1 No. ACM 40746 12 October 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **18 November 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
20 OCT 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 29 cases; 23 cases are pending before this Court (18 cases are pending AOEs). Two cases have priority over the present case:

1. *United States v. Marcoux,* No. ACM 40708- The record of trial consists of twelve volumes, with twenty-nine Prosecution Exhibits, one Court Exhibit, seventeen Defense Exhibits, and eighty-three Appellate Exhibits. The transcript is 1345 pages long. Appellant is currently confined. Undersigned counsel is currently drafting the AOE in this case.
2. *United States v. Heilig*, No. ACM 40740 – The record of trials consists of one e-ROT with six volumes, three Prosecution Exhibits, eight Defense Exhibits, and six Appellate Exhibits; the transcript is 135 pages long. Appellant is not currently confined. Undersigned counsel has completed her review of the record for this case.

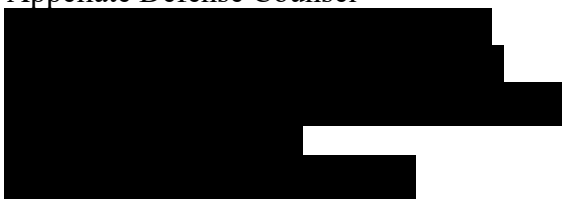
Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel


CERTIFICATE OF FILING AND SERVICE

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

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	14 October 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 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[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 14 October 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	12 November 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **18 December 2025**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 324 days have elapsed. [1] On the date requested, 360 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131,

[1] The filing of this Motion is timely in accordance with Rule 23.3(m)(1) of this Court's Rules of Practice and Procedure. In accordance with JT. CT. CRIM. APP. R. 15 and Rule 15 of this Court's Rules of Practice and Procedure, the seventh calendar day before this AOE is due is calculated as 12 November 2025 because 11 November 2025 was a holiday on which this Court was closed. This Court clarified its calculation of time in accordance with JT. CT. CRIM. APP. R. 15 in its 12 February 2025 Order in *United States v. Vongphachanh*, No. ACM 40741. In accordance with JT. CT. CRIM. APP. R. 15, when the last day of a period of time to be computed ends on "a Saturday, Sunday, holiday, or day on which the Court is closed," that period of time, "runs until the end of y that is not a Saturday, Sunday, holiday, or day on which the Court is closed." The the period of time to be computed in this case (the seventh day before this AOE is due) lay, and therefore, in accordance with JT. CT. CRIM. APP. R. 15 and Rule 15 of this les of Practice and Procedure, the end of that period runs until the next day this Court d, which is 12 November 2025.

GRANTED

17 Nov 2025

1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[2] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel has completed her review of the record for this case.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 29 cases; 23 cases are pending before this Court (18 cases are pending AOEs). Two cases have priority over the present case:

1. *United States v. Reese*, No. ACM 24069 – The record of trial consists of one E-ROT containing two volumes, with twelve Prosecution Exhibits, four Court Exhibits, fourteen Defense Exhibits, and fifty-six Appellate Exhibits. The transcript is 1310 pages long. Appellant is not currently confined. The Reply in this case is due 15 November 2025.
2. *United States v. Marcoux,* No. ACM 40708- The record of trial consists of twelve volumes, with twenty-nine Prosecution Exhibits, one Court Exhibit, seventeen Defense

[2] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

Exhibits, and eighty-three Appellate Exhibits. The transcript is 1345 pages long. Appellant is currently confined. Undersigned counsel is currently drafting the AOE in this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 12 November 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM**, United States Air Force, *Appellant.*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 1 No. ACM 40746 14 November 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 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

KATE E. LEE, 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 14 November 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 1 No. ACM 40746 11 December 2025

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

Pursuant to Rule 23.3(m)(1) and (4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **17 January 2026**.

Appellant's case was docketed with this Court on 23 December 2024. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed since docketing.

From 15 through 20 January 2024 through, Appellant was tried by a General Court-Martial composed of officer and enlisted members at Keesler Air Force Base, Mississippi. R. at 1, 131, 1248. Appellant entered mixed pleas and was convicted of one Charge with One Specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ); One Charge with One Specification of dereliction of duty, in violation of Article 92, UCMJ; One Charge with One Specification of sexual assault, in violation of Article 120, UCMJ; and One Charge with One Specification of assault consummated by a battery, in violation of Article 128, UCMJ. R. at 250, 1167; Entry of Judgment (EOJ). The military judge

GRANTED
16 DEC 2025

sentenced Appellant to be confined for a total period of thirty months and to be dishonorably discharged.[1] EOJ; R. at 1247-48.

The record of trial consists of ten volumes with twelve Prosecution Exhibits, one Court Exhibit, seven Defense Exhibits, and eighty-five Appellate Exhibits. The transcript is 1,249 pages long. Appellant is currently confined. Undersigned counsel is drafting the AOE in this case and, barring exceptional circumstances, does not anticipate requesting an additional extension of time.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: Maj Grande is currently assigned 22 cases; 17 cases are pending before this Court (10 cases are pending AOEs). One case has priority over the present case:

1. *United States v. Marcoux,* No. ACM 40708- The record of trial consists of twelve volumes, with twenty-nine Prosecution Exhibits, one Court Exhibit, seventeen Defense Exhibits, and eighty-three Appellate Exhibits. The transcript is 1345 pages long. Appellant is currently confined. The AOE in this case is currently being reviewed.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

[1] Appellant was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

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

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 11 December 2025.

[redacted]

JORDAN L. GRANDE, Maj, USAF
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 Panel No. 1
Airman Basic (E-1)	)	
TYLER D. CUNNINGHAM,	)	No. ACM 40746
United States Air Force.	)	
Appellant	)	15 December 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 over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over 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 more than two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[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 15 December 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	20 January 2026

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

Assignments of Error

I.

The evidence is factually insufficient to support the finding of guilty for sexual assault.

II.

The special trial counsel committed prosecutorial misconduct during closing argument by conflating separate theories of liability, which eliminated the mistake of fact as to consent defense.

Statement of the Case

From 15 through 20 January 2024, Airman Basic (AB) Tylir D. Cunningham, the Appellant, was tried by a General Court-Martial composed of officer and enlisted members at Goodfellow Air Force Base, Texas. R. at 1, 131, 1248. AB Cunningham entered mixed pleas. R. at 250. He pled guilty and was convicted of one charge with one specification of absenting himself from his place of duty without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §886; and one charge with one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. §892. R. at 250, 291-92. He pled not guilty but was convicted of one charge with one specification of sexual assault without consent, in violation of Article

120(b)(2)(A), UCMJ, 10 U.S.C. §920(b)(2)(A).[1] R. at 250, 1167; Entry of Judgment (EOJ), 7 May 2024. The military judge sentenced AB Cunningham to be confined for a total period of thirty months and to be dishonorably discharged.[2] EOJ; R. at 1247-48. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 Feb. 2024.

Statement of Facts

Airman Basic Cunningham and AP met in technical school and were moving from acquaintances to a dating relationship.

When AB Cunningham met AP in early 2023, they were both in technical school and shared mutual friends. R. at 754-55. One friend they did not have in common was AP's boyfriend, ES. R. at 820-21. Despite AP's dating relationship with ES, AP and AB Cunningham soon began spending time together alone, getting fast food and running errands as a pair. R. at 755-56.

Initiating one of these get-togethers, AP texted AB Cunningham around 2200 one night asking to get food together. R. at 759. She also asked if she could spend the night in his dorm room. R. at 760. AB Cunningham agreed to both of AP's requests. R. at 808-09. AB Cunningham then picked AP up from her friend's dorm room, and the two got fast food and chatted in the car. R. at 760-61.

During the discussion, AP initiated a discussion about sex. Specifically, without AB Cunningham having brought up the topic, AP said something like "sex isn't going to happen because I didn't shave." R. at 811. AB Cunningham was not angry about this comment, nor did he try to persuade her otherwise. R. at 811-12. They then went back to AB Cunningham's dorm room. R. at 760-62.

---

[1] AB Cunningham pled not guilty to and was acquitted of one charge with one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. §928.
[2] AB Cunningham was credited with 325 days of pretrial confinement credit. EOJ; R. at 1248.

AP initiated consensual sex with AB Cunningham.

After eating their fast food in AB Cunningham's room, the two undertook what AP did not foreclose with her remark about sex in the car. R. at 762-65, 811-12. They laid in AB Cunningham's bed, watched Netflix, and cuddled under the covers. R. at 762. They began making out, eventually taking off their clothes and touching each other. R. at 763-65.

AP got on top of him and began grinding into him. R. at 815. At that point, they were both naked. R. at 764-65. AP initiated the transition to sex, asking AB Cunningham if he had a condom, and he retrieved one and put it on. R. at 765. They were both naked, and AP was on top of AB Cunningham for "a large amount of the sex." R. at 765. There was not much talking during the sex. R. at 817.

After sex, AP put her underwear and shirt on, and they slept in AB Cunningham's twin bed together. R. at 765-66. AP was on her side in bed, facing away from AB Cunningham and out into the room towards the desk and window. R. at 767. They were spooning with her back and buttocks up against AB Cunningham's stomach and chest. *Id.*

The next morning, AP woke up to AB Cunningham trying to have sex with her, and she just "let it happen."

AP testified on direct examination that she woke up the next morning to AB Cunningham "trying to penetrate her." R. at 768. She opened her eyes when she woke up. R. at 828. AP testified that AB Cunningham also was able to see her face, but AP "[didn't] believe he saw" her eyes open. R. at 771. She testified at trial that her underwear was already down and pinpointed that the pain of AB Cunningham trying to put his penis into her vagina woke her up. *Id.* But months earlier, on the morning after the charged conduct, AP told her friend, Airman JC, that she woke up to AB Cunningham pulling down her underwear. R. at 908. And a third account emerged on cross-examination, when AP admitted that she had opened her eyes at some point that morning, had

looked around the room, and then closed her eyes and pretended to be asleep when she felt AB Cunningham repositioning her prior to any penetration. R. at 828. Her eyes were "closed for a majority of the time" but she could not remember if they were closed "for the whole thing" taking place. R. at 828. AP gave still another, alternate explanation that she did not say anything to him during the morning sex because she "[didn't] think [she] really understood what was going on," and she "froze." R. at 774.

AP did not say anything to AB Cunningham. R. at 769. When she realized that AB Cunningham was positioning her body to have sex, she closed her eyes and pretended to be asleep. R. at 828-29. At one point, AP testified that she felt that it would be easier if she just "let it happen." R. at 835. He put his penis into her vagina and began "pushing it in and out." R. at 768-69. AP continued to pretend to be asleep. R. at 769. AP claimed that she was in the same position she fell asleep in and she "would assume [AB Cunningham] was like on his knees and kind of like maneuvered himself in a way where I like wouldn't be aware that he was moving other than obviously the feeling of his stuff." *Id.* She did not know where AB Cunningham's arms were, and though she was on the edge of the bed, AP could not explain why she did not fall off the mattress when AB Cunningham was thrusting. R. at 828. The sex lasted ten to fifteen minutes. R. at 829-30. AB Cunningham was quiet during sex in the morning, just like he was during sex the night before. R. at 772, 818.

AP testified that AB Cunningham was not wearing a condom and that he ejaculated on her leg. R. at 770. However, a sexual assault forensic exam done that same day showed a negative test for AB Cunningham's semen on AP's thigh. R. at 1020. The exam produced a positive test for another, second male's DNA on her thigh and in her vagina. *Id*.

Despite testifying that she kept her eyes closed the "majority of the time," AP was aware

that after he ejaculated, AB Cunningham got off the bed, went into the bathroom, came back with a piece of toilet paper, cleaned off his ejaculate, and threw the toilet paper out. R. at 771, 828. He then resumed his spot in the bed "the way [they] fell asleep" and repositioned AP. R. at 771-72.

AP and AB Cunningham "woke up together" and then got breakfast together the next morning.

AP testified that she said nothing and then pretended to wake up about five to ten minutes later. R. at 773. They "woke up like normal," and AB Cunningham asked AP how she slept. R. at 773. She commented on a video he was looking at while scrolling on his phone. R. at 774. After about thirty minutes of laying in bed together and scrolling on their phones, they decided to get breakfast. R. at 775, 840. As they ate breakfast together, they had "casual chitchat," and AB Cunningham brought AP back to her room. R. at 776, 844.

AP reported that she was sexually assaulted and had a sexual assault forensic exam, but told the nurse, her friends, and her boyfriend different versions of events.

When back at her room, AP texted AB Cunningham that she was going to sleep. R. at 779-80. She then took a shower and decided to call the "[Sexual Assault Prevention Response (SAPR)] hotline." *Id.*

AP reported to SAPR that AB Cunningham had sexually assaulted her, but she did not tell them that they had consensual sex the night prior. R. at 782. She had a sexual assault forensic exam (SAFE) done at the hospital. R. at 919-21. She told the nurse that she had been sexually assaulted but did not tell the nurse that she had consensual sex with AB Cunningham hours before. R. at 819-20; Pros. Ex. 4 at 5. Instead, she told the nurse that AB Cunningham had "asked her to stay in his dorm with him," that they were watching a movie together when she fell asleep, and that she woke up and he was "having sex with her." Pros. Ex. 4 at 5, R. at 961. She stated that the sex lasted ten to fifteen minutes, and then "he finished, got up, and went to the bathroom." Pros. Ex. 4 at 5, R. at 961. She then "pretended to be asleep" and then "stretched and woke up." Pros. Ex. 4 at 5,

R. at 961. Lastly, AP told the nurse she left AB Cunningham's room at about 1000 and went to her own room to shower. Pros. Ex. 4 at 5.

AP had two friends accompany her to SAPR and to the SAFE that day - Airman JC and Airman BJ. She told both that AB Cunningham had sexually assaulted her, but she did not tell them that they had spent the night prior together nor that they had consensual sex. R. at 819. She did not tell her friends that she and AB Cunningham had breakfast together the next morning. R. at 842. She told them that she had accidentally fallen asleep at AB Cunningham's room, but acknowledged at trial that she had all along planned to sleep in AB Cunningham's room; it was not an accident. R. at 822. She told her boyfriend, ES, that AB Cunningham had sexually assaulted her, but she did not tell ES about the consensual sex with AB Cunningham. R. at 820, 850-53; Def. Ex. A. ES found this out for the first time when the defense interviewed him just before trial. *Id.* During her interview with the Office of Special Investigations (OSI), AP did not tell investigators about ES. R. at 820.

After she made a report to OSI and prior to the trial, AP discussed her own testimony and the testimony of at least four witnesses with those witnesses. R. at 859-63. She told her boyfriend not to speak to the defense, R. at 850-53; Def. Ex. A., made sure that her story was consistent with Airman JC's story, R. at 860, 910-11; and spoke with Airman JM about his interview with the defense. *Id.* She declined to interview with the defense ahead of trial. R. at 848-49.

AP lied to AB Cunningham and told him she was asleep during the morning sex, and he apologized because he believed she was awake, which she was.

That night, AP and AB Cunningham were planning to see each other again, but AP told AB Cunningham she was too tired. R. at 847. The two talked about how the sex they had was awkward. *Id.* AP sent AB Cunningham a message telling him that she had been asleep when they had sex that morning. R. at 845. AB Cunningham told AP that he thought she was awake and that

it was a big misunderstanding. Pros. Ex. 1; R. at 845-46. She did not tell him that she had been pretending to be asleep and was, in fact, awake. R. at 846.

At trial, the military judge gave the reasonable mistake of fact as to consent instruction. R. at 1104. Additional facts are incorporated in the argument below.

Argument

I.

The evidence is factually insufficient to support the finding of guilty for sexual assault because the Government failed to prove there was no mistake of fact as to consent beyond a reasonable doubt.

Standard of Review

This Court review issues of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *See United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i)); *Manual for Courts-Martial*, *United States* (2024 ed.)(2024 *MCM*); *United States v. Csiti*, No. ACM 40386, 2024 LX 43043 (A.F. Ct. Crim. App. Apr. 29, 2024), *aff'd*, 85 M.J. 414 (C.A.A.F. 2025).

Law and Analysis

For factual sufficiency, Article 66(d)(1)(B)(ii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(ii), directs this Court to "weigh the evidence and determine controverted questions of fact." "This power is subject, in part, to Article 66(d)(1)(B)(ii)(I), UCMJ, [10 U.S.C. § 866(d)(1)(B)(ii)(I)] which requires 'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.'" *Harvey*, 85 M.J. at 130. However, this Court does not have to give complete deference to the court-martial, and depending on the evidence, no deference may be appropriate. *See id.* at 130-31 ("The statute affords the [court of criminal appeals (CCA)] discretion to determine what level of deference is appropriate."). This Court can "weigh the evidence differently

from how the court-martial weighed the evidence." *Id*. at 131. If after this weighing, the CCA 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. Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii).

For this Court to be "clearly convinced that the finding of guilty was against the weight of the evidence," this Court must (1) decide that the evidence, as just weighed, does not prove guilt beyond a reasonable doubt, and (2) "be clearly convinced of the correctness of this decision." *Harvey*, 85 M.J. at 132.

Here, the specific deficiency of proof is that the Government failed to prove beyond a reasonable doubt that AB Cunningham did not have a reasonable mistake of fact as to consent.[3] AB Cunningham believed AP was awake and consenting, *and she was awake*. R. at 845-46. Even if she was awake *but not consenting*, AB Cunningham had a reasonable belief that she was consenting, given the totality of events, to include how AP sought out AB Cunningham for a private sleep-over the night before, made a Freudian slip revealing her interest in sex with AB Cunningham, then proceeded to act on that interest by initiating sex with AB Cunningham, followed hours later when AB Cunningham saw her open her eyes when he was positioning her to have sex and she said nothing for ten to fifteen minutes of sex, just as during the consensual encounter. R. at 765-66, 828-29.

A. AB Cunningham's mistake of fact was reasonable under the circumstances.

In a case where the Government charges sexual assault *without consent* under Article 120(b)(2)(A), UCMJ, once the defense of mistake of fact as to consent is raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. Rule for

[3] This showing triggers factual sufficiency review under Article 66(d)(1)(B)(i), UCMJ.

Courts-Martial (RCM) 916(b)(1); *see also United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). Once raised, the Government has to disprove the mistake of fact as to consent beyond a reasonable doubt. *See McDonald*, 78 M.J. at 379 (considering the defense of mistake of fact to a charge of sexual assault).

It was subjectively and objectively reasonable for AB Cunningham to think that AP consented to sex the next morning based on "the totality of the circumstances at the time." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citations omitted). AB Cunningham's mistake was reasonable given that the two had just had sex hours prior, AP chose to sleep over in his bed, the two fell asleep "spooning," and they were in that same position in the morning. R. at 767-69. AB Cunningham believed AP was awake during sex the next morning- he told her this in the text messages that day. Pros. Ex. 1. When she confronted him, telling him she was asleep when they had sex in the morning, his response was, "I didn't think you were sleeping when I did it." *Id.* at 3. And it is supported by AP's own testimony that she opened her eyes and saw what he was doing in the morning. R. at 828. She then, by her own testimony, did nothing to indicate that she was not okay with his "repositioning her," or him lifting her leg up, or his "attempting to penetrate her." *Id.* And there is no evidence in the record that penetration occurred prior to her waking up. AB Cunningham believed she was awake, *and she was awake. Id.*; R. at 768-69.

The Government did not disprove mistake of fact as to consent beyond a reasonable doubt, and it was its duty to do so. RCM 916(b)(1); *see McDonald,* 78 M.J. at 379. AB Cunningham believed AP was awake and consenting and his belief was reasonable because *she was awake*, she felt him attempting to remove her underwear, and she "let it happen." R. at 835. She claimed she was "pretending to be asleep" while he was "positioning [her] body to make it easier to achieve penetration." R. at 829. Moreover, she claimed her eyes were open, she saw AB Cunningham's

face, and while her eyes were "closed for a majority of the time" and she could not remember if they were closed "for the whole thing," this necessarily means her eyes were open for at least some portion of the sex. R. 828. It is reasonable that AB Cunningham saw her open her eyes and believed she was awake. Common sense dictates that if AB Cunningham, who was a tall individual, was thrusting behind her for potentially fifteen minutes on a twin bed, and AP did not fall off the bed, she was either bracing herself against him or he was holding her. R. at 822-23. What makes more sense is what AP initially told OSI – that she just "let it happen" after having consensual sex with AB Cunningham just hours prior – that she opened her eyes and AB Cunningham believed she was awake. R. at 835. It is reasonable that AB Cunningham, who, by AP's own account, was being pursued by AP, and had consensual sex with her the night prior, believed that she consented to sex in the morning. R. at 760 (AP texted AB Cunningham to get food and asked to spend the night in his dorm room). This is the perfect scenario for mistake of fact as to consent, particularly where the lines have been blurred. R. at 816-17 (AP told AB Cunningham thirty to forty-five minutes before they had sex that night that sex "wasn't going to happen.")

1. AP's testimony about the night and morning in question was inconsistent.

Even AP's story about what happened that morning was inconsistent, indicating that the Government's star witness lacked credibility. AP's testimony was the sole basis for the Government's argument that AB Cunningham's mistake of fact as to consent was unreasonable. Where the Government's theory of the case hinged on the idea that AB Cunningham must have believed she was asleep based on her alleged lack of movement and her closed eyes, the specificity of her testimony on what happened was crucial. Yet, her narrative was never consistent on these key points.

2. AB Cunningham's actions after sex showed that he believed AP was awake and consenting.

The reasonableness of AB Cunningham's belief that AP was awake and consenting is supported by both of their actions the next morning. AP did not get out of bed and go to her own dorm, though she lied and told the SANE and her friends that she did. R. at 841-42. In reality, AB Cunningham went back to sleep after the morning sex. R. at 837. AP pretended to go to sleep and then wake up again. R. at 839. AB Cunningham eventually woke up and they both scrolled on their phones. R. at 774-75, 839-40. He asked her how she slept. R. at 775. They then got breakfast together, and he dropped her back off at her dorm. R. at 844. He texted her later that day to ask if they were going to see each other again that day. R. at 844, 847. AB Cunningham's actions that morning are those of someone who believed he had morning sex with an awake, consenting partner. His actions after sex that morning, being quiet, going to sleep after, and resuming the spooning position with AP are indistinguishable from his post-sex reaction after sex the night before. And, importantly, AP's post-sex reaction, where she is exerting independent agency by choosing to stay in bed and then get breakfast with AB Cunningham, contradict her narrative of being a "frozen" victim during sex immediately before. This is why she lies to her friends and the SANE about her actions after the morning sex – because the reality, that she cuddled with AB Cunningham after, stayed in bed scrolling on her phone, and then got breakfast with him- runs counter to her description of the way the morning sex happened.

Underlying each of these lies was AP's motive to fabricate the assault that she was assaulted at all – she had a boyfriend who she was sleeping with at the same time. R. at 820-21. The impact of that motive and AP's interest in presenting herself in the most favorable light played out as AP's story about what happened changed depending on who she was talking to. AP and AB Cunningham had consensual sex the night before she reported a sexual assault. R. at 815-18. When

AP reported to the SAPR office, she completely omitted the fact that she had consensual sex with AB Cunningham just hours before she claimed he assaulted her. R. at 819. AP talked to Airman BJ and Airman JC that morning about what happened with AB Cunningham. *Id*. She did not tell either of them that she had consensual sex with AB Cunningham the night prior. *Id.* When AP had a sexual assault forensic exam that morning and the forensic nurse asked her questions about her interaction with AB Cunningham, she did not tell the nurse that she had consensual sex with AB Cunningham the night prior. R. at 820. At trial, she tried to claim this was because she was not asked about consensual sex. R. at 841-42, 858. But she did more than just omit the consensual sex—she lied about it. She told the nurse that "they were watching a movie last night when she fell asleep." Pros. Ex. 4 at 5. This was false. R. at 765-66 (AP testified that she went to sleep cuddling AB Cunningham after they had sex.) She did not tell her boyfriend, ES, that she had consensual sex with AB Cunningham. R. at 820-21.

While AP testified that she pretended to be asleep throughout the encounter, she told AB Cunningham a different story. R. at 768-69. She told AB Cunningham in the text messages (the full conversation of which she refused to provide, and there is no evidence the prosecution asked her to provide it) that she was actually asleep during the sex and claimed, "[I] don't want this to be a big thing but [I] really did not like it especially without the use of protection as well." Pros. Ex. 1; R. at 833-34. She never told him the truth—that she was actually awake. R. at 845-46. The apology from AB Cunningham was based on a lie, just like the version of events she told everyone else. The Government then used this coerced apology to argue that AB Cunningham admitted to assaulting her. R. at 1121.

3. AP attempted to influence the testimony of other witnesses.

Because she told so many different versions of events, AP then tried to get her story straight with the witnesses before trial. AP spoke with several of the witnesses about their interviews with defense counsel—Airman BJ, Airman JM, ES, and Airman JC—in an attempt to ensure her story was consistent with the story the witnesses told defense counsel and to try to hide information that was unfavorable to her. R. at 860-63. When ES expressed his distaste with learning from defense counsel that AP had consensual sex with AB Cunningham right before the alleged non-consensual sex, AP told ES, "Don't believe anything that they tell you." R. at 873. She next claimed that she "was told" that the defense team "was saying things that were [untrue] about me to other people." *Id.* She tried to persuade ES not to talk to the defense attorneys because if anything did not "match up" the defense would "use it against [her]." R. at 853. She and Airman JC spoke about the night of the alleged assault and made sure their stories aligned about what they did together the day she went to SAPR. R. at 860-61.

Given AP's shifting story, her attempts to influence testimony of other witnesses, and the centrality of AP's testimony to the prosecution's case, this Court should give no deference to the trial court's ability to see and hear AP's testimony when analyzing the factual sufficiency of AB Cunningham's conviction. *See United States v. Davis*, 75 M.J. 537, 546 (A. Ct. Crim. App. 2015) (holding that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue"), *aff'd on other grounds*, 76 M.J. 224 (C.A.A.F. 2017). This Court, like a factfinder at trial, "examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie." *United States v. Torres*, No. NMCCA 201300396, 2014 CCA LEXIS 641, at *10 (N-M. Ct. Crim. App. Aug. 28, 2014). AP's conflicting story about when she was awake or asleep, the physical impossibility of her description of the alleged assault,

and her attempts to resolve these issues by influencing the testimony of other witnesses cast reasonable doubt upon her version of events.

B. Sexual assault charged as "without consent" is a separate theory of liability from sexual assault on a sleeping person, and the Government did not make clear when AP was asleep and when she was just pretending to be asleep.

To meet its burden for the sexual assault charge, the Government had to prove that AB Cunningham penetrated AP's vulva with his penis, without her consent. 10 U.S.C. § 920(b)(2)(A). To prove sexual contact occurred "without consent," the Government had to prove that AP was capable of consenting and, in fact, did not consent. *United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024). The United States Court of Appeals for the Armed Forces (CAAF) in *Mendoza* held that the Government cannot "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial" without violating an appellant's constitutional rights, as "[d]oing so robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" *Id.* (citation omitted) (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). Accordingly, to convict under a lack of consent theory without violating an accused's constitutional rights, the Government is required to prove that a victim is capable of consenting but does not consent and cannot rely on showing that the victim was asleep to show that she did not consent. *See Mendoza*, 85 M.J. at 221-22; *see also United States v. Ryder*, No. ACM 40605, 2025 LX 160255 (A.F. Ct. Crim. App. June 25, 2025).

This case presents a unique set of facts. Even though AP testified that she was awake, the Government told the members that AB Cunningham believed her to be asleep, and therefore, it argued, this act could never have been consensual. R. at 1118 The senior prosecutor stated, "The problem in this situation is a person that's laying still with their eyes closed is not communicating consent." *Id.* He then went on to say, "And if somebody who's asleep can't consent, and if you

don't know if somebody's asleep or not, then how do you understand whether or not they're consenting." *Id.* Such an argument is problematic for three reasons: 1) it conflates the two separate theories of liability in violation of *Mendoza*; 2) it obviates the defense of mistake of fact as to consent for the theory of liability that the Government *actually* charged; and 3) it allowed the Government to essentially argue an asleep theory of liability while also circumventing the mens rea requirement (that AP was asleep and also that AB Cunningham knew or reasonably should have known she was asleep).

It is unclear what was occurring when AP woke up, except that no penetration of AP's vulva transpired prior to then. AP told Airman JC the morning of the incident that she woke up to AB Cunningham pulling her underwear down, before any penetration was even attempted. R. at 908. In a different telling, according to the prosecution's opening statement, AP "woke up to AB Cunningham *trying to then have sex* with her that next morning." R. at 668 (emphasis added). Consistent with that, during her direct testimony, AP claimed that the next morning "he was trying to penetrate [her]" and that her "underwear were down and he was attempting to put his penis inside of [her]" but it "wasn't working." R. at 767. Trying but failing falls far short of actual penetration, meaning the only penetration that was ever proven occurred after AP was alert and awake.

As this Court stated in *United States v. Hunt*, No. ACM 40563, 2025 LX 73191, at *21 (A.F. Ct. Crim. App. May 16, 2025), *certificate for rev. filed*, 2025 CAAF LEXIS 734 (C.A.A.F. Sep. 2, 2025), analysis here requires a "narrow, fact-specific analysis of this case, considering all the surrounding circumstances and keeping in mind that it is the Government who bears the burden of proof." While this Court in *Hunt* was considering a case of withdrawn consent, the same careful analysis should be applied here, where the Government's case is so unclear as to when AP claimed

to be awake or asleep and at which points she had her eyes open. In this case, an already confusing fact patten was further muddied by the STC's concluding questions on direct examination:

> Q: The morning – that morning, did you consent to him having sex with you?
> A: No.
> Q: Did you realize he was going to start having sex with you?
> A: What do you mean?
> Q: Thank you. I appreciate you asking me to clarify. Did you -did you know that he was about to have sex with you?
> A: No, no.
> Q: Okay. When he started having sex with you, had you – were you okay with that?
> A: No.

R. at 794. The Government's loose and careless approach to articulating when or whether AP was asleep or only pretending to be asleep and its failure to identify when penetration even occurred is problematic, considering that in one circumstance, mistake of fact as to consent applies, and in the other circumstance it does not. *See Mendoza* 85 M.J. at 220-21; *see also McDonald*, 78 M.J. at 379. Instead of clarifying this issue, in an attempt to resolve the obvious holes in its case and obviate the mistake of fact defense, the STC told members in closing argument that it was simply "irrelevant" whether AP was awake or asleep. R. at 1125. This is, of course, not the law. *See*, e.g., *Mendoza*, 85 M.J. 213.

This Court should find the sexual assault conviction factually insufficient because the Government failed to disprove mistake of fact as to consent. AP's shifting narrative and credibility issues do not prove AB Cunningham's guilt beyond a reasonable doubt. Mistake of fact as to consent was the key issue in this case and the Government's approach to this case, rather than articulating a clear theory of liability, only confused this issue. The members of this Court can be clearly convinced that the finding of guilty was against the weight of the evidence, and this Court should dismiss with prejudice the sexual assault conviction.

II.

The special trial counsel committed prosecutorial misconduct during closing argument by conflating separate theories of liability, which eliminated the mistake of fact as to consent defense.

Standard of Review

Improper argument, a form of prosecutorial misconduct, is a question of law reviewed de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)).

Law and Analysis

Where no objection to improper argument is made at trial, a military appellate court reviews the issue for plain error. *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)*. 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). "[T]he 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)).

"Improper argument is one facet of prosecutorial misconduct." *Id*. (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (alteration in original) (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example], a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Id.* at 160 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

Improper argument does not automatically require a new trial or the dismissal of the charges against the accused. *Fletcher*, 62 M.J. at 178. Relief will be granted only if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." *Id.* (quoting *Meek*, 44 M.J. at 5). "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). "[P]rosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident" that the appellant was convicted and sentenced on the basis of the evidence alone. *Fletcher*, 62 M.J. at 184. Prosecutorial misconduct can occur even without a "malicious intent on behalf of the prosecutor." *Hornback*, 73 M.J. at 160. In assessing prejudice from improper argument, courts balance three factors: "(1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction." *Id.* (citing *Fletcher*, 62 M.J. at 184). Trial counsel "may prosecute with earnestness and vigor . . . But, while he may strike hard blows, he is not at liberty to strike foul ones." *United States v. Frey*, 73 M.J. 245, 247 (C.A.A.F. 2014) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

A. The STC confused theories of liability under Article 120, UCMJ.

In his closing argument, the STC conflated separate theories of liability under Article 120, UCMJ. That was plain error. AB Cunningham was charged with sexual assault without consent under Article 120(b)(2)(A), and sexual assault on a sleeping person under Article 120(b)(2)(B) is a separate theory of liability. *See Mendoza*, 85 M.J. at 221-22. In *Mendoza*, the CAAF held that the Government is required to prove that a victim is capable of consenting but does not consent and cannot rely on showing that the victim was asleep to show that she did not consent. *Id.* Despite this, the STC told the members during argument:

> …[W]hen you go back there and look at this Article 120 offense, read closely through the messages, think about her testimony. And when you do and you make those comparisons, you're going to see that it's clear beyond reasonable doubt that he sexually assaulted her, and that she did not consent, and that he-he-he or at least there was no reasonable mistake of fact to her consent. She is laying there asleep. She wakes up, he's starting to penetrate her, she just lays there. **And whether or not she's asleep or awake at this point, is irrelevant because he still doesn't have consent.**

R. at 1125 (emphasis added). He argued that AP was asleep:

> Lying there without moving. She didn't resist. She didn't say anything. She didn't fight. She didn't fight back. And she didn't stop him. She just laid there. The law doesn't allow somebody to go, you didn't resist you just laid there. **Oh, you asleep, I didn't want to wake you up to ask for consent.**

R. at 1122 (emphasis added). He also wove this narrative into a flawed comparison of the definition of "consent" to a traffic signal hypothetical.

> It's not like a stop sign where you pull up and on your own accord make your own decisions and go through. You have to wait for a signal. You have wait for some type of symbol or some type of signal that there is an agreement between you and the person. And that's why it's important to understand that somebody who is asleep can't consent. And if somebody who's asleep can't consent, if you don't know if somebody's asleep or not, then how do you understand whether or not they're consenting?

R. at 1117-18. The problem with this argument is that the CAAF and this Court have made clear that *it does matter* whether AP was awake or asleep. *See, e,g, Mendoza*, 85 M.J. 213. The military judge instructed on mistake of fact. R. at 1104. The STC's argument confused legal theories and violated the CAAF's express prohibition on doing so, as articulated in *Mendoza*. In order to win its case, the Government tried to marry AP's inconsistent testimony about when she was awake and asleep, when penetration occurred, and when her eyes were open versus closed with its chosen theory of liability—sexual assault without consent. It did so by 1) arguing an improper definition of consent; and 2) arguing facts not in evidence about when AP claimed she was awake versus

asleep and when penetration began. In reality, the Government was unable to overcome mistake of fact as to consent beyond a reasonable doubt if it had refrained from confusing legal theories.

If AP was asleep during the sex and the Government drafted the specification to reflect that, then the Government would have to prove both that she was asleep and that AB Cunningham knew or reasonably should have known that she was asleep. If AP was awake during the sex, as the Government charged here, then once raised, the Government had to prove beyond a reasonable doubt that AB Cunningham did not have a reasonable mistake of fact as to consent. By crafting his argument this way, the STC conflated the separate theories of liability under Article 120, UCMJ, and also argued a fact pattern not charged and not grounded in evidence–that AP was asleep during the sex. A prosecutor "may not make material misstatements of fact in summation." *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994) (citation omitted). Here, the STC mischaracterized the evidence that was of central import in this case—when AP was sleeping. Whether this mischaracterization was a result of AP's confusing narrative or it was an intentional attempt to blur the lines of whether mistake of fact as to consent was an available defense does not matter. Both causes had the same effect–the STC's argument eliminated the defense and prejudiced AB Cunningham.

B. The special trial counsel's improper argument prejudiced the defense.

AB Cunningham bears the burden to show that the improper argument materially prejudiced a substantial right. *Voorhees*, 79 M.J. at 9. The prejudice analysis "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 *Andrews*, 77 M.J. at 402).

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

Here, the misconduct was severe. "Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge." *Fletcher*, 62 M.J. at 184 (citation omitted). The misconduct was numerous and varied and permeated the STC's initial findings argument.

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

After closing arguments, the military judge gave no specific curative instructions but did properly instruct the members that "argument by counsel is not evidence" and to apply the law as he instructed. R. at 1155. The military judge reiterated, "If there is any inconsistency between what counsel has said about the instructions and the instructions which I gave you, fyou must accept my statement as being correct." *Id.* He also reminded them that "[c]ounsel are not witnesses" and that the members' "memory of the facts" control. *Id*. He gave no specific curative instructions about the definition of consent nor about the elements of the charged sexual assault, and did not address the conflation of theories of liability. *Contrast* R. at 1117-19, 1125 (STC's improper argument), *with* R. at 1125, 1155-56 (no specific curative instructions given after Government's closing argument nor after the conclusion of Government rebuttal).

Most significantly, the military judge failed to interrupt the STC's argument when he continuously misstated both the facts and the law. 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 specific and tailored curative instructions supports finding prejudice.

3. The scant weight of the evidence supporting the finding of guilty to sexual assault rendered the prosecutorial misconduct particularly prejudicial.

AP was the only witness to testify about what happened in the room that morning. Her narrative about when her eyes were open or closed, and when she was asleep or only pretending to be asleep was inconsistent. The only other witnesses who testified gave second-hand information that only demonstrated AP's conflicting narratives of the event. R. at 819 (AP told Airman JC and Airman BJ that AB Cunningham had sexually assaulted her, but she did not tell them that they had spent the night prior together, nor that they had consensual sex). Even the physical evidence failed to corroborate AP's claim. R. at 1020 (the test for AB Cunningham's semen on AP's thigh was negative and showed only the semen of another male).

The risk that the STC's improper argument prejudiced AB Cunningham is not theoretical. In *Greene-Watson*, the appellant was tried by a military judge alone, and this Court found that even if error occurred in admitting prior acts, it did not materially prejudice the appellant's substantial rights. *See United States v. Greene-Watson*, 85 M.J. 340, 345, 349 (C.A.A.F. 2025). This is in part because judges are presumed to apply the law faithfully and avoid improper reliance on propensity evidence. *See United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). That presumption does not extend to member panels, where the risk of unfair prejudice is heightened. Where the entirety of the defense's case was based in a mistake of fact as to consent and the evidence about AB Cunningham's actions following that morning pointed to a mistake of fact, it was prejudicial for the STC to blur the lines about the law on mistake of fact. This Court cannot be confident that AB Cunningham was convicted on the evidence alone. *Fletcher*, 62 M.J. at 184.

For the foregoing reasons, this Court should hold that the special trial counsel's closing argument constituted prosecutorial misconduct and set aside the finding of guilty to the sexual assault charge and the sentence.

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
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 Air Force Government Trial and Appellate Operations Division on 20 January 2026.

Respectfully submitted,

[redacted]

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM** United States Air Force *Appellant.*	)	No. ACM 40746
	)	18 February 2026

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

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

MARY ELLEN PAYNE
Associate Chief
[redacted]

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II.

THE SPECIAL TRIAL COUNSEL'S ARGUMENT WAS NOT PROSECUTORIAL MISCONDUCT.

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

ISSUES PRESENTED

I.

[WHETHER] THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR SEXUAL ASSAULT.

II.

[WHETHER] THE SPECIAL TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY CONFLATING SEPARATE THEORIES OF LIABILITY, WHICH ELIMINATED THE MISTAKE OF FACT AS TO CONSENT DEFENSE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

AP and Appellant barely knew each other.

AP, the victim in this case, met Appellant at technical school. (R. at 753-754). They had only been talking for around five days before he sexually assaulted her. (R. at 755, 791, 797; *Charge Sheet*). During that time, AP and Appellant messaged on Snapchat because they had not

even exchanged phone numbers. (R. at 797-798). They spent time together twice. (R. at 798). The first time, they got fast food together and ran errands at Walmart and Target. (R. at 765-757). The second time, they went to a bar with a group of friends. (R. at 756; 802).

At the bar, AP and Appellant danced together. (R. at 756, 805-806). AP was an enthusiastic participant in dancing with Appellant by dancing on him as he "just kind of stood there." (R. at 806, 807). That evening, Appellant asked AP to go back to his dorm room with him. (R. at 758). AP declined because she had been drinking, and so she did not think it was a "good idea" to go home with Appellant. (R. at 758).

AP and Appellant had consensual sex the night before he sexually assaulted her.

The evening after AP and Appellant danced at the bar, AP messaged Appellant and asked if he wanted to "hang out." (R. at 758-759). During their conversation, AP asked if she could go back to Appellant's dorm room and spend the night. (R. at 760). Appellant agreed, picked AP up in his car, and they went to McDonalds. (Id.) While at McDonalds, AP told Appellant that they were not going to have sex that evening because she had not shaved. (R. at 811).

AP and Appellant returned to Appellant's room with their food. Appellant turned on Netflix as they ate. (R. at 762). When they finished eating, AP picked out a show, and they cuddled in Appellant's bed. (R. at 762-763). Despite AP's earlier comment about not having sex, the cuddling consensually "escalated" to kissing, mutual touching, and Appellant and AP taking their clothes off. (R. at 763-764, 813-815). AP enthusiastically participated in what she characterized as "the kind of steps you take towards having sex," by "grinding" into Appellant as she was on top of him. (R. at 815, 869).

As AP was on top of Appellant, he started to insert his penis in her vagina. (R. at 816). AP stopped Appellant and asked if he had a condom because she did not want to have sex

without a one. (R. at 764, 816). Appellant slightly resisted by saying, "Oh, you think I have a dirty dick," or words to that effect. (R. at 764). After AP was adamant that she would not have sex with Appellant without a condom, he retrieved one from a drawer. (R. at 764-765).

After Appellant put on a condom, he and AP had consensual sex. (R. at 765). AP continued to be an enthusiastic participant while having sex with Appellant by being on top of Appellant for "a large amount" of the sex. (R. at 765). Eventually, AP and Appellant stopped having sex, but Appellant did not get to ejaculate. (R. at 766). AP put her underwear and shirt back on, lay next to Appellant in a "spooning" position under the covers, and fell asleep. (R. at 766-767, 838).

AP woke up to Appellant trying to penetrate her vagina with his penis.

The next morning, AP was awoken by the pain of Appellant trying to penetrate her vagina with his penis. (R. at 768). The covers were off her, her underwear was pulled down to her mid-thigh, and Appellant "was attempting to put his penis" in her vagina. (R. at 768, 832, 837-838). AP was not aroused, because she had been asleep, and so Appellant was struggling to insert his penis into AP's vagina and causing her pain. (R. at 768). Appellant was only able to penetrate AP's vagina with his penis after he spit on his hand and used the spit as a lubricant. (R. at 768).

AP testified that she would not have had sex with Appellant if he was not wearing a condom. (R. at 763-764, 793). Despite knowing her boundary from the consensual sex the night before, Appellant was not wearing a condom when he penetrated AP. (R. at 770).

As Appellant had sex with AP, she pretended to be asleep. (R. at 769, 828-829). She kept her eyes closed. (R. at 771). She did not move. (R. at 769, 825-826, 834-835). Her body did not jerk. (R. at 825). She did not speak. (R. at 772, 826-827). AP told an agent at the Air

Force Office of Special Investigations (OSI) that she "let it happen." (R. at 835). AP testified that Appellant did not speak and was "dead silent" during the sexual assault. (R. at 772). AP did not know Appellant was about to penetrate her. (R. at 795). She testified that she did not consent to Appellant having sex with her that morning. (R. at 794).

AP told OSI and a sexual assault nurse examiner (SANE) that Appellant had sex with her for around 10 to 15 minutes. (R. at 829; Pros. Ex. 4, pg. 5). Eventually, Appellant ejaculated on AP's right thigh. (R. at 770). Then, he got out of bed, retrieved toilet paper from the bathroom, and wiped his semen off her leg. (R. at 771). After cleaning off AP's leg, Appellant got back under the covers and fell asleep. (R. at 772).

AP lay in the same position – not moving and not speaking – for "a while" after Appellant ejaculated. (R. at 773). She testified that it could have been anywhere from five to ten minutes. (Id.) When AP got up, Appellant asked her how she slept and scrolled on his phone as if nothing had happened. (R. at 773). AP testified that she did not confront Appellant because she was scared. (R. at 774). AP had only known Appellant for a short time. (R. at 755). AP testified that she didn't "really underst[and] what was going on" and "froze." (R. at 774).

AP made a restricted report that afternoon.

After having breakfast with Appellant, AP told him that she wanted to go back to her room. (R. at 775- 776). Appellant dropped her off at her dorm. (R. at 779). AP testified that she sat in her room "for some time" thinking about what to do. (R. at 779). She took a shower and thought about it more in the shower. (R. at 779-780). She replayed the incident in her mind. (R. at 780). She cried. (R. at 780). She scrubbed where Appellant had ejaculated on her body. (R. at 780). AP questioned whether what happened was sexual assault because she had

consensual sex with Appellant the night before. (R. at 780). She was afraid of how she would look if she reported what happened. (R. at 780).

Despite her concerns, AP decided to make a report. AP called the sexual assault prevention and response (SAPR) hotline, and they told her to come to the SAPR office on base. (R. at 780). She texted her friend BJ and asked for a ride. (R. at 781). BJ testified that when he saw AP she was unusually quiet. (R. at 894-895).

At the SAPR office, AP filed a restricted report. (R. at 782). AP told the SAPR advocates how Appellant sexually assaulted her. (R. at 782). AP admitted that she didn't tell the SAPR advocates that she had consensual sex with Appellant the night before he sexually assaulted her. (R. at 782). After she made her report, AP, BJ, and the SAPR advocates headed to the hospital for AP to get a sexual assault forensic exam (SAFE) by a SANE.

BJ was getting upset after hearing what Appellant did to AP because he and Appellant were friends. (R. at 782). Because of this, AP decided that he "wasn't the best person" to be there with her and so she called another friend, JC, to come be with her. (R. at 782, 905). JC testified that when she arrived AP was "very shaken up" and "trying not to cry." (R. at 905).

During the SAFE, AP told the SANE that she woke up to Appellant "having sex with her." (Pros. Ex. 4, pg. 5). AP reported that Appellant used his saliva as lubricant. (Pros. Ex. 4 at pg. 9). AP reported that Appellant did not use a condom. (Id). AP reported that Appellant ejaculated on her right thigh. (Id.) The SANE observed abrasions on AP's vagina which the SANE testified could be consistent with sexual activity. (R. at 924-925, Pros. Ex. 4 at pg. 6, 8).

After leaving the hospital, AP went back to her dorm. (R. at 787). Neither BJ nor JC went to her room with her. (R. at 787). It was Super Bowl Sunday, and although JC invited AP out, AP stayed in her room for the rest of the night. (R. at 788, 907).

Appellant's semen was found on AP's vulva and cervix and his DNA was found on her right thigh.

At the hospital, the SANE swabbed AP's vulva, cervix, and thigh for DNA. (R. at 786). KO, an expert in serology and forensic biology, analyzed the DNA results, compared the samples taken from AP to Appellant's DNA, and issued a report. (R. at 1006, 1012; Pros. Ex. 10). KO testified that she identified semen on the vaginal cervical swab and vulva swab of AP. (R. at 1016). She determined that the DNA profile was consistent with Appellant's DNA[1]. (R. at 1017-1018).

Although KO's analysis did not identify semen on the swab of AP's right thigh, she did identify Appellant's DNA.[2] (R. at 1019). KO explained that she could not "fully exclude" the DNA from "being semen based[.]" (R. at 1020). AP showered after Appellant ejaculated on her thigh, and KO explained that showering could "potentially lead to a depletion of the amount of DNA" in the test for the presence of semen. (Id.) KO said this was because "some of the markers" she is looking for when testing for the presence of semen "are water soluble and they would then wash away." (R. at 1020-1021).

Appellant admitted that he did not get AP's consent before penetrating her.

Less than 24 hours after the sexual assault, AP confronted Appellant about what happened over Snapchat. (R. at 788-790; Pros. Ex. 1). AP falsely told Appellant that she was asleep when he had sex with her. (R. at 845). In response, Appellant explained that he did not "think" AP was sleeping when he "did it." (Pros. Ex. 1, pg. 3). He continued, "I should've made sure you were up for one and got consent before doing anything." (Id.) Appellant told AP,

[1] KO also identified DNA that was consistent with another unknown person.

[2] KO identified DNA consistent with the same unknown person identified from AP's cervical and vulva swabs. (R. at 1019-1020).

"That was the first time I've done anything like that and for sure the last. I feel extremely sick like I wanna [sic] throw up." (Id. at pg. 4).

Appellant continued to express his guilt. He said, " You should be able to trust people and I don't deserve that." (Id.) After telling AP that he had also been sexually assaulted, Appellant told AP that he knew how she felt saying, "I don't know exactly how you feel but I understand the emotions behind it. I never in my life thought I could do this to someone, especially after having multiple things done to me by one person." (Id. at pg. 5). He continued, "I just want to apologize over and over again for my actions. I really feel like shit, and I deserve to." (Id.) He concluded, "Literally whatever you choose to do with my actions I respect [that choice] fully. I take accountability for what I did and understand that it was wrong." (Id. at 7).

AP admitted to not telling people that she had consensual sex with Appellant the night before he sexually assaulted her.

At trial, AP was candid about the fact that she did not tell the SANE, her friends, or another man who she had a sexual relationship with (ES) about having consensual sex with Appellant the night before he sexually assaulted her. (R. at 784, 819-820). AP explained, "I only spoke about the sexual assault because that's all anybody asked me about." (R. at 820). AP was also candid about the fact that she did not tell BJ or JC that she had breakfast with Appellant that morning because "at that time their questions were related to the assault." (R. at 842). But AP did tell the SAPR advocate and the OSI agents that she had consensual sex with Appellant the night before. (R. at 858; 991).

BJ and JC confirmed that they never asked AP if she had consensual sex with Appellant. (R. at 899, 907). The SANE testified that she asks the questions on the SAFE report "pertaining directly to the assault" and writes what the patient tells her. (R. at 925-926). The SAFE report does not ask about prior consensual activity. (*See* Pros. Ex. 4).

There is no evidence that AP told anyone that she accidentally fell asleep in Appellant's room.[3] AP denied accidentally falling asleep in Appellant's room. (R. at 822). When trial defense counsel asked AP if she told JC and BJ that she accidentally fell asleep at Appellant's house, AP said, "I don't remember." (R. at 822). Neither JC nor BJ testified that AP told them she accidentally fell asleep in Appellant's room. Nor does the SAFE report indicate that AP claimed falling asleep in Appellant's room was an accident. It merely says that AP said she and Appellant were "watching a movie last night when she fell asleep." (Pros. Ex. 4, pg 5).

AP did not interfere with witness testimony.

AP was candid that two prior sexual partners, ES and JM, and her friends, AC, AM, and BJ, contacted her after the defense had interviewed them. (R. at 860).

JM told AP that he was being influenced by the defense to say AP was a "wild person," that she went to the club after she was sexually assaulted, and that she was a "very promiscuous person." (Id.) Because of this, AP felt like the defense was "trying to prove that [she] was a slut." (R. at 857). So AP chose not to interview with the defense. (Id.) But there is no evidence that AP told JM to change what he told the defense, and JM did not testify.

AP had a sexual relationship with ES, but there is no evidence ES was AP's boyfriend. Instead, they were in what the defense characterized as a "quasi-dating relationship." (R. at 820-821). One day, ES messaged AP and told her that he was contacted by a "military official" about AP's character. (Def. Ex. A). He wanted to see if AP's attorney recommended that he speak to them, but he did not want "to be subpoenaed and have to go out of town[.]" (Id.) AP told him

> You don't need to talk to anybody and I don't need you to, you have rights and can deny it because it's ode [sic] as hell. The defense is running out of options and is doing everything they can to prove I'm

[3] Appellant incorrectly claims that AP told JC and BJ that she accidentally fell asleep in Appellant's room. (App. Br. at 6).

> a slut so is [sic] talking to the guys I've slept with. I appreciate you though, if you still wanna [sic] call me you can.

(Def. Ex. A).

AP did not tell ES to not talk to the defense, nor did she tell him what to say if he did. She merely said that she would "appreciate it if [ES] didn't say anything" but if ES did choose to speak to them she told him to "just say what you want[.]" (Def. Ex. A, pg. 3). AP explained that she would prefer if ES did not answer questions about "her rape" because "if anything doesn't match they'll use it against me[.]" (Id.) ES explained that he would participate if it helped AP's case. (Id. at pg. 4). AP responded that she "personally" did not think ES should and explained that her "counsel doesn't think it is in her best interest." (Id.)

After ES told the defense he did not want to participate, the defense told him "some details from before the incident too." (Id. at pg. 5). ES called AP "dirty." (Id.) Based on this, AP believed that the defense had told ES that she had consensual sex with Appellant "at the same time that [she] had a sexual relationship with [ES]." (R. at 867). In response, AP told ES to not "believe anything they tell you." (Def. Ex. A, pg. 5). ES was not called to testify at the court-martial.

AP's friend, AC, also reached out to AP after the defense interviewed her. AC asked AP if they "hung out" the day AP was sexually assaulted which was Super Bowl Sunday. (R. at 860). AC told AP that the defense "kept asking me over and over if we did, and it made me start to question if we did." (Id.) AP explained that the messages between her and AC from the day AP reported the sexual assault reflected that AP stayed in her room and did not go out with AC. (R. at 860-861). Although AP and AC had this limited conversation, there is no evidence that AP directed AC to alter what she told the defense or her testimony. Instead, AC's testimony

showed that she verified what AP told her because she "scrolled back to the actual day and saw that AP had declined the invitation" to hang out. (R. at 909).

AP admitted that AM also contacted her. (R. at 861). But AP denied that she told AM to not speak to the defense. (R. at 854). AM was not called to testify at the court-martial.

AP was also candid that BJ contacted her the day before trial and asked if she was at the base. (R. at 862). She responded, "Yes" and then they had no further communication. (Id.) Although BJ did testify at the court-martial, he was not asked during his testimony whether AP influenced his testimony.

AP testified that none of the discussions with her friends altered how she recalled the morning Appellant sexually assaulted her. (R. at 888).

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY SUFFICIENT.

Standard of Review

This Court is only empowered to review factual sufficiency if (1) an appellant requests factual sufficiency review and (2) an appellant shows a specific deficiency in proof. United States v. Harvey, 85 M.J. 127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ).

When both requirements are met, this court "may weigh the evidence and determine controverted questions of fact[.]" Article 66(d)(1)(B)(ii). But this Court must give "appropriate deference" to (1) the fact that the trial court saw and heard the witnesses and other evidence and (2) the findings of fact entered into the record by the military judge. Article 66(d)(1)(B)(ii)(I)-(II). If, because of this Court's review, 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." Article 66(d)(1)(B)(iii).[4]

In other words, if this Court reverses the finding of guilt, this Court must (1) decide that the evidence, as it has weighed it, does not prove that Appellant is guilty beyond a reasonable doubt and (2) this Court must be clearly convinced of the correctness of that decision. Harvey, 85 M.J. at 132.

Law

1. Factual Sufficiency

When there is "no merit" to the appellant's contention forming the basis of the alleged deficiency in proof, the appellant has failed to articulate a specific showing of a deficiency in proof. United States v. Hughes, 2026 CCA LEXIS 66, *15 (A.F. Ct. Crim. App. 6 Feb 2026). "[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." Id. at *15-16 (quoting United States v. Valencia, 85 M.J. 529, 535 (N.M. Ct. Crim. App. 2024), aff'd, 2025 CAAF LEXIS 966 (C.A.A.F. 24 Nov. 2025)).

"Minor inconsistencies in the witness' testimony do not establish a specific deficiency in proof." Id. at *16 (citing United States v. Brassfield, 85 M.J. 523, 528 (A. Ct. Crim. App. 2024), rev. denied, 2025 CAAF LEXIS 271 (C.A.A.F. 11 Apr. 2025). "Testimony 'need not be completely consistent to still be sufficiently reliable to sustain a conviction, and we do not confine our analysis to merely the testimony of a single witness in performing our factual

[4] This standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (2021). The United States agrees with Appellant that this is the correct standard to apply in his case.

sufficiency review under Article 66, UCMJ.'" United States v. Augustin, 2026 CCA LEXIS 11, *33 (A.F. Ct. Crim. App. Jan. 21, 2026) (quotations and citations omitted).

2. Appropriate Deference

"Appropriate deference" "depend[s] on the nature of the evidence at issue." Harvey, 85 M.J. at 130. Although it is within this Court's discretion to determine what level of deference is appropriate, CAAF has provided guidance on the issue.

> [A] CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, *whose credibility was at issue*, is high because the CCA judges could not see the witness testify. In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low.

Id. at 131 (emphasis added).

Our sister service courts of criminal appeals, applying CAAF's guidance, have found it appropriate to apply high deference to the court-martial's assessment of witness testimony when the witness credibility is at issue. The Navy-Marine Corps Court of Criminal Appeals did so in United States v. Hayes, 2025 CCA LEXIS 541, *6 (N-M.C.C.A. 19 November 2025), United States v. Dillenburger, 85 M.J. 599, 606 (N-M.C.C.A. 2025), and United States v. Valencia, 85 M.J. 529, n.30 (N-M. C.C.A. 2025).

The Army Court of Criminal Appeals has also given high deference to the fact-finder's determination of witness credibility. As Appellant highlights, under the old Article 66 standard for factual sufficiency review, the Army Court of Criminal Appeals explained that the degree of deference it would apply "often depend[s] on the degree to which the credibility of witness is at issue." United States v. Davis, 75 M.J. 537, 546 (A. Ct. Crim. App. 2015). In recent opinions under the new Article 66 standard, the Army Court of Criminal Appeals has applied this to mean – contrary to Appellant's argument – that when credibility is at issue the deference to the fact-

finder's determination of witness credibility will be high. *See, e.g.*, United States v. Coe, 85 M.J. 658, 663 (A. Ct. Crim. App. 2025) (the court gave a "high level of deference" to the fact-finder's conclusion when "virtually all of the evidence on the issue of consent came from witness testimony."); United States v. Quintanilla, 2025 CCA LEXIS 532, *14 (A. Ct. Crim. App. 18 November 2025) (the court gave greater deference to the fact-finder's weighing of the opposing testimony of two expert witness); United States v. Perez, 2025 CCA LEXIS 516, *5 (A. Ct. Crim. App. 16 Oct. 2025) (citing Davis, 75 M.J. at 546 and Harvey, 85 M.J. at 131) (the credibility of the witnesses was material and the Army Court of Criminal Appeals gave "greater deference" to the fact-finder who "actually heard and saw the witnesses provide various accounts[.]") The Army Court of Criminal Appeals' decision to repeatedly give higher deference to the fact-finder's weighing of witness testimony aligns with CAAF's guidance in Harvey that deference might be high when a witness testifies and that fact witness' "credibility was at issue[.]" 85 M.J. at 131.

3. Reasonable Mistake of Fact as to Consent

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1).

If the mistake goes to an element requiring general intent or knowledge, such mistake "must have existed in the mind of the accused and must have been reasonable under all the circumstances." Id. Thus, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to the charged offense. *See, e.g.*, United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (considering the defense of mistake of fact to a charge of sexual assault). Once the defense of mistake of fact is raised by some evidence, the

Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); McDonald, 78 M.J. at 379.

In considering whether the defense of mistake of fact as to consent was raised at trial, this Court considers "the totality of the circumstances at the time of the offense." United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003) (citations omitted). The record must contain "some evidence of an honest *and* reasonable mistake to which the [factfinder] could have attached credit if they had so desired." Id. (emphasis added). The quantity of evidence required is low, but "the record must contain evidence supporting *both* the subjective 'honest' and the objective 'reasonable' mistaken belief." United States v. Evangelista, 2025 CCA LEXIS 501, *17 (A.F. Ct. Crim. App. 5 Nov 2025) (citing *See* United States v. Davis, 76 M.J. 224, 230 (C.A.A.F. 2017) (citation omitted) ("[W]hile [the a]ppellant's statement may constitute a scintilla of evidence about his 'honest belief,' . . . there is not an iota of evidence that such a belief was reasonable."); *see also* United States v. Willis, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) ("The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.").

"The temporal proximity of prior consensual sexual encounters with a particular victim is relevant to determining whether an accused entertained a reasonable mistake of fact as to consent." United States v. Couty, 2025 CCA LEXIS 48, at *22-23 (A.F. Ct. Crim. App. Feb. 7, 2025) (citing United States v. St. Jean, 83 M.J. 109 (C.A.A. F. 2022)) But, "the mere fact that there was some temporally proximate intimate acts or prior consensual encounters does not axiomatically create a reasonable mistake that a future encounter would also be consensual." Id. "As the Court noted in St. Jean, 'the fact that a person consented to kissing on one day is not

particularly probative of the issue of whether that person consented to full sexual intercourse a day later.'" Id. (quoting St. Jean, 83 M.J. at 114).

"Just as a victim's 'lack of verbal or physical resistance does not constitute consent,' a [. . .] victim's lack of verbal or physical resistance, without more, is not some evidence of a reasonable belief that consent has been obtained (or given)." United States v. Rodela, 82 M.J. 521, 529 (A.F. Ct. Crim. App. 2021). "As a matter of law, [a victim's] shocked silence is not consent, and no reasonable person under the circumstances would think otherwise." Couty, 2025 CCA LEXIS at *31.

In Couty, this Court found that an appellant's "unilateral" initiation of sexual contact and penetration without the victim's "cooperation or encouragement, either verbally or physically" did not establish a reasonable mistake of fact as to consent even though the appellant and the victim were engaged in consensual sexual intercourse moments before. 2025 CCA LEXIS at *27. This Court explained that the appellant's initiation of sexual conduct may have been "the product of wishful thinking" but was "unreasonable." Id.

> Here, the circumstances of his reinitiation—done silently, in a dark room, without a word from [the appellant] to [the victim], much less a contemporaneous request or approval for sexual intimacy that she had just verbally disclaimed and physically disengaged from several minutes before—are not reasonable grounds to believe she was consenting at the time he penetrated her vulva for the first time.

Id.

This Court continued, "Lying motionless, facing away from Appellant—a man with whom she had no prior sexual or romantic relationship—is not the sort of indicia that an objective person under the circumstances would view as an invitation to have sex. Any mistake of fact on the part of Appellant as to consent, given these circumstances, was blatantly unreasonable." Id.

Analysis

1. Appellant has failed to allege a specific deficiency in proof because his alleged deficiency has no merit.

Although Appellant has requested factual sufficiency review, this Court should find that he has failed to allege a specific deficiency in proof because his purported deficiency has "no merit." Hughes, 2026 CCA LEXIS at *15. Appellant claims the specific deficiency in proof is that the "Government failed to prove beyond a reasonable doubt that [Appellant] did not have a reasonable mistake of fact as to consent." (App. Br. at 8). Not only is this insufficient because it is a "general disagreement" with the fact-finder's determination that the Government proved that Appellant did not have a reasonable mistake of fact as to consent, but also like in Hughes, this contention lacks merit. Hughes, 2026 CCA LEXIS at *15-16 (citing Valencia, 85 M.J. at 535). As explained below, the evidence shows that Appellant neither had an honestly held nor objectively reasonable mistake of fact as to consent. Therefore the defense of mistake of fact as to consent never applied to Appellant's case, and his claimed deficiency in proof – that the Government failed to disprove his supposed reasonable mistake of fact – has no merit. As a result, like in Hughes, Appellant's claimed deficiency does not trigger full factual sufficiency review. Id.

Despite only identifying mistake of fact as his alleged specific deficiency in proof, (App. Br. at 8), Appellant seemingly also complains (1) that the Government failed to prove that Appellant committed sexual assault without consent, rather than sexual assault based on sleep; and (2) that AP was not credible. (App. Br. at 10-14). This Court should disregard these arguments for three reasons. First, Appellant's argument is neither clear nor specific on these issues as required by Article 66, UCMJ. Second, Appellant's claim that the Government failed to prove that Appellant committed sexual assault without consent both lacks merit and is merely

a "general disagreement with the verdict." Hughes, 2026 CCA LEXIS at *15-16 (quoting Valencia, 85 M.J. at 535). Finally, Appellant's claim that AP was not credible is no more than a "general disagreement with the verdict" because AP's credibility was highly litigated at the court-martial, and the fact finder determined she was credible. Should this Court disagree, for clarity, the United States addresses these arguments first.

2. The Government proved that Appellant sexually assaulted AP without her consent.

The United States agrees with Appellant that the Government had to prove, beyond a reasonable doubt, that Appellant penetrated AP's vulva with his penis without her consent. (App. Br. at 14) (citing Article 120(b)(2)(A)). Under this theory of liability, unless AP had consented when Appellant penetrated her vulva with his penis, Appellant violated Article 120(b)(2)(A) by penetrating her without consent.[5]

It is irrelevant whether AP was asleep or awake when Appellant penetrated her vulva because he neither had her consent to penetrate her when before she fell asleep or after she woke up. Because Appellant never had AP's consent to penetrate her vulva with his penis after their initial sexual encounter ended, Appellant violated Article 120(b)(2)(A) whether AP was awake or asleep when he initially penetrated her.

A. AP did not consent to Appellant penetrating her vulva before she fell asleep.

There is no evidence that AP consented to Appellant penetrating her vulva with his penis again after their consensual sexual encounter ended. Instead, after having consensual sex with Appellant, AP fell asleep. (R. at 766-767, 838). A sleeping person cannot consent. Article 120(g)(7)(B), UCMJ. "[I]f a victim *did not consent* to a sexual act before falling asleep, and

[5] Appellant conceded that the Government proved that he penetrated AP's vulva with his penis. (App. Br. at 15) (". . . the only penetration that was ever proven occurred after AP was alert and awake.") Therefore, the only element at issue is whether AP consented.

[under the law] the victim *could not consent* to a sexual act while asleep, then a sexual act occurring while the victim is asleep is 'without consent.'" United States v. Moore, ___ M.J. ___, 2026 CAAF LEXIS 73, *10 (C.A.A.F. 23 Jan 2026).

AP testified that she woke up to the pain of Appellant trying to insert his penis in her vagina. (R. at 768). She explained that covers were off her, her underwear was pulled down to her mid-thigh, and Appellant "was attempting to put his penis" into her vagina. (R. at 768, 832, 837-838). Because AP was not aroused, Appellant's attempt to insert his penis into her vagina hurt AP. (R. at 768).

Although Appellant focuses on the word "trying" to argue that penetration only occurred after AP woke up, his argument is unpersuasive. Appellant could not have been causing AP pain without having already penetrated her vulva "however slight." Article 120(g)(1)(a). Because AP did not consent to Appellant penetrating her vulva with his penis before she fell asleep, and she could not consent while she was asleep, and did not consent when she awoke, Appellant committed sexual assault without AP's consent – as charged.

B. AP did not consent to Appellant penetrating her vulva with his penis when she was awake.

Even if Appellant is correct that the charged penetration did not occur until AP was awake, Appellant still did not have AP's consent. AP testified that after Appellant was struggling to insert his penis into her vagina, he used his spit as lubricant, penetrated her vagina, and had sex with her. (R. at 768). AP did not move or speak as Appellant had sex with her. (R. at 769, 772, 825-827, 834-835). AP testified that she did not consent to Appellant having sex with her that morning. (R. at 794). This is probative evidence that Appellant committed a sexual act on AP without her consent. *See* Moore, 2026 CAAF LEXIS at * 15 (explaining that a rational trier of fact could find the sexual act was done without consent based on the victim's

testimony). Because AP did not consent before she fell asleep, could not consent while she was asleep, did not consent when she woke up to the pain of Appellant trying to penetrate her vagina, and did not consent when Appellant successfully penetrated her vagina, Appellant committed a sexual act against AP without her consent in violation of Article 120(b)(2)(A).

3. AP's testimony was credible.

The fact-finder found AP's testimony to be credible because they found Appellant guilty and, as Appellant recognizes, AP's credibility was "central" to Appellant's case. (App. Br. at 13). Because AP's credibility was a material issue, and this Court cannot observe her testimony, in line with Harvey and our sister services, high deference to the fact-finder's weighing of her testimony is the appropriate deference in this case. *See* Hayes, 2025 CCA LEXIS at *6, Dillenburger, 85 M.J. at 606, Valencia, 85 M.J. at n.30, Coe, 85 M.J. at 663, Quintanilla, 2025 CCA LEXIS at *14, Perez, 2025 CCA LEXIS at *5. But even without high deference, this Court should find AP's testimony was credible.

Contrary to Appellant's argument, AP's statements were consistent and corroborated. She reported to the SANE that she woke up to Appellant "having sex with her." (App. Br. at 10; Pros. Ex. 4, pg. 5). This statement is not meaningfully different from her testimony that she woke up to Appellant trying to penetrate her vagina and then using his spit as lubricant to fully penetrate her and have sex with her. Further supporting AP's credibility is the physical evidence of Appellant's semen in AP's vagina which corroborated AP's testimony that Appellant penetrated her without a condom. (R. at 770; Pros. Ex. 4). These consistencies support the conclusion that AP was credible.

Additionally, the fact that AP reported that she was sexually assaulted mere hours after it occurred and that AP's friends noticed a difference in her demeanor bolsters her credibility. (R.

at 894-895, 905). Finally, Appellant's own words support AP's credibility. Appellant admitted that he did not get AP's consent when he said that he "should've gotten [AP's] consent before doing anything." (Pros. Ex. 1). Taken together, all this evidence supports the fact-finder's conclusion that AP was credible, and so this Court should not be clearly convinced that Appellant's conviction was against the weight of the evidence. Article 66(d)(1)(B).

JC's slight contradiction of AP's testimony and report to the SANE was weak and does not fatally undermine AP's credibility. When trial defense counsel told JC that AP told her, "the first thing [AP] noticed was [Appellant pulling down her pants and underwear," JC only weakly agreed by saying, "From what I can recall, yes." (R. at 908). This is not compelling when compared to AP's clear, repeated, and unequivocal statements that she awoke to the pain of Appellant trying to penetrate her vagina. (R. at 768, 908; Pros. Ex. 4, pg. 5).

Contrary to Appellant's argument, AP did not have a motive to fabricate. (App. Br. at 11). ES was not AP's boyfriend. Instead, their relationship was a more casual sexual relationship that even the trial defense counsel only characterized as "quasi-dating." (R. at 821). There is no evidence that she valued that casual sexual relationship so much that she was willing to make up a sexual assault.

Further, Appellant's argument to the contrary is illogical. AP did not report the sexual assault because ES found out she had sex with Appellant. In fact, if AP had not reported that she was sexually assaulted, nobody except she and Appellant would have known that they had sex. Additionally, if AP were fabricating the sexual assault to protect her sexual relationship with ES, it is absurd that AP would only claim the second sexual encounter was nonconsensual. If she were trying to preserve her relationship and her reputation, she would have alleged that the entire encounter was non-consensual. Because Appellant's claim that AP had a motive to fabricate is

fanciful and not supported by the evidence, this Court should not find that it is a persuasive attack on AP's credibility.

This Court should not be persuaded that AP's interactions with BJ, JM,. ES, and JC undermined AP's credibility. (App. Br. at 13). First, there is no evidence that AP tried "to hide information that was unfavorable to her," in her interactions with her friends as Appellant claims. (Id.) There is no evidence that she prevented any witness from speaking to the defense or testifying or that she coordinated what to say with witnesses. Instead, the evidence shows that AP merely refreshed JC's memory by directing her to physical evidence and told ES to say what he wanted to the defense. (R. at 909; Def. Ex. A).

Second, AP's interaction with BJ was merely affirming that she was at the base day before the trial. (R. at 862). There is nothing to suggest they discussed BJ's testimony or that AP "tried to get her story straight" with him. (Id.)

Third, JM spoke with the defense before he spoke to AP and there is no evidence that AP altered her testimony based on what he told her, or that JM altered what he told the defense after speaking to AP.

Finally, there is no evidence that AP influenced ES's actions. ES revealed that he had sought counsel from an attorney and his mom and preferred not to talk to the defense *before* AP told him that she preferred that he did not speak to the defense. (Def. Ex. A, pg. 1, 2, 4). AP told ES that if he chose to talk to the defense, to "say what [he wanted]." (Id. at pg. 2). As a result, no evidence supports that AP improperly influenced ES or altered her corroborated testimony in any way.

AP was honest about these interactions with her friends and prior sexual partners when testifying. (R. at 860-862). Because she was honest about these interactions, and there is no

evidence she improperly influenced any of the witness' testimonies, altered her own testimony, and her testimony was corroborated by prior reports and physical evidence, this Court should not find these interactions fatally undermine her credibility. Additionally, all this information was presented to the panel members and they found AP credible. This Court should afford the panel's determination of AP's credibility high deference.

AP's testimony was consistent and corroborated by both direct and circumstantial evidence. Weighing the evidence and giving appropriate deference to the fact that the fact-finder saw the witness' testimony, this Court should find AP's testimony that she did not consent to Appellant penetrating her vulva with his penis credible. As a result, this Court should not be clearly convinced that Appellant's guilt is against the weight of the evidence. Article 66(d)(1)(B).[6]

Having resolved that the Government proved that Appellant violated Article 120(b)(2)(A) and that AP was credible, the United States now addresses Appellant's first point alleging that Government failed to disprove that Appellant had a reasonable mistake of fact as to consent. (App. Br. at 8).

4. The Government proved that Appellant did not have an honest and reasonable mistake of fact as to consent.

To overturn Appellant's conviction on his specified deficiency, this Court must decide that the evidence does not prove that Appellant did not have a reasonable mistake of fact as to consent beyond a reasonable doubt, and this Court must be "clearly convinced of the correctness of [that] decision." Harvey, 85 M.J. at 132.

[6] Appellant conflates an improper argument issue with factual sufficiency when he argues that the STC's closing argument should influence this Court's factual sufficiency review. (App. Br. at 14-15). Arguments of counsel are not evidence. Therefore, this Court should not consider the STC's closing argument when weighing the *evidence* under factual sufficiency. The United States will address the STC's closing argument in Appellant's second assignment of error.

The record of "the totality of the circumstances at the time of the offense" does not contain "some evidence of an honest *and* reasonable mistake to which the [factfinder] could have attached credit if they had so desired." Hibbard, 58 M.J.at 75. Appellant therefore did not have a reasonable mistake of fact as to consent, and so his argument that the Government failed to disprove his affirmative defense "has no merit." Hughes, 2026 CCA LEXIS at *15-16. Thus, this Court should find Appellant's conviction factually sufficient.

A. Appellant's messages establish that he did not honestly believe AP had consented.

In order for the mistake of fact defense to apply, Appellant's actions had to "provide insight as to whether [he] actually or subjectively did infer consent based on the circumstances." Rodela, 82 M.J. at 527-28 (quoting United States v. Willis, 41 M.J. 435, 438 (C.A.A.F. 1995)). Appellant's text messages are the only insight about whether he "actually or subjectively" inferred consent based on the circumstances at the time of the offense. Id. In those messages, Appellant admitted that he "should've . . . got consent before doing anything." (Pros. Ex. 1 at pg. 3). This established that Appellant did not honestly believe that he had AP's consent before he penetrated her vulva with his penis. As a result, the defense of mistake of fact did not apply, and Appellant's claim that the Government failed to disprove mistake of fact has no merit.

Appellant's assertion in the text messages that the sexual assault resulted from a "misunderstanding" also cannot establish that he had an honest mistake of fact as to consent. In Rodela, this Court rejected the notion that an appellant's statements that he "got the wrong idea about everything" and "confused [the] connection and situation" could establish an honest mistake of fact. Rodela, 82 M.J. at 528-29. This Court explained, "the record does not reveal what [the] [a]ppellant may have been wrong or confused about —perhaps it was whether [the victim] consented to touching, or perhaps it was whether the law permitted him to touch his

friend when she was unresponsive to his advances." Id. The same is true here but to a stronger degree.

Appellant's "misunderstanding" is tied to his statement "I didn't think you were sleeping when I did it[,]" not to whether he honestly believed AP had consented. (Pros. Ex. 1). If Appellant had said, "I thought you were consenting" or "I misunderstood your body language" then there would have been some evidence that he honestly held a mistake of fact as to consent at the time of the offense, but he did not. Instead, after claiming there was a "misunderstanding," Appellant admitted that he did not get AP's consent before he penetrated her. This undermines that the "misunderstanding" between AP and Appellant related to whether she consented. Also like in Rodela, Appellant may have misunderstood whether the law permitted him to touch AP just because she did not react negatively to him. As a result, this Court should, like in Rodela, find Appellant did not have an honest mistake of fact as to consent and so his conviction is factually sufficient.

Appellant relies on the fact that AP was awake when he penetrated her to argue that he had a mistake of fact as to consent. (App. Br. at 8-10). This argument is unpersuasive because Appellant's belief that AP was awake as he penetrated her does not establish an honestly held mistake of fact as to consent. Believing someone is awake is different from believing a person consented. Even if Appellant did believe that AP was awake, neither being awake nor a lack of resistance establishes consent. *See*; Article 120(g)(7) ("Lack of verbal or physical resistance does not constitute consent.) Because Appellant's text messages prove that he knew he did not obtain AP's consent before he penetrated her, Appellant did not have an honestly held belief that AP was consenting. Even if he did, such a belief would not be reasonable.

Finally, Appellant's actions post-assault conduct cannot establish that he had an honest and reasonable mistake of fact as to consent at the time of the offense. (App. Br. at 11). Post-assault conduct, by its very nature, is not "the totality of the circumstances *at the time of the offense.*" Hibbard, 58 M.J.at 75 Therefore it could neither inform the fact finder – or this Court – whether Appellant honestly held a mistake of fact at the time of the offense nor whether that belief at the time of the offense was reasonable.

If Appellant had raised some evidence that he held an honest mistake of fact as to consent at the time of the offense*,* then his post-assault conduct might have been relevant to evaluate the strength of that honesty. But there is no evidence that at the time of the offense Appellant honestly believed AP was consenting. His post-assault conduct merely supports that Appellant, as explained above, may have mistakenly believed that the law allowed him to have sex with AP if she did not resist or manifest non-consent. Rodela, 82 M.J. at 528-29. As a result, Appellant's post-assault conduct cannot support that he had an honest mistake of fact as to consent.

B. Even if Appellant honestly believed AP was consenting, the totality of the circumstances established that such a belief was unreasonable.

There is no evidence that AP gave any verbal or nonverbal indication that she was consenting to Appellant penetrating her vulva with his penis. Instead, like in Couty, AP seemingly lay there in "shocked silence." Couty, 2025 CCA LEXIS at *31. AP's silence is particularly telling because she had previously demonstrated consent by being an active and enthusiastic participant in activities with Appellant. She danced on him at the club, she participated in consensual kissing and touching before sex with Appellant, and she was on top of Appellant for most of their consensual encounter. (R. at 815-816, 869). As a result, Appellant would have known how AP showed consent – by enthusiastically participating. It would be unreasonable to believe that AP was consenting to the next sexual encounter by acting in a

completely opposite way – not speaking, not moving, not participating. (R. at 769, 772, 825-827, 834-835).

Appellant's argument that his alleged belief was reasonable, like the argument in Rodela, "demonstrates a misunderstanding of the law." (App. Br. at 9). Consent requires a "freely given agreement" to the sexual act. Article 120(g)(7)(a). Merely being awake is not consent to sex. *See* Moore, 2026 CAAF LEXIS at 7-8 (explaining that United States v. Casillas, 86 M.J. 94 (C.A.A.F. 2025), held that if a victim awoke before a sexual act was complete and *while awake did not consent* then the sexual act was without consent). Sleeping in a person's bed is not consent to sex. Having sex with a person previously is not consent to sex. Article 120(g)(7); *See also* Couty, 2025 CCA LEXIS at *22-23 (recent consensual sex does not axiomatically create a reasonable mistake that a future encounter would also be consensual). A lack of verbal or physical resistance (i.e. "letting it happen") is not consent to sex. *See* Rodela, 82 M.J. at 529 ("Just as a victim's lack of verbal or physical resistance does not constitute consent, a victim's lack of verbal or physical resistance, without more, is not some evidence of a reasonable belief that consent had been obtained (or given)"). When AP woke up she did not move, did not speak, and did not consent, and "it would be 'patently unreasonable,'" for Appellant to believe that AP consented to Appellant penetrating her vulva with his penis when none of her actions could amount to consent under the law. Instead, the evidence shows that AP "merely endured" the sexual encounter. Rodela, 82 M.J. at 529 (quotation and citation omitted). That is not consent, and no reasonable person would think otherwise.

The evidence established that Appellant had neither an honestly held nor objectively reasonable belief that AP consented to him penetrating her vulva with his penis. Thus, the Government disproved the mistake of fact as to consent defense beyond a reasonable doubt, and

this Court should not be clearly convinced that Appellant's conviction is against the weight of the evidence. As a result, this Court should find Appellant's conviction is factually sufficient.

II.

THE SPECIAL TRIAL COUNSEL'S ARGUMENT WAS NOT PROSECUTORIAL MISCONDUCT.

Additional Facts

The Special Trial Counsel (STC) told the panel members that they had to apply the "facts and circumstances" to reach their conclusion – not argument of counsel. (R. at 1113). He said, "You take the law the judge gives you, and you apply the facts and circumstances and go back into the deliberation room. That's what you take into consideration." (Id.)

The STC correctly explained that consent requires a freely given agreement and that a sleeping person cannot consent. He said,

> Consent is not a clean pathway. It's not a written agreement. It is this difficult process we go through in figuring out if somebody's consenting to have sex with us. But the law requires us to have that agreement, it requires us to have that – that interaction with somebody. It also requires us to actually know that we have the agreement before we have sex with somebody.

(R. at 1117).

To illustrate his point, the STC described an intersection with a traffic cop. (Id.) He pointed out that when you approach an intersection with a traffic cop in it, you must wait for the traffic cop to "give a signal" or communicate that you can proceed – this is like consent. (R. at 1117-1118). He then pointed out that needing that communication or "signal" before proceeding is why "it's important to understand that somebody who is asleep can't consent. And if somebody who's asleep can't consent, if you don't know if somebody's asleep or not, then how do you understand whether or not they're consenting." (R. at 1118). He later returned to his analogy and said, "That's why consent is like approaching a traffic cop when you're waiting for

a signal, when you're looking for some interaction, some type of reason to believe the other person is consenting." (R. at 1118).

The STC then distinguished AP and Appellant's consensual sex from the sexual assault. He identified for the members that during the consensual sexual encounter AP and Appellant were cuddling and "making out" as their interactions progressed towards sex. (R. at 1118). It was these "signals or symbols between the two individuals where they're actually communicating [consent] through body language." (R. at 1118). "But you don't proceed to have sex with them unless you know that they're interacting, unless there's consent." (Id.) He highlighted, "The problem in this situation is a person that's laying still with their eyes closed is not communicating consent." (R. at 1118).

The STC never argued that AP was asleep when Appellant penetrated her. Instead, he said that AP woke up to Appellant penetrating her. (R. at 1119, 1125). He explained that she froze, she did not communicate with Appellant, she did not move, "she just lays there." (R. at 1119). He highlighted that Appellant also violated "one of the parameters" that AP had set for consent – that Appellant wear a condom during sex. (R. at 1119).

Although in a single sentence, the STC noted that there is reason to believe that Appellant thought AP was sleeping, he did not spend much time on the issue. Instead, he only pointed out that by asking AP how she slept when she pretended to wake up, Appellant seemed to believe AP was asleep. (R. at 1120).

Then, the STC emphasized the absurdity that a person trying to get consent for sex would be unsure whether a person is asleep or awake. (R. at 1121-1122; ROT, Audio of Open

Proceedings, File Goodfellow_20240120-0732_01da4b72e15a5700 at 59:37 -1:00:25.[7]) He argued,

> [W]hen you say to somebody, 'I didn't think you were sleeping when I did it.' . . . if you're trying to get consent, how do you not think that they were sleeping? They're either sleeping or they're not. If you're getting consent, if there's an agreement between the parties, how could you not think they were. . . I mean, how could you think they were sleeping? An agreement means two people are communicating. If someone's asleep, you either know or you don't.

(Id.)

Next, the STC attacked the notion that Appellant might have a mistake of fact as to consent by pointing out that in Appellant's message to AP he said, "It's just a big misunderstanding." (R. at 1122). The STC attacked the idea that this statement reflected a reasonable mistake of fact as to consent with the law and the facts. He highlighted that AP was not moving and said nothing. (Id.) He then explained, "The law doesn't allow somebody to go, you didn't resist you just laid there. Oh, you're[8] asleep, I didn't want to wake you up to ask for

[7] There are several typographical errors in this section of the transcript. The United States asks this Court to rely on the audio for this section rather than the incorrect transcript because the typographical errors alter the STC's argument.

On page 1121, he transcript says, "'I think you were sleeping when I did it.'" But in the audio of the STC's argument he directly quotes Appellant's message to AP and says, "'I *didn't* think you were sleeping when I did it.'" (ROT, *Audio of Open Proceedings*, File Goodfellow_20240120-0732_01da4b72e15a5700, 59:48-59:51).

On page 1122, the transcript reflects the STC finished the question, "how could you not think that they were?" before asking "how could you think that they were sleeping?" But the audio reflects that he paused and corrected the mistake in his question rather than ask two separate questions. (Id. at 1:00:12-1:00:16).

[8] There is a typographical error in the transcript on page 1122. The audio reflects that the STC said, "Oh, you'*re* asleep. . ." (ROT, Audio of Open Proceedings, File Goodfellow_20240120-0732_01da4b72e15a5700, 1:01:28-1:01:31).

consent. You have to have an agreement. That's what the law says. You have to have an agreement between two people." (Id.)

Throughout his argument, the STC highlighted the strength of the Government's case. He argued that the DNA evidence aligned with AP's report. (R. at 1122). He highlighted that AP told OSI that she had consensual sex with Appellant. (Id.) He noted that if AP hadn't reported Appellant, then nobody would have known about the consensual sex. (R. at 1122). He argued that if AP was making up the sexual assault, she could have said both sexual encounters were nonconsensual, but she did not. (R. at 1124). He argued that AP had no motive to fabricate, and the only benefit she got was her friends finding out she had sex with Appellant – something she hadn't wanted to disclose to them. (R. at 1122-1124).

In his conclusion, the STC pointed out that whether AP was asleep or awake when Appellant penetrated her was "irrelevant" because Appellant did not have consent before he penetrated her. (R. at 1125). He argued that Appellant and AP had to have an agreement. "There has to be some type of communication between them. And if you have no agreement, if you have no communication, there can't be a reasonable mistake of fact as to consent." (R. at 1125).

The STC never argued that the members could convict Appellant merely because AP was asleep, nor did he say the defense of reasonable mistake of fact could not apply because AP was asleep. (*See* R. at 1113-1125).

In rebuttal, the STC directly read the judge's instructions on consent. (R. at 1150). He also explained, "If you have questions about the instructions, don't think back to what me and opposing counsel say in this – in this argument, go to the judge's instructions. . . This is what the

law is. This is what you are required by law to follow. This is what you have to follow according to the judge's instructions." (R. at 1151).

Next, the STC explained that AP being sexually interested in Appellant is not consent. He argued,

> It doesn't mean the next morning you can have sex with her without getting consent. Without having some type of communication. And you have to have some type of communication for there to be an agreement. [. . .] But the reality is you've got to have some type of communication, some type of body language, and there is zero evidence, in fact, there is zero evidence here in the courtroom of that. What there is evidence of, both from the victim in this case and from the accused, is that there was no communication about that.

(R. at 1152).

The STC explained that the members must look at what the Appellant "understood or should have understood in the situation he was in." (R. at 1153). He noted that AP had "no duty to demonstrate a lack of consent." But Appellant had "every duty to attain consent" before having sex with AP. (Id.)

The STC encouraged the members to look at Appellant's messages. (R. at 1153-1154). He highlighted that Appellant did not respond to AP's claim that she was asleep by contradicting it. (R. at 1154). He noted that Appellant said nothing about AP participating, looking into his eyes, or that they were "having sex together." (Id.)

Standard of Review

When there is not an objection to argument by counsel at the court-martial, claims of improper argument – a kind of prosecutorial misconduct – are forfeited and reviewed for plain error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). Plain error "occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F.

2005) (citation omitted). The Appellant has the burden to establish plain error. Voorhees, 79 M.J. at 9 (citation omitted).

Law

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.'" Id. at 178 (quoting Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). In presenting argument, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). Trial counsel is entitled to respond to matters raised by an accused or his counsel. United States v. Gilley, 56 M.J. 113, 121-23 (C.A.A.F. 2001).

A prosecutor's comments "must be examined in light of its context within the entire court-martial." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). This Court does not "surgically carve out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238 (internal quotation marks omitted).

Appellant has the "burden to prove that there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 12 (internal quotation marks and citation omitted). Relief for improper argument will be granted only if the misconduct "actually impacted [] a substantial right of an accused (i.e. resulted in prejudice)." Fletcher, 62 M.J. at 178. Prosecutorial misconduct only requires reversal when the comments "taken as a whole, were so damaging that [this Court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id. at 184.

To assess prejudice, this Court evaluates the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." Id. (quoting Fletcher, 62 M.J. at 184). The lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." Gilley, 56 M.J. at 123 (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). For improper argument, this requires analyzing: "(1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction." United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013) (citation omitted); Fletcher, 62 M.J. at 184. In some cases, "the third factor may so clearly favor the [G]overnment that the appellant cannot demonstrate prejudice." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing Halpin, 71 M.J. at 480).

CAAF has identified five factors to help determine the severity of the misconduct:

> (1) The raw numbers—the instances of misconduct as compared to the overall length of the argument;
>
> (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole;
>
> (3) the length of the trial;
>
> (4) the length of the panel's deliberations; and
>
> (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184 (citation omitted).

Analysis

1. There was no plain error.

The STC did not "conflate separate theories of liability," misstate the law, or argue facts not in evidence as Appellant alleges. (App. Br. at 18-20).

A. The STC did not argue facts not in evidence or mischaracterize facts.

In line with AP's testimony, the STC said that AP "w[oke] up to [Appellant] penetrating her without a condom on." (R. at 1119). Then, again in line with AP's testimony, the STC explained that AP was "laying there asleep. She w[oke] up, he's starting to penetrate her, she just lays there." (R. at 1125). The STC never confused when AP was awake and asleep and he did not mischaracterize the facts. Therefore, Appellant's argument must fail.

The full context of the section cited by Appellant reveals that the STC did not argue that AP was asleep. (App. Br. at 19). Shortly before the section cited by Appellant, the STC made it clear that AP woke up to Appellant penetrating her. (R. at 1119) ("[S]he wakes up to him penetrating her. [. . .] [S]he wakes up to him penetrating her without a condom on.") Then, in the section Appellant cites, the STC is merely poses a hypothetical to highlight the absurdity in Appellant's message that the sexual assault was a "misunderstanding." The STC argued,

> "It's just a big misunderstanding." That's what he said. Lying there without moving. She didn't resist. She didn't say anything. She didn't fight. She didn't fight back. And she didn't stop him. She just laid [sic] there. The law doesn't allow somebody to go, you didn't resist you just laid [sic] there. Oh, you're asleep, I didn't want to wake you up to ask for consent. You have to have an agreement. That's what the law says. You have to have an agreement between two people.

(R. at 1122; ROT, Audio of Open Proceedings, File Goodfellow_20240120-0732_01da4b72e15a5700, 1:01:28-1:01:31). Not only was the STC not arguing that AP was asleep, but also, the STC correctly stated the law. Unless Appellant had obtained consent from AP before she fell asleep, he did not have consent when AP was asleep and so by penetrating AP, Appellant violated Article 120(b)(2)(A) because he committed a sexual act against AP without her consent. Moore, 2026 CAAF LEXIS at 7-8. Because the STC did not misstate the

facts, there was not error. So Appellant's claim of prosecutorial misconduct by misstating facts or arguing facts not in evidence must fail.

B. The STC did not conflate separate theories of liability or misstate the law.

The STC never argued that the members could convict Appellant "merely" because AP was asleep. United States v. Mendoza, 85 M.J. 213, 221 (C.A.A.F. 2024). Instead, the STC's argument focused on whether AP consented to Appellant penetrating her vulva with his penis and whether Appellant had a reasonable mistake of fact as to consent. (*See* R. at 1117-1125). As a result, Appellant's argument must fail.

In both passages cited by Appellant, the STC correctly argued the "without consent" theory of liability. In the first section, the STC argued first that "[AP] did not consent," and then that there was "no reasonable mistake of fact as to consent." (R. at 1125). He then correctly argued that it was "irrelevant" whether AP was asleep or awake when Appellant penetrated AP because Appellant and he "still [did] not have consent." (Id.) As CAAF has explained, if there was no consent before AP fell asleep, and she could not consent while she was asleep, unless she consented when she awoke, then Appellant committed a sexual act without consent in violation of Article 120(b)(2)(A). Moore, 2026 CAAF LEXIS at 7-8. AP testified that she did not consent when she awoke. (R. at 794). So it is "irrelevant" whether AP was awake or asleep when penetration began and the STC did not misstate the law.

In the second section, the STC correctly explained the requirement for communication, of some kind, to establish consent by using a traffic cop analogy. (R. at 1117-1118). He later returned to this analogy and explained that "consent is like approaching a traffic cop when you're waiting for a signal, when you're looking for some interaction, some type of reason to believe the other individual is consenting." (R. at 118-1119). He was correct that a sleeping

person cannot consent because they cannot give the necessary signal or communication. If Appellant was unsure whether AP was awake – as shown by his message that he only *thought* AP was awake and should have made sure she was awake – then he could not have known whether AP was consenting.

Although Appellant attempts to "surgically carve out a portion of the argument with no regard to its context," this Court must evaluate all of the STC's argument. Baer, 53 M.J. at 238. By evaluating the rest of the paragraph Appellant cites, it is clear the STC was correctly arguing the "without consent" theory of liability because if there was no evidence of any agreement between Appellant and AP and there was no communication between Appellant and AP, then there could not be a reasonable mistake of fact as to consent. (R. at 1125). Therefore, the STC neither shifted theories of liability nor did he misstate the law. As a result, Appellant's assertion that there was error must fail.

Finally, Appellant's claim that the STC's argument "eliminated" the mistake of fact as to consent defense is incorrect. (App. Br. at 20). The STC never argued – directly or indirectly – that the defense of mistake of fact as to consent could not apply in this case because AP was asleep. Instead, he properly countered the notion that Appellant had an honest and reasonable mistake of fact as to whether AP consented to the charged sexual act after the defense requested, and the judge gave, the instruction on mistake of fact. This is proper argument to respond to a matter raised by the defense and so the STC did not err. Gilley, 56 M.J. at 121-123.

In conclusion, the STC did not err in his argument. He correctly stated the law and the facts and he only argued the charged theory of liability – that Appellant committed a sexual act against AP without her consent. Because there was no plain error, this Court should deny Appellant's requested relief.

2. Appellant was not prejudiced.

Even if there were plain error, Appellant suffered no prejudice. That the defense did not object is indicative of the "minimal impact' of a prosecutor's improper comment." Gilley, 56 M.J. at 123 (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). Further, the alleged misconduct was not severe, the judge's instructions would have dispelled the minor allegedly improper statements, and the evidence supporting the conviction was strong.

A. The alleged misconduct was not severe.

Appellant's perfunctory conclusion that the STC's conduct was severe is unpersuasive. The "raw numbers" betray Appellant's claim that the STC's alleged misconduct was "numerous and varied and permeated" his findings argument. (App. Br. at 20). The STC's argument on the sexual assault charge spanned 162 lines – not including his rebuttal. (R. 1117-1125). Appellant points to 13 non-consecutive lines which he claims were improper. (App. Br. at 19). This is neither numerous nor varied and it did not permeate the STC's findings argument. Therefore, this factor weighs against finding prejudice.

B. The military judge's general instructions after argument by counsel cured any error in the STC's argument.

As explained above, because there was no error by the STC, there was no reason for the judge to interrupt counsel's argument or provide a specific curative instruction. But, as extra precaution, the judge gave another instruction after arguments by counsel which would have dispelled the minor allegedly improper statements. The judge told members that if there was any inconsistency between his instructions and what counsel said that the members "must accept [the judge's] statement as being correct. He reiterated, "Arguments by counsel are not evidence. Counsel are not witnesses and if the facts as you remember them differ from the way counsel state the facts, it is your memory of the facts that controls." (R. at 1155).

"Absent evidence to the contrary, this Court may presume that members follow a military judge's instructions." United States v. Stewart, 71 M.J. 38, 42 (C.A.A.F. 2012) (citation omitted). This Court has found that improper argument by counsel is "ameliorated" by the judge's instructions that were given before argument. United States v. Jones, 2015 CCA LEXIS 86, *39-40 (A.F. Ct. Crim. App. 13 March 2015). Here, on top of the instruction after argument, the members were also instructed on consent and reasonable mistake of fact as to consent prior to argument. (R. at 1105-1105). Like Jones, the instructions were available to the members during deliberation "unlike counsel's argument." 2015 CCA LEXIS at *40. Further, during argument the STC told the members to rely on the judge's instructions, not his argument. (R. at 1151). Therefore, there is no evidence to support that the members would have been influenced by the STC's minimal allegedly improper comments, and this factor weighs against finding prejudice.

C. The evidence supporting Appellant's conviction was strong.

Appellant's conviction is supported by AP's testimony and Appellant's confession that he penetrated AP without obtaining her consent. AP's testimony was corroborated by physical evidence that demonstrated he was not wearing a condom when he penetrated her and that he ejaculated on her leg. (R. at 770, Pros. Ex. 5). AP's testimony was credible. It is illogical that she would make up a story about being sexually assaulted but admit sex the night before was consensual. Nor did AP have a motive to fabricate. It is not as if AP reported after her "quasi-dating" sexual partner, ES, found out she had sex with Appellant. Instead, people only found out AP had sex with Appellant because she reported. This supports her credibility.

Finally, the defense's case was weak. As Appellant concedes, "the entirety of the defense's case was based in mistake of fact as to consent[.]" (App. Br. at 22). There was no evidence that supports that Appellant had an honestly held and objectively reasonable mistake of

fact as to consent. As the STC correctly highlighted, AP was not moving, speaking, or otherwise communicating with Appellant when he penetrated her. (R. at 769, 772, 825-827, 834-835). As explained in issue I, AP's prior sexual encounter with Appellant, sleeping in his bed, or Appellant's actions after he sexually assaulted AP do not support an objectively reasonable mistake of fact. Further, Appellant's admission that he should have gotten AP's consent before he penetrated her belies the notion that he honestly held a mistake of fact as to consent. Therefore, the defense's case was unsupported by the evidence. Because of this, Appellant has failed to meet his "burden to prove that there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 12 (internal quotation marks and citation omitted). The STC's 13 nonconsecutive lines of argument are not "so damaging that [this Court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." Fletcher, 62 M.J. at 184.

In conclusion, the STC's argument was not plain error. But even if it were, the STC's alleged misconduct was not severe and do not warrant reversal. Therefore, this Court should deny Appellant's requested relief.

CONCLUSION

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

[redacted]
HEATHER R. BEZOLD, Capt, USAF
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 February 2026.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 1
Airman Basic (E-1) **TYLIR D. CUNNINGHAM,** United States Air Force, *Appellant.*	)	No. ACM 40746
	)	25 February 2026

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

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Airman Basic (AB) Tylir D. Cunningham replies to the United States' Answer filed on 18 February 2026. AB Cunningham primarily rests on the arguments contained in his initial brief, filed on 20 January 2026, and submits the following additional arguments for the issues identified below.

Assignment of Error I.

The Government reframes Issue I to avoid engaging with the specific deficiencies of proof identified in AB Cunningham's brief. It attempts to avoid addressing the evidentiary gaps AB Cunningham raised as to the charged sexual act, the evidence contradicting lack of consent, and the Government's failure to disprove mistake of fact as to consent. Instead, the Government argues that (1) AB Cunningham failed to make a "specific showing of a deficiency in proof" sufficient to trigger factual sufficiency review because, despite identifying several deficiencies raised by AB Cunningham's brief, those deficiencies were not "clear" or "specific" enough for the Government's preference, and (2) even if review is triggered, AP's testimony—if believed—alone sustains the convictions. (Gov. Ans. at 16-17). Neither contention withstands scrutiny

under the record or Article 66(d)(1)(B), Uniform Code of Military Justice (UCMJ).

A. Airman Basic Cunningham made the precise "specific showing of a deficiency in proof" that the Government claims is absent.

The Government's threshold argument is that AB Cunningham's identified deficiencies of proof do not satisfy the "specific deficiency of proof" requirement contained in Article 66, UCMJ. Gov. Ans. at 16. It claims that the deficiencies are merely "general disagreement" with the verdict and lack merit under *United States v. Valencia*, 85 M.J. 529, 535 (N-M. Ct. Crim. App. 2024), *aff'd on other grounds* __ M.J. __, No. 25-0089/MC, 2025 CAAF LEXIS 966 (C.A.A.F. Nov. 24, 2025).[1] (Gov. Ans. at 16-17). That characterization misstates both AB Cunningham's argument and the governing standard.

AB Cunningham did not ask this Court to reweigh AP's credibility in the abstract. He identified concrete deficiencies tied to specific elements of the charged offenses and explained why, on balance, "the finding of guilty is against the weight of the evidence." Art. 66(d)(1)(B)(iii), UCMJ. Contrary to the Government's assertion, AB Cunningham's showing was consistent with *Valencia* and how this Court has engaged in factual sufficiency review previously. *Valencia*, 85 M.J. at 535; *see United States v. Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *23-25 (A.F. Ct. Crim. App. Aug. 15, 2025) (finding that an assertion that "[the victim] did not testify to a lack of consent

[1] The Court of Appeals for the Armed Forces (CAAF) affirmed *Valencia* not on the grounds the Government asserts this case stands for but because the Navy-Marine Corps Court of Criminal Appeals (NMCCA) determined that "[e]ven assuming that disagreement with a conviction based on largely witness testimony can constitute a deficiency in proof sufficient to trigger factual sufficiency review," the NMCCA was not "clearly convinced that the verdict [was] against the weight of the evidence." *Valencia*, 85 M.J. at 535 n.30; *compare* Valencia, __ M.J. __, No. 25-0089/MC, 2025 CAAF LEXIS 966, *with Valencia*, 85 M.J. at 535 n.30.

and even if she did, the Government did not disprove reasonable mistake of fact as to consent" triggered factual sufficiency review); *United States v. Slayton*, No. ACM 40583, 2025 CCA LEXIS 427, at *38 (A.F. Ct. Crim. App. Sep. 8, 2025) (Johnson, C.J., dissenting) (highlighting a witness's lack of credibility and an appellant's reasonable mistake of fact as to consent as potential specific showings that would trigger factual sufficiency review).

First, AB Cunningham identified a deficiency as to whether the charged sexual act even occurred in the way that AP claimed. (App. Br. at 9-10). That deficiency is grounded in AP's changing narrative about what occurred the night before and the morning of the act, and the physical implausibility of the alleged conduct occurring in the way that she claimed. (R. at 774-75, 767-69, 822-23, 828-29, 835). This is not a generalized credibility attack; it is a showing that the Government's proof of the actus reus itself is internally inconsistent and contradicted by other evidence.

AB Cunningham identified a deficiency as to the element of "without consent." (App. Br. at 8–16). This deficiency is based on AP's own testimony and conduct before, during, and after the alleged acts: her actions the next morning that demonstrate she acted no differently towards AB Cunningham than before the act, her consent to sexual conduct just hours prior to the alleged nonconsensual sex, her admitted lack of verbal or physical objection during the charged conduct, and her lie to AB Cunningham that she was actually asleep when she was, in fact, awake. (R. at 767-69, 816-17, 822-23, 828-29, 835-840). These facts directly bear on whether the Government disproved mistake of fact as to consent beyond a reasonable doubt, not merely on AP's general credibility. This is a distinct deficiency, and once mistake of fact was raised and

objectively supported, the Government bore the burden to disprove it beyond a reasonable doubt. Rule for Courts-Martial (R.C.M.) 916(b)(1); (R. at 1104). AB Cunningham explained why the surrounding circumstances, to include AP's conduct before, during, and immediately following the event prevent the Government from meeting that burden. (App. Br. at 14-18). These are precisely the type of element-specific deficiencies Article 66(d)(1)(B), UCMJ, contemplates. Treating them as impermissible "general disagreement" would collapse the statutory threshold into a nullity whenever the Government's case rests on a single witness.

B. The Government's attempt to bar factual sufficiency review misreads Valencia.

The Government relies heavily on *United States v. Hughes*, No. ACM 24066, 2026 CCA LEXIS 66, at *15 (A.F. Ct. Crim. App. Feb. 6, 2026), which quotes *Valencia,* to argue that AB Cunningham has not triggered factual sufficiency review. (Gov. Ans. at 16–17). Neither *Hughes* nor *Valencia* stand for the proposition that any challenge implicating credibility is per se insufficient, only that a factual sufficiency review requires identification of some specific deficiency of proof, not general disagreement with the factfinder's conclusion. Unlike the appellants in *Hughes* and *Valencia*, who asserted bare legal errors, 85 M.J. at 535, AB Cunningham specifically identified the elements at issue and tied credibility concerns to demonstrable proof failures: contradictory statements to law enforcement and other witnesses, attempts to coerce the stories of other witnesses, implausible mechanics of the alleged acts, and AP's own lies about whether she was asleep or awake. AB Cunningham did not limit his challenge to legal sufficiency or a bare assertion about whether the conduct qualified as an offense. He went beyond what the appellant raised in *Valencia* to identify

weaknesses in the evidence.

Furthermore, in *Valencia*, the NMCCA also found factual sufficiency review was not triggered because "[t]he testimony did not substantively conflict in major respects. The words used . . . were not in dispute. This case does not require us to resolve a credibility dispute as to what was said, or to otherwise resolve materially inconsistent evidence or conflicting testimony." 85 M.J. at 535. AB Cunningham's case is distinct because AP contradicted herself on matters that impeached her credibility. App. Br. at 5-6 (covering how AP lied to the nurse about having consensual sex immediately before the alleged assault, while also highlighting how AP misled her apparent boyfriend and friends). Where the Government's case hinges entirely on a single witness, and that witness's account is contradicted by other evidence and by her own conduct, factual sufficiency review is unquestionably permitted. *United States v. Downum*, No. 24-0156, 2025 CAAF LEXIS 828, at *15-16 (C.A.A.F. Sep. 30, 2025) (citing Article 66(d)(1)(B)(ii), UCMJ) ("[U]nder the new version of Article 66, UCMJ, the service courts are still authorized to 'weigh the evidence and determine controverted questions of fact.'").

Critically, it is after this specific deficiency is raised that this Court "weigh[s] the evidence and determine[s] controverted questions of fact." Art. 66(d)(1)(B)(ii), UCMJ. The Government attempts to bar factual sufficiency review by arguing that AB Cunningham's showing requires this Court to weigh the evidence first. (Gov. Ans. at 16-17). This is misleading and incorrect. Consistent with Article 66, UCMJ, AB Cunningham is making his "specific showing of a deficiency in proof" by identifying a deficiency in the evidence at trial associated with the elements and explaining "why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding."

Valencia, 85 M.J. at 535. His explanation goes into these credibility determinations to trigger factual sufficiency review, not to put the cart before the horse, as the Government argues.

C. The Government's merits analysis rests on a misstatement of consent law and a selective reading of the record.

The Government argues that AB Cunningham's sufficiency challenge also fails because it "demonstrates a misunderstanding of the law" regarding consent and improperly equates lack of resistance with consent. (Gov. Ans. at 25-27). That mischaracterizes AB Cunningham's argument and improperly relies on *United States v. Rodela*, 82 M.J. 521 (A.F. Ct. Crim. App. 2021), a case in which the facts are inapposite to AB Cunningham and AP's encounter.

In *Rodela*, the Court, considering "all the surrounding circumstances," found that the victim's consent and lack of resistance to the appellant rubbing her back in between bouts of her throwing up after drinking and resting her face on the toilet bowl did not create a reasonable mistake of fact as to consent to sexual conduct immediately following. *Id.* at 527-29. Prior to that incident, the appellant and victim were "best friends." *Id.* at 529. There was nothing in the record indicating prior consensual conduct. *Id.* The *Rodela* Court was unconvinced that the victim was even able to "manifest resistance to Appellant's actions" given her state of vomiting and laying on the toilet bowl. *Id.*

The comparison of AB Cunningham's case to that of *Rodela* is illogical. In *Rodela*, this Court recognized that when considering whether a mistake of fact as to consent was reasonable, a "rigid construct fails to recognize that the specific facts of each case drive the analysis." *Id.* at 527. By lumping the facts of this case in with a case

like *Rodela,* the Government is doing the very thing that this Court cautioned against. AB Cunningham did not argue that silence or lack of resistance equals consent. He argued that consent and mistake of fact must be assessed under "all the surrounding circumstances," as the statute requires. 10 U.S.C. § 920(g)(7)(C); (App. Br. at 15). Those circumstances include AP's conduct and attitude towards AB Cunningham prior to the alleged assault, that she brought up sex that night without prompting, and her "enthusiastic" participation in the sex just hours before the alleged assault. R. 895, 901-02; Gov. Ans. at 2. This is compounded by the absence of contemporaneous objection, particularly where AP herself testified that when she did express non-consent, AB Cunningham did not pressure her and complied with her requests, and she herself pursued AB Cunningham and then brought up sex when AB Cunningham had not even mentioned it. (R. at 895, 901–02).

This Court should equally reject the Government's attempt to reframe AB Cunningham's text messages to AP as an admission of guilt because he was merely responding to her lie. At trial, AP characterized AB Cunningham's text messages after the act in question as her "confront[ing]" him and him apologizing to her. The Government then argued that the text messages showed that AB Cunningham "own[ed] up to what he did" because "he [didn't] have time to think about oh, how am I going to get out of this." R. at 1121. On appeal, the Government falls victim to the same selective reframing of the record, arguing that AB Cunningham "admitted that he did not get consent before penetrating [AP]." Gov. Ans. at 6. The Government goes so far as to claim AB Cunningham's texts "prove that he knew he did not obtain AP's consent before he penetrated her." Gov. Ans. at 24. This completely ignores the reality

of the situation – that AB Cunningham's text messages came only after AP lied to him, claiming that she was asleep when she was not. His text messages merely demonstrate his actual shock at hearing the (unbeknownst to him) lie that AP was asleep when he believed—correctly—that she was awake. They are not an admission of guilt, and claiming otherwise is a mischaracterization. Moreover, the text messages are not the only evidence that AB Cunningham held an actual or subjective belief that she was consenting. His belief is clear from the Government's own evidence, including the sexual acts and her behavior towards him before the alleged assault.

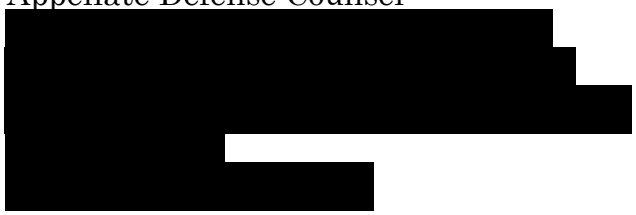
D. The Government's reliance on *Moore* is misplaced.

For the acts underlying the conviction, AP admitted she did not verbalize non-consent and, in fact, did nothing—she "let it happen." (R. at 835). All the surrounding circumstances—especially that AP "enthusiastically" initiated sex with AB Cunningham mere hours before and then went to sleep in the same bed—would lead a reasonable person to believe that there was consent. Gov. Ans. at 2. The Government erroneously analogizes this case to *United States v. Moore*, ___ M.J. ___, No. 25-0110, 2026 CAAF LEXIS 73, at *10 (C.A.A.F. Jan. 23, 2026). It claims that AP is like the alleged victim in *Moore* "because AP did not consent before she fell asleep, [she] could not consent when she was asleep," and did not consent when she woke up. Gov. Ans. at 18-19. This reliance on *Moore* is misplaced because, unlike the victim in that case, AP *testified that she had consensual sex with AB Cunningham right before they went to sleep*. R. at 763-64, 813-15. As the Government puts it, she "enthusiastically participated" in sexual conduct. Gov. Ans. at 2. The Government cannot rely on AP's "enthusiastic" behavior just hours prior to then somehow prove willful non-consensual

conduct elsewhere, without acknowledging that under the circumstances, her behavior caused a reasonable mistake of fact as to consent.

This Court should set aside the finding of guilty and the sentence.

Respectfully submitted,

JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 February 2026.

Respectfully submitted,

[redacted]

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