

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392 (rem)
<i>Appellee</i>)	
)	
v.)	
)	
Isaac J. SERJAK	)	NOTICE OF
Airman First Class (E-3)	)	DOCKETING
U.S. Air Force)	
<i>Appellant</i>)	

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

Accordingly, it is by the court on this 24th day of February, 2026,

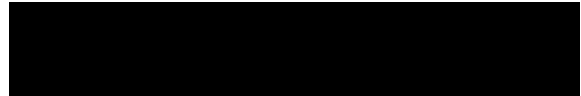
ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 2.

No briefs will be filed unless ordered by the court.



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (FIRST)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	10 February 2023
<i>Appellant.</i>)	

**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 his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 April 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 10 February 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (SECOND)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	27 March 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 May 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 98 days have elapsed. On the date requested, 150 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 27 March 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (THIRD)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	9 May 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 June 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 9 May 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 May 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (FOURTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	8 June 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 July 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Pursuant to Rule 12(a), Mr. Frank Spinner makes his notice of appearance as civilian appellate defense counsel. He has an active docket with cases pending before, *inter alia*, the Court of Appeals for the Armed Forces, the Army Court of Criminal Appeals, and the Navy-Marine Corps Court of Criminal Appeals. Civilian Counsel also has several administrative and criminal actions he is working that have not reached the appellate level. He has not finished his review of Appellant's case.

Military appellate counsel is currently assigned 23 cases; 12 cases are pending initial AOE's before this Court. Counsel has two Supreme Court petitions for certiorari and one petition/supplement before CAAF. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Five Air Force Court cases have priority over the present case:

1. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, UCMJ. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT,

Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has reviewed the entire record of trial and is drafting the AOE.

2. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id.* The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit \$1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The

Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

4. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ. R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id.* The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution

Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has not yet started his review of Appellant's case.

5. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

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

Respectfully submitted,

Frank J. Spinner
Attorney at Law

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division

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 Division on 8 June 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 9 June 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (FIFTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	10 July 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 August 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Defense Counsel has an active docket with cases pending before, *inter alia*, the Court of Appeals for the Armed Forces, this Court, the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, and federal courts. Civilian Counsel also has several administrative and criminal actions he is working that have not reached the appellate level, including cases originating in the AOR. He has not finished his review of Appellant's case.

Military appellate counsel is currently assigned 23 cases; 12 cases are pending initial AOE's before this Court. Counsel has three Supreme Court petitions for certiorari. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Four Air Force Court cases have priority over the present case:

1. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred

Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id.* The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has reviewed the allied papers and all exhibits.

2. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit \$1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

3. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of

reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ. R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id.* The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has not yet started his review of Appellant's case.

4. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic

forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 10 July 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 11 July 2023.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Isaac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 10 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 11th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **16 August 2023**.

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



FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION TO EXAMINE SEALED
<i>Appellee,</i>	)	MATERIAL
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3), ISAAC J. SERJAK,	)	No. ACM 40392
))	
United States Air Force,	)	10 July 2023
<i>Appellant.</i>)	

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel respectfully moves to examine the following sealed materials in Appellant’s record of trial:

1. Appellate Exhibit I, Defense Supplemental Notice and Motion to Admit Evidence in Accordance with M.R.E. 412, dated 8 December 2021
 - a. Presented or reviewed at trial: Record (R.) at: 19¹
2. Appellate Exhibit II, United States Response to Defense M.R.E. 412 Motion, dated 17 December 2021
 - a. Presented or reviewed at trial: R. at 21
3. Appellate Exhibit III, VC for H.C. Response to Defense Supplemental Motion to Admit Evidence in Accordance with M.R.E. 412, dated 17 December 2021
 - a. Presented or reviewed at trial: R. at 22.
4. Appellate Exhibit IV, VC Response to Defense’s and Government’s Motion to Admit Evidence Under M.R.E. 412, dated 17 December 2021
 - a. Presented or reviewed at trial: R. at 22
5. Appellate Exhibit V, Victim H.B.’s [*sic*] Joint Response to Government and Defense Supplemental Notice and Motion to Admit M.R.E. 412 Evidence, dated 15 December 2021
 - a. Presented or reviewed at trial: R. at 23
6. Appellate Exhibit VI, Government Motion to Admit Evidence Under M.R.E. 412, dated 8 December 2021

¹ The Military Judge collectively ordered Appellate Exhibits I-VII to be sealed. R. at 154.

- a. Presented or reviewed at trial: R. at 24
7. Appellate Exhibit VII, VC for H.C. Response to Government Motion to Admit Evidence under M.R.E. 412, dated 17 December 2021
 - a. Presented or reviewed at trial: R. at 25
8. Appellate Exhibit XLIII, Defense Motion to Suppress – M.R.E. 412, dated 21 February 2022
 - a. Presented or reviewed at trial: R. at 282
 - b. Ordered sealed: R. at 283
9. Appellate Exhibit XLIV, Government Response to Defense Motion to Suppress – M.R.E. 412, dated 24 February 2022
 - a. Presented or reviewed at trial: R. at 283
 - b. Ordered sealed: R. at 283
10. Appellate Exhibit XLV, H.C. Response to Defense Motion to Suppress – M.R.E. 412, dated 25 February 2022
 - a. Presented or reviewed at trial: R. at 284
 - b. Ordered sealed: R. at 284
11. Appellate Exhibit XLIX, Ruling on J.M. Defense Motion to Suppress – M.R.E. 412, dated 16 March 2022
 - a. Presented or reviewed at trial: R. at 285
 - b. Ordered sealed: R. at 285.
12. Appellate Exhibit L, Ruling on H.C. Defense Motion to Suppress – M.R.E. 412, dated 24 March 2022
 - a. Presented or reviewed at trial: R. at 286
 - b. Ordered sealed: R. at 286
13. Appellate Exhibit LI, Ruling on B.H. Defense Motion to Suppress – M.R.E. 412, dated 24 March 2022
 - a. Presented or reviewed at trial: R. at 286
 - b. Ordered sealed: R. at 287
14. Transcript pages 119 - 153

Although the Military Judge said he would issue an order sealing the above-mentioned items, it appears he did not. R. at 154. Trial Counsel, Defense Counsel, and the Military Judge presented or reviewed the above-mentioned items at trial at the record citations above.

Pursuant to R.C.M. 1113(b)(3)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel’s responsibilities[.]” A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of “the entire record.” To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine “the entire record”:

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide “competent appellate representation.” *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel’s responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the Defense Counsel’s motions were handled correctly.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 10 July 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	TO EXAMINE
v.	)	SEALED MATERIAL
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF)	
<i>Appellant.</i>	)	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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the exhibit listed in Appellant's motion, which was available to all parties at trial, so long as the United States can also review the sealed exhibit as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed material.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has first determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

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

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

United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 June 2023.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Isaac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 10 July 2023, counsel for Appellant submitted a Motion to Examine Sealed Materials. Specifically, counsel seeks to examine Appellate Exhibits I–VII, XLIII, XLIV, XLV, XLIX, L, LI, and transcript pages 119–153. The Government does not oppose the motion as long as its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

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

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

Accordingly, it is by the court on this 13th day of July, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view Appellate Exhibits I–VII, XLIII, XLIV, XLV, XLIX, L, LI, and transcript pages 119–153, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.



FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR LEAVE TO GIVE
<i>Appellee,</i>	)	NOTICE TO COURT
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	12 July 2023
<i>Appellant.</i>)	

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

Pursuant to Rules 3.1, 23(d), and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, Appellant moves for leave to give the following notice regarding sealed materials in the above-captioned case.

On 7 July 2023, while drafting this Appellant’s Motion to Examine Sealed Materials, Counsel discovered that the electronic transcript on WebDocs was missing the first 260 pages. Counsel emailed the court reporters to find out where the missing pages were located or to have them emailed to Counsel. The same day, one court reporter responded explaining that there were multiple court reporters on the case and that he would work with them to find the missing pages. Meanwhile, Counsel used the paper copy of the record to complete the Motion to Examine Sealed Materials, which he filed with this Court on 10 July 2023.

On 11 July 2023, the court reporter emailed both undersigned Counsel and Civilian Defense Counsel with the missing electronic transcript pages. When Counsel reviewed the .pdf file, he realized that it contained portions of the transcript that the military judge ordered to be sealed (pages 119-153). Counsel did not review the substance of the sealed pages; rather, Counsel only reviewed enough to verify that the pages were, in fact, sealed and then stopped reading. Counsel notified the court reporter of his error, notified JAJA and JAJG leadership, and this Court.

Undersigned Counsel confirmed with Civilian Defense Counsel that he did not view the sealed pages. Both Counsel have deleted the emails and files from their computers that contained the sealed portions.

Undersigned Counsel provides this notice per this Court's direction and out of an abundance of caution. Neither Counsel believes they are conflicted from further review of this case generally, or the sealed materials specifically.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant leave to file this notice and rule in Appellant's favor for his previously filed Motion to Examine Sealed Materials.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 12 July 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (SIXTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	8 August 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 September 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before, *inter alia*, the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, and this Court. Civilian Counsel also has several administrative and criminal actions he is working that have not reached the appellate level. He is actively reviewing the ROT.

Military appellate counsel is currently assigned 26 cases; 14 cases are pending initial AOE's before this Court. Counsel has two Supreme Court petitions for certiorari. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Three Air Force Court cases have priority over the present case:

1. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit \$1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request

for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel is finalizing the AOE for submission.

2. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ. R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id.* The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution

Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has started an initial review of the case.

3. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant’s request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 8 August 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 9 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (SEVENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	8 September 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 October 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before, *inter alia*, the Army Court of Criminal Appeals and this Court. Civilian Counsel also has several administrative and criminal actions he is working that have not reached the appellate level. His cases include federal court cases and cases arising overseas. He is actively reviewing the ROT and has started drafting the AOE.

Military appellate counsel is currently assigned 27 cases; 14 cases are pending initial AOE's before this Court. Counsel has two Supreme Court petitions for certiorari, one case pending a CAAF Supplement, and a CAAF oral argument at the end of October. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two Air Force Court cases have priority over the present case:

1. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ. R. at 209, 849. The

Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id.* The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has reviewed the allied papers, prosecution exhibits, defense exhibits, and appellate exhibits. Contemporaneously with this motion, Counsel filed a motion to view the sealed materials in this case.

2. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic

forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 8 September 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (EIGHTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	5 October 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 November 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before, *inter alia*, the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, and this Court. Civilian Counsel also has several administrative and criminal actions he is working that have not reached the appellate level. He is actively reviewing the ROT and is drafting the AOE.

Military appellate counsel is currently assigned 24 cases; 14 cases are pending initial AOE's before this Court. Counsel has a Supreme Court petition for certiorari, one case pending a CAAF Supplement, and a CAAF oral argument on 25 October 2023. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two Air Force Court cases have priority over the present case:

1. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ. R. at 209, 849. The

Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id.* The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has reviewed the allied papers, prosecution exhibits, defense exhibits, and appellate exhibits. Counsel has reviewed the entire record of trial and is drafting the AOE.

2. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic

forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 5 October 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (NINTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	7 November 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 December 2023**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before the Army Court of Criminal Appeals, including a 7-day suspension for two specified issues. Civilian Counsel also had an Army FEB and pre-trial preparations for an upcoming court-martial. He has several Boards of Inquiry. He is actively reviewing the ROT and is drafting the AOE.

Military appellate counsel is currently assigned 24 cases; 13 cases are pending initial AOE's before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Since his last extension of time request, Counsel has:

1. Prepared for, and delivered, oral argument at the CAAF in *United States v. Rocha*, No. 23-0134/AF, 2023 CAAF LEXIS 181 (C.A.A.F. Mar. 31, 2023)
2. Prepared for, and participated, in five moots as a judge
3. Drafted and filed the AOE for *United States v. Navarro Aguirre*, ACM 40354

One Air Force Court case has priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the

sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

Given the number of EOTs granted in this case, if this Court were to order a status conference, Counsel will tell the court that he has the following deadlines that take precedent over, or must be completed in conjunction with, Appellant's case:

1. Supreme Court Petition for Writ of Certiorari due in *United States v. Cunningham*, ___ M.J. ___, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Application for Extension Previously Granted*. Counsel is the only attorney assigned to the case and will be petitioning on two issues (unanimous verdict and improper victim impact statement). Counsel's petition is due the publishing company on or about 4 December 2023.
2. CAAF Supplement to Petition due in *United States v. Johnson*, No. 24-0004/AF, 2023 CAAF LEXIS 714 (C.A.A.F. Oct. 16, 2023), *Extension of Time Previously Granted*. Counsel is the only attorney assigned to the case and will be petitioning for multiple issues. The Supplement is due on 22 November 2023 and "absent extraordinary circumstances, no further extension of time will be granted."
3. CAAF Petition due on 29 November in *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS _____ (A.F. Ct. Crim. App. 5 Oct. 2023) (unpub. op.).

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 7 November 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (TENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	7 December 2023
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 January 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before the Army Court of Criminal Appeals. Civilian Counsel is also preparing for an Army GCM, a BOI, and an FEB. He has responded to an order from the AFBCMR and prepared for potential federal litigation in two cases. Counsel intends to keep working on the AOE this month.

Military appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOE's before this Court. Counsel has one pending CAAF Supplement. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Since his last extension of time request, Counsel has:

1. Drafted and delivered training for District 1 Area Defense Counsels
2. Prepared for, and participated in, five moots as a judge
3. Drafted and filed a two-issue, 40-page CAAF supplement in *United States v. Johnson*, No. 24-0004/AF, 2023 CAAF LEXIS 714 (C.A.A.F. Oct. 16, 2023)
4. Drafted and filed a one-issue, 23-page CAAF petition and supplement in *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. 5 Oct. 2023) (unpub. op.)
5. Drafted a two-issue, 50-page Supreme Court petition for certiorari in *United States v. Cunningham*, __ M.J. __, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Application for Extension Previously Granted*.

One Air Force Court case has priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted

Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has started to review this case.

Given the number of EOTs granted in this case, if this Court were to order a status conference, Counsel will tell the court that he has the following deadlines that take precedent over, or must be completed in conjunction with, Appellant's case: Only the above-listed case Air Force Court case, *United States v. Ramirez*. Barring unforeseen circumstances, Counsel expects to complete a large swath of work for *United States v. Ramirez* in the next 30 days.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 7 December 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 8 December 2023.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Isaack J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 7 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant’s assignments of error (AOE). The Government opposes the motion.

The court notes that since Appellant’s Motion for Enlargement of Time (Seventh), military appellate defense counsel indicated civilian counsel has been “actively reviewing the [record of trial] and has started drafting the AOE.” In Appellant’s current motion, civilian counsel “intends to keep working on the AOE this month,” and appellate military defense counsel has “not yet started his review of Appellant’s case.” It is not clear as to how much progress has been made by civilian counsel at this time, or whether the 7 December 2023 motion is likely to be Appellant’s last EOT request.

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 December, 2023,

ORDERED:

Appellant’s Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **13 January 2023**.

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



FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (ELEVENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	6 January 2024
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 February 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 383 days have elapsed. On the date requested, 420 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before the Army and Navy-Marine Corps Courts of Criminal Appeals (with a reply brief due next week in *United States v. Salinas*) and the AFBCMR. In the last thirty days Civilian Counsel prepared and filed motions in *United States v. Tyler*, an Army GCM, followed by travel for one week for a motions hearing at Fort Knox, KY. Counsel also prepared and submitted additional matters in an Army FEB at JB Lewis/McChord, WA. Counsel prepared and submitted responses to Air Force Advisory Opinions in a case pending before the AFBCMR. Counsel worked on issues related to *United States v. Aquino*, a case scheduled for a final hearing the Federal District in Savannah, GA, on 16 January 2023. Next week Counsel intends to complete a final draft of the portion of the AOE brief related to a complex Unlawful Command Influence issue raised at trial. Work will then begin on a factual insufficiency issue. In the last week, Counsel traveled to Texas for a New Year's Day visit along with attending to personal family matters.

Military appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOE's before this Court. Counsel has three pending CAAF petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Since his last extension of time request, Counsel has:

1. Finalized and filed a two-issue, 50-page Supreme Court petition for certiorari in *United States v. Cunningham*, 83 M.J. 367, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Petition for Writ of Certiorari filed*
2. Reviewed approximately 700 transcript pages in *United States v. Ramirez*, No. ACM 40373
3. Took 9 days of leave for Christmas vacation
4. Prepared for, and participated in, three moots as a judge

One Air Force Court case has priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant’s request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Except for sealed materials, Counsel has finished his review of this case. Counsel filed a motion to view sealed materials on 3 January 2024 which has not yet been ruled on. In his last EOT motion on 3 January 2024, which was granted, Counsel forecasted to this Court that he does not anticipate needing another EOT unless unforeseen circumstances arise.

Given this Court’s order on 12 December 2023, stating that further requests for an extension of time “may necessitate a status conference,” Counsel states the following: He has no planned leave for the month of January and intends to finish *United States v. Ramirez*, No. ACM

40373 in the next month. The only task that Counsel must complete in conjunction with *Ramirez* is a CAAF Supplement in *United States v. Lampkins*, No. 24-0069, 2023 CAAF Lexis 896 (C.A.A.F. Dec. 28, 2023), *Application for Extension Previously Granted*. This supplement is due on 18 January 2024. Following these tasks, *Serjak* will be Counsel's number one priority.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 6 January 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

First, the United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one 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 420 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

Second, it appears Appellant's Military counsel has not completed review of the record of trial at this late stage of the appellate process. It further appears Appellant's civilian defense counsel has an "active docket" with the other service CCAs, and has no projected timeline for beginning, much less concluding, review of this particular case. Based on the representations by counsel, while military counsel may address this case shortly, there does not seem to be any realistic prospect for civilian counsel to do so.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 8 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (TWELFTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	5 February 2024
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 March 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 450 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before the Army and Navy-Marine Corps Courts of Criminal Appeals and the AFBCMR. In the last thirty days Civilian Counsel prepared and filed motions in *United States v. Tyler*, an Army GCM for an Idaho Guardsman. After the Military Judge in *Tyler* ruled in the client's favor, the Government motioned for reconsideration. Civilian Counsel spent significant time responding to the Government given that the issue was complex and implicated the Secretary of the Army's approval authority to confine Guard members. As mentioned in previous EOTs, counsel spent a week in Federal District Court in Savannah, GA, for *United States v. Aquino*. Finally, Counsel unexpectedly gained a new client facing a Guard discharge board which left counsel only a week to prepare for the board. The Client was unable to reach his Trial Defense Services attorney, so Civilian Counsel facilitated communication and prepared for the board alone. Counsel was given a last-minute continuance for the board. For *Serjak* Counsel has moved on from the UCI issue to draft factual and legal sufficiency. Civilian Counsel intends to spend the next three weeks on *Serjak* as his calendar is open.

Military appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOE's before this Court. Counsel has one pending Supreme Court Reply Brief (Answer due to Court and Counsel on 20 February 2024) and four pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate

review, extensions of time, and consents to this extension of time. Since his last extension of time request, Counsel has:

1. Written and filed a two issue, 310-page CAAF Supplement in *United States v. Lampkins*, No. 24-0069, 2023 CAAF Lexis 896 (C.A.A.F. Dec. 28, 2023)
2. Finished reviewing the record in *United States v. Ramirez*, No. ACM 40373 and drafted (thus far) a 6-issue 37-page AOE with an originally drafted, 50+ page Appendix.
3. Prepared for, and participated in, three moots as a judge

Two Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant’s request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has reviewed the entire record of trial and finalizing the AOE for submission to this Court on Thursday, 8 February 2024.

2. *United States v. Ellis*, No. ACM 40430¹ – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted

¹ On 29 January 2024, this Court (Panel 1) approved Appellant’s request for EOT 9. Without prior notice and without any status conferences, this Court said, “Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements

Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.² R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id.*; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet started his review of this case.

Given this Court's order on 12 December 2023, stating that further requests for an extension of time "may necessitate a status conference," Counsel states the following: Counsel intends to submit *United States v. Ramirez*, No. ACM 40373 Thursday, 8 February 2024. Given this Court's order that *Ellis* must be completed by 1 March 2024, Counsel will begin and complete that case by the deadline. In conjunction with *Ellis*, Counsel will respond to the Solicitor General's Answer in *United States v. Cunningham*, 83 M.J. 367, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Petition for Writ of Certiorari filed* which is due on 20 February 2024 to the Supreme Court and Counsel. Counsel must also complete a four issue CAAF Petition and Supplement in *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023). The Petition is due on or about 8 February 2024 with the Supplement due 20 days thereafter (assuming the CAAF grants one extension request).

of time absent exceptional circumstances." As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

² Various charges and specifications were withdrawn and dismissed with prejudice.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 5 February 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

First, 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 450 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities.

Second, it appears Appellant's Military counsel has not started review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 February 2024.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
)	
v.)	
	)	ORDER
Issac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
Appellant	)	Panel 1

On 5 February 2024 counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

This court held a status conference on 8 February 2024 to discuss the progress of Appellant’s case. Ms. Mary Ellen Payne represented the Government, and Mr. Frank Spinner and Major (Maj) Spencer Nelson represented Appellant. Lieutenant Colonel Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division.

Appellant’s civilian counsel, Mr. Spinner, informed the court that Appellant’s case is his priority, and he has begun drafting several assignments of error. Mr. Spinner further emphasized, as was in Appellant’s motion, that he “intends to spend the next three weeks on [Appellant’s case] as his calendar is open.” While Maj Nelson “has not yet started his review of Appellant’s case” to date, Mr. Spinner informed the court that Maj Nelson will be assisting him with reviewing the brief and examining sealed materials. Maj Nelson indicated Appellant’s case is his second case in order of priority.

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 9th day of February, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **13 March 2024**.

Appellant’s counsel is advised that given the nature of this case and the number of enlargements granted thus far, any further requests for enlarge-

ment of time may necessitate another status conference in order for counsel to provide an update as to their progress on Appellant's case.



FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (THIRTEENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	29 February 2024
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his thirteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 April 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 437 days have elapsed. On the date requested, 480 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel has an active docket with cases pending before the Army and Navy-Marine Corps Courts of Criminal Appeals and the AFBCMR. In the last thirty days Civilian Counsel finished, and just returned from, *United States v. Tyler*, an Army GCM for an Idaho Guardsman. Civilian Counsel is traveling to Texas to represent a new client facing a Guard discharge board, which is taking place this weekend. Civilian Counsel has made significant written progress on the issue of factual and legal sufficiency. Civilian Counsel has no other cases scheduled for March except for the current case. As such, Civilian Counsel anticipates making significant headway on the AOE.

Military appellate counsel is currently assigned 23 cases; 11 cases are pending initial AOE's before this Court. Counsel four pending CAAF Petitions and Supplements. Counsel has started his review of this case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Since his last extension of time request, Counsel has:

1. Filed a 116-page AOE in *United States v. Ramirez*, No. ACM 40373 and various versions of a Motion to Exceed Page Limit as the original was returned with no action from this Court
2. Petitioned the CAAF and finalized a four-issue, 48-page CAAF Supplement in *United States v. Casillas*, No. 24-0089/AF, 2024 CAAF LEXIS 88 (C.A.A.F. Feb. 13, 2024)
3. Reviewed the record and filed a Motion for Withdrawal from Appellate Review and Motion to Attach in *United States v. Ellis*, No. ACM 40430
4. Prepared for, and participated in, two moots as a judge

One Air Force Court case has priority over the present case:

1. *United States v. Ellis*, No. ACM 40430¹ – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.² R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id.*; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant’s requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is not confined. On 26 February 2024, Counsel filed a Motion for Withdrawal from Appellate Review and Motion to Attach Document which this Court has not yet acted upon.

Given this Court’s order on 9 February 2024, stating that further requests for an extension of time “may necessitate another status conference,” Counsel states the following: He intends to finish reviewing *Serjak* and start drafting the AOE in the next 30 days. Concurrent with *Serjak*, Counsel must incorporate feedback and file *Casillas* with CAAF. After that, Counsel must petition the CAAF and write two CAAF Supplements also concurrently with his review of *Serjak*.

¹ On 29 January 2024, this Court (Panel 1) approved Appellant’s request for EOT 9. Without prior notice and without any status conferences, this Court said, “Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances.” As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

² Various charges and specifications were withdrawn and dismissed with prejudice.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 29 February 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

First, 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 480 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 2 months combined for the United States and this Court to perform their separate statutory responsibilities.

Second, it appears Appellant's Military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Isaac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 29 February 2024 counsel for Appellant submitted a Motion for Enlargement of Time (Thirteenth) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

The court has considered Appellant’s motion, the Government’s opposition, case law, and this court’s Rules of Practice and Procedure. The court strongly considered that civilian appellate defense counsel has no other cases scheduled for March apart from this case and that this is military defense counsel’s number one priority before this court. Therefore, this court expects this to be Appellant’s final enlargement of time.

Accordingly, it is by the court on this 5th day of March, 2024,

ORDERED:

Appellant’s Motion for Enlargement of Time (Thirteenth) is **GRANTED**. Appellant shall file any assignments of error not later than **12 April 2024**.

Appellant’s counsel is advised that given the nature of this case and the number of enlargements granted thus far, any future requests shall detail exceptional circumstances necessitating another enlargement of time.



FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION TO EXAMINE SEALED
<i>Appellee,</i>	)	MATERIAL
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	25 March 2024
<i>Appellant.</i>)	

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel respectfully moves to examine the following sealed materials in Appellant’s record of trial:

1. Appellate Exhibit I, Defense Supplemental Notice and Motion to Admit Evidence in Accordance with M.R.E. 412, dated 8 December 2021 [SEALED]¹
 - a. Presented or reviewed at trial: R. at 19
 - b. Ordered sealed: R. at 154
2. Appellate Exhibit II, United States Response to Defense MRE 412 Motion, dated 17 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 21
 - b. Ordered sealed: R. at 154
3. Appellate Exhibit III, VC for H.C. Response to Defense Supplemental Motion to Admit Evidence in Accordance with M.R.E. 412, dated 17 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 21-22
 - b. Ordered sealed: R. at 154
4. Appellate Exhibit IV, VC Response to Defense’s and Government’s Motion to Admit Evidence Under M.R.E. 412, dated 17 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 22
 - b. Ordered sealed: R. at 154
5. Appellate Exhibit V, Victim HB’s [sic] Joint Response to Government and Defense Supplemental Notice and Motion to Admit M.R.E. 412 Evidence, dated 15 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 23
 - b. Ordered sealed: R. at 154

¹ Undersigned Counsel copied the titles from the Exhibit Listing in Volume Two of the Record of Trial.

6. Appellate Exhibit VI, Government Motion to Admit Evidence Under MRE 412, dated 8 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 24
 - b. Ordered sealed: R. at 154
7. Appellate Exhibit VII, VC for H.C. Response to Government Motion to Admit Evidence under MRE 412, dated 17 December 2021 [SEALED]
 - a. Presented or reviewed at trial: R. at 25
 - b. Ordered sealed: R. at 154
8. Appellate Exhibit XXIII, Memorandum for Record From: A1C Isaac J. Serjak, dated 5 January 2022
 - a. Presented or reviewed at trial: R. at 158-159
 - b. Ordered sealed: Page placeholder for exhibit: “Appellate Exhibit XXIII was ordered sealed by the Military Judge in an E-mail correspondence with Trial Counsel. The Transcript and Exhibit Index does not reflect that appellate exhibit XXIII was ordered sealed. It is to remain sealed and opened only by order of the court. Appellate Exhibit XXIII is found in Volume 4 of the original ROT.”
9. Appellate Exhibit XLIII, Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ***
 - a. Presented or reviewed at trial: R. at 282
 - b. Ordered sealed: R. at 283
10. Appellate Exhibit XLIV, Government Response to Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ***
 - a. Presented or reviewed at trial: R. at 283
 - b. Ordered sealed: R. at 283
11. Appellate Exhibit XLV, HC Response to Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ***
 - a. Presented or reviewed at trial: R. at 283
 - b. Ordered sealed: R. at 284
12. Appellate Exhibit XLIX, Ruling on JM Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ*** dtd 16 Mar 22, 9 pgs
 - a. Presented or reviewed at trial: R. at 285
 - b. Ordered sealed: R. at 285
13. Appellate Exhibit L, Ruling on HC Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ*** dtd 24 Mar 22, 4 pgs
 - a. Presented or reviewed at trial: R. at 286
 - b. Ordered sealed: R. at 286
14. Appellate Exhibit LI, Ruling on BH Defense Motion to Suppress – M.R.E. 412 ***SEAL BY MJ*** 24 Mar 22, 4 pgs
 - a. Presented or reviewed at trial: R. at 286
 - b. Ordered sealed: R. at 287.
15. Transcript pages:
 - a. 119 – 153

The Military Judge did not issue an order sealing the relevant exhibits; rather, he ordered them to be sealed during the court-martial at the above noted record citations. Trial Counsel,

Defense Counsel, and the Military Judge presented or reviewed these materials at trial at the above noted citations. *Id.*

Pursuant to R.C.M. 1113(b)(3)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel’s responsibilities[.]” A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of “the entire record.” To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine “the entire record”:

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide “competent appellate representation.” *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel’s responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the Defense Counsel’s motions were handled correctly.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 25 March 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	TO EXAMINE
v.	)	SEALED MATERIALS
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF)	
<i>Appellant.</i>	)	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 responds to Appellant's Motion to Examine Materials. The United States does not object to Appellant's counsel reviewing the named appellate exhibits and sealed transcript pages, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel, and to the Air Force Appellate Defense Division on 25 March 2024.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Isaac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 25 March 2024, counsel for Appellant submitted a Motion to Examine Sealed Materials, requesting Appellant’s defense counsel be allowed to examine sealed Appellate Exhibits I–VII, XXIII, XLIII–XLV, and XLIX–LI and sealed trial transcript pages 119–153. The sealed exhibits were presented at trial and the sealed transcript pages were part of closed sessions in which those exhibits were discussed. The court finds that the sealed materials were reviewed by trial and defense counsel at Appellant’s court-martial.

On 25 March 2024, the Government filed a response to Appellant’s Motion to Examine Sealed Materials. The Government does not oppose the motion, so long as appellate government counsel are also permitted to review the sealed materials as necessary to respond to any assignment of error that refer to the sealed material.

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

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel’s responsibilities. This court’s order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 27th day of March 2024,

ORDERED:

Appellant’s Motion to Examine Sealed Materials is **GRANTED**. Appellate defense counsel and appellate government counsel may **view Appellate Exhibits I–VII, XXIII, XLIII–XLV, and XLIX–LI and transcript pages 119–153**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.



FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF
<i>Appellee,</i>	)	TIME (FOURTEENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	3 April 2024
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his fourteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 May 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 471 days have elapsed. On the date requested, 510 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant’s request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant’s request for waiver of all automatic forfeitures for

six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Civilian Appellate Defense Counsel's work on this case has been interrupted by clemency and parole season at the USDB. Civilian Counsel has four clients who are filing requests for parole. The USDB sets dates for submitting matters and they do not grant delays. They set dates for the local boards at the USDB and then submit matters to the Air Force and Army Clemency and Parole Boards. These dates cannot be changed, so Civilian Counsel is bound to meet the deadlines the USDB sets. One particular case has been challenging and required the involvement of the Command Judge Advocate at the USDB to correct an error that was made in the case along with obtaining Civilian Counsel's medical and behavioral health records while he was temporarily transferred to a Federal facility that manages health care for inmates. Finally, Civilian Counsel is working on a CAAF supplement in *US v Adams*, an Army case that has been on appeal multiple times, and has had two rehearings with thousands of pages of transcript from the original trial along with the rehearings.

Military appellate counsel is currently assigned 21 cases; 10 cases are pending initial AOE's before this Court. Counsel has two pending CAAF Petitions and Supplements. Counsel has reviewed all exhibits (except for sealed materials), has received permission from this Court to review sealed materials, and has reviewed 700 pages of transcript. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Counsel specifically briefed Appellant on this extension of time request, and not only does he consent, but he also asks that this Court grant the extension. Appellant wants to receive the full benefit of

undersigned counsel reviewing his case and advising him accordingly. Since his last extension of time request, Counsel has:

1. Drafted and filed a five-issue, 38-page CAAF Supplement in *United States v. Casillas*, No. 24-0089/AF, 2024 CAAF LEXIS 88 (C.A.A.F. Feb. 13, 2024)
2. Drafted and filed a two-issue, 24-page CAAF Supplement in *United States v. Saul*, No. 24-0098/AF, 2024 CAAF LEXIS 114 (C.A.A.F. Feb. 26, 2024)
3. Drafted and filed a three-issue, 238-page CAAF Supplement in *United States v. Fernandez*, No. 24-0101/AF, 2024 CAAF LEXIS 140 (C.A.A.F. Mar. 7, 2024)
4. Attended a one-week TDY at Maxwell Air Force Base for the Accident Investigation Board Course, in preparation for counsel's upcoming PCA.
5. Moved this Court to review the sealed materials in this case and reviewed 700 pages of transcript.

No cases have priority over the present case.

Given this Court's order on 5 March 2024, stating that further requests for an extension of time "shall detail exceptional circumstances necessitating another enlargement of time," Counsel states the following: First, counsel was required to attend the Accident Investigation Board Course at Maxwell, AFB, Alabama, for his next assignment. This was a five-day class that prevented him from working on any appellate matters during the duty day. Second, Appellant consents to this request and wants this Court to grant it so that he can be assured his counsel had sufficient time to review his case and advocate on his behalf via the Assignment of Errors. Third, on 25 March, the Court of Appeals for the Armed Forces granted counsel's extension of time request to file a Supplement in *United States v. Jackson*, No. 24-0106/AF, 2024 CAAF LEXIS 178 (C.A.A.F. Mar. 25, 2024) until 16 April 2024. However, the CAAF stated that, "No further extensions of time will be granted in this case." As such, counsel needs to work the *Jackson* CAAF Supplement concurrently with this case.

Counsel is confident that he will be able to submit this case to this Court on or before the requested extension date. Counsel will not be seeking another extension of time in this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division

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 Division on 3 April 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

First, 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 510 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. If this Enlargement of Time is granted, the Appellant's delay will have consumed nearly the entirety of the 18-month standard for this Court to issue a decision, which leaves virtually no time for the United States and this Court to perform their separate statutory responsibilities.

Finally, while Appellant's military counsel cites civilian counsel's case work at the United States Disciplinary Barracks (USDB), the fact that civilian defense counsel has taken on a large number of clients at the USDB and not completed Appellant's brief in this case prior to that facility's deadlines is not sufficient justification for a delay of this magnitude.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 4 April 2024.

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

**IN THE UNITED STATES AIR FORCE COURT OF
CRIMINAL APPEALS**

UNITED STATES,
Appellee,

v.

ISAAC J. SERJAK,
Airman First Class (E-3),
United States Air Force
Appellant.

No. ACM 40392

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES)	BRIEF ON BEHALF OF
<i>Appellee,</i>	)	APPELLANT
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force	)	13 May 2024
<i>Appellant</i>)	

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

ASSIGNMENTS OF ERROR

I.

WHETHER A1C SERJAK WAS THE VICTIM OF SELECTIVE PROSECUTION WHEN COMMAND WROTE, “THERE COULD BE BACKLASH” IF A1C SERJAK “HAS THE OPPORTUNITY TO GET HIS STORY OUT OF ‘I (WHITE MALE) WAS THE VICTIM FIRST, NOW THE BLACK FEMALE IS THE VICTIM’”?

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT ANY TAIN FROM THE UNLAWFUL COMMAND INFLUENCE THAT OCCURRED WAS OVERCOME WHEN: 1) THIRD AIR FORCE INFLUENCED THE BASE LEGAL OFFICE TO CHANGE ITS OPINION ON THE CASE TWICE; 2) THE BASE LEGAL OFFICE TOLD THE BASE COMMAND ABOUT THE UCI; AND 3) THE BASE LEGAL OFFICE THEN ADVISED COMMAND PURSUANT TO THIRD AIR FORCE’S INFLUENCE?

III.

WHETHER THE GOVERNMENT’S REPREFERRAL OF CHARGES SOLELY IN RESPONSE TO EVIDENCE OF UNLAWFUL COMMAND INFLUENCE IS “SUBTERFUGE” OR AN “IMPROPER REASON” UNDER *UNITED STATES V. HENDRIX*, 77 M.J. 454 (C.A.A.F. 2018) AND THUS SHOULD NOT RESET THE SPEEDY TRIAL CLOCK?

IV.

WHETHER A1C SERJAK’S CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT?

V.

WHETHER ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), ARE UNCONSTITUTIONALLY VAGUE BECAUSE THEY FAIL TO PUT DEFENDANTS ON FAIR NOTICE OF THE SPECIFIC CHARGE AGAINST THEM?

VI.

AS APPLIED, WHETHER ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), GAVE A1C SERJAK FAIR NOTICE WHEN THE MILITARY JUDGE OVERRULED DEFENSE COUNSEL’S OBJECTION TO TRIAL COUNSEL’S ARGUMENT ON UNCHARGED THEORIES OF LIABILITY?

VII.

WHETHER THE GOVERNMENT GAVE A1C SERJAK “FIVE DAYS FROM RECEIPT” OF B.H.’S SUBMISSION TO THE CONVENING AUTHORITY “TO SUBMIT ANY MATTERS IN REBUTTAL” PRIOR TO THE CONVENING AUTHORITY TAKING ACTION?

VIII.

AS APPLIED TO A1C SERJAK, WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY “DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION’S HISTORICAL TRADITION OF FIREARM REGULATION”¹ WHEN A1C SERJAK WAS NOT CONVICTED OF AN OFFENSE INVOLVING A FIREARM?

STATEMENT OF THE CASE

On 29 July 2022, contrary to his pleas, officer and enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Airman First Class (A1C) Serjak of one charge and one specification of assault against B.H., in violation of Article 128

¹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

Uniform Code of Military Justice (UCMJ)²; one specification of sexual assault against H.C. in violation of Article 120, UCMJ;³ one specification of sexual assault against J.M., in violation of Article 120, UCMJ; and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. *Convening Authority Decision on Action*.

STATEMENT OF FACTS

1. Introduction and Overview

A1C Serjak was convicted of only one specification against each victim, despite the Government charging him with multiple specifications. *Charge Sheet*. Specifically, members found A1C Serjak guilty of holding B.H.'s wrists above her head, but acquitted him of kissing her neck and touching her buttocks; members found A1C Serjak guilty of touching H.C.'s buttocks, but found him not guilty of touching her on another occasion; finally, members found A1C Serjak guilty of sexually assaulting J.M. and wrongfully agreeing with his First Sergeant's conclusion that he—A1C Serjak—was sexually assaulted by J.M. making him the victim, not J.M. *Charge Sheet*. R. at 897.

² Enlisted members acquitted A1C Serjak of one specification of unlawfully touching B.H. and one specification of sexual assault against B.H. in violation of Articles 128 and 120, UCMJ, respectively.

³ Enlisted members acquitted A1C Serjak of one specification of unlawfully touching H.C. in violation of Article 128, UCMJ.

J.M. is black, female, and bisexual. R. at 36, 246, 1017. When command switched A1C Serjak from the Victim to the Subject, a Commander's Critical Information Report was sent up the chain of command. App. Ex. X, attachment 6. Command was worried that A1C Serjak would be able to "get his story out of 'I (white male) was the victim first, now the black female is the victim.'" *Id.* Command was concerned this could cause "backlash." *Id.*

A1C Serjak's commander initially decided not to prefer charges against him and she proceeded with administrative action; however, after feeling "pressured" by the Numbered Air Force she reluctantly preferred charges. R. at 65. Upon realizing that this constituted unlawful command influence (UCI), the Government withdrew the charges that the commander preferred and repreferred anew with a different commander. R. at 66, 76. These newly preferred charges, which copied the original charges, constitute A1C Serjak's convictions.

2. B.H. Gave A1C Serjak "Access" to her Neck and did not say "No" or "Stop"

B. H. and A1C Serjak were in the same squadron and met each other at a squadron training. R. at 739-40. After that training, B.H. and A1C Serjak engaged in "banter" around the base and they eventually exchanged phone numbers. R. at 741. They both had a love for cars and A1C Serjak offered to help B.H. with her broken down car. R. at 742-43. B.H. gave A1C Serjak her Snapchat. R. at 743.

On the night in question, A1C Serjak asked if he could "come over" and B.H. agreed, texting him "sure." R. at 745. A1C Serjak sat on B.H.'s bed because B.H. was sitting in the only chair in her dorm room. R. at 755. B.H. and A1C Serjak talked to each other about multiple things, including sexuality. R. at 800-01. They started to watch a movie and B.H. voluntarily agreed to sit with A1C Serjak on her bed. *Id.* A1C Serjak moved closer to B.H., put his head on her chest, and put his arm around her. R. at 807-08. B.H. did not say "no" or "stop." *Id.* A1C Serjak asked B.H.

if she could give him a massage and she started to pat his upper back. R. at 757-58. A1C Serjak explained to B.H. that he was lonely and B.H. sympathized with him. R. at 809.

A1C Serjak then got up, got out of bed, and turned the movie off. R. 809. A1C Serjak got back into the bed with B.H. without objection. R. at 810. B.H. started to massage A1C Serjak again and was “comforting” him. R. at 811. A1C Serjak then moved closer to B.H. and started kissing her neck. R. at 812. B.H. did not say “no,” “stop,” or push A1C Serjak away. *Id.* B.H. turned her neck to the side and gave A1C Serjak “access” to her neck. *Id.* During this “access” A1C Serjak kissed and sucked B.H.’s neck. R. at 813. During this kissing, B.H. said—out loud—“Isaac,” which is A1C Serjak’s first name. R. at 816, 818-19. During this kissing, B.H. did not say “no,” “stop,” or push A1C Serjak away. R. at 819-20.

At this point in time, A1C Serjak’s phone rang. R. at 820. He stopped kissing B.H., got off the bed, and spoke on his phone for several minutes. R. at 820-21. B.H. also got her phone, checked her messages, and sent a message to her girlfriend that A1C Serjak would be leaving in a few minutes. R. at 821-22. B.H. did not mention the kissing. B.H. also did not leave the room, did not call anyone for help, text anyone for help, or ask A1C Serjak to leave. R. at 823-24.

A1C Serjak and B.H. then looked at each other and B.H. said, “what?” R. at 825. A1C Serjak then picked up B.H. and put her back on the bed. R. at 826. B.H. did not ask why A1C Serjak picked her up or put her back on the bed. *Id.* A1C Serjak then got onto the bed with B.H. and she did not say “no,” “stop,” or tell him that “we’re not going to go back to doing that.” R. at 828-29. B.H. “turn[ed] [her] head to the side and [gave] him access to [her] neck” like she did previously. R. at 829.

At this point in time, A1C Serjak reached for B.H.’s arms and put them over her head. *Id.* He continued kissing B.H.’s neck in this position. R. at 830. A1C Serjak was not crushing her

arms. *Id.* B.H. did not say “stop,” she “never tried” to get her arms away, and she could move her arms “a little bit.” R. at 831. B.H. “never tried” to push A1C Serjak away not did she ever try to get him off of her. *Id.* B.H.’s breathing became heavier at this point in time. R. at 860.

Later, B.H. and A1C Serjak switched positions so that A1C Serjak was on his back and B.H. was on top of him. R. at 834-35. B.H. did not say “no,” “stop,” or try get off of A1C Serjak. R. at 836-37. A1C Serjak told B.H. that she needed “some dick in her life” and B.H. laughed about this and said, “oh sure.” R. at 839-41. This encounter continued until B.H. said “no, we’re not going to [kiss lips]” to which A1C Serjak said, “oh, okay” and stopped. This was the first time that night that B.H. told A1C Serjak “no,” “stop,” or “I don’t want to do this.” R. at 867. They continued to talk, B.H. continued to pat A1C Serjak, and then he left B.H.’s dorm room. R. at 845-47. B.H. did not tell her girlfriend about this interaction when she called her later that night. R. at 823, 847.

3. H.C.: A1C Serjak “Touched [my] Butt to try and Lift [me] on the bed”

H.C. got to know A1C Serjak when she brought him food while he was in quarantine. R. at 622. They continued to talk because they exchanged Snapchat information. *Id.* They developed a “casual” friendship wherein they would exchange messages and A1C Serjak would come over to H.C.’s dorm. R. at 623. Their Snapchat messages were sexual in nature. R. at 629, 679. Their relationship involved hugging and embracing each other. R. at 681-82.

Prior to the charged incident, they watched a movie at H.C.’s dorm about pornography while H.C. gave A1C Serjak a massage. R. at 630, 632-33. After this movie and massage, H.C. continued to message A1C Serjak over the following weeks. R. at 671. On 1 January 2022, A1C Serjak kissed H.C. at a gas station. R. at 673. H.C. never told A1C Serjak that she did not want to be kissed, that kissing was not a part of their relationship, or that he misinterpreted their relationship. R. at 674. She went to A1C Serjak’s dorm later that day. R. at 675, 678. H.C. never

told anyone, including OSI, about this kiss. R. at 675.

A week after kissing H.C., A1C Serjak went to H.C.'s dorm and she let A1C Serjak in. R. at 679. A1C Serjak tried to kiss H.C. on the lips, but she stopped him. R. at 681. A1C Serjak then told H.C. that he "just want[ed] a hug" so H.C. and A1C Serjak hugged. R. at 682. During this time, both A1C Serjak and H.C. are moving toward the bed and talking. *Id.* A1C Serjak told H.C. that he had feelings for her, but H.C. told him that she did not feel the same way. R. at 683. A1C Serjak then tried to pick up H.C. by grabbing her buttocks. *Id.* H.C. assumed a wrestling position because she thought A1C Serjak was "trying to pick [her] up to put [her] on the bed." R. at 683. H.C. was a competitive wrestler so she knows how to avoid being picked up by another person. R. at 693. H.C. pushed A1C Serjak's hands away and he left shortly after. R. at 684.

After he left, H.C. spoke with a friend and told her that A1C Serjak tried to lift her onto her bed. R. at 684. She did not tell OSI that A1C Serjak was "groping" her buttocks or making sexual comments while he was trying to lift her. R. at 685. H.C. told OSI that A1C Serjak touched her buttocks to lift her onto her bed. R. at 685. In the weeks following this incident, H.C. did not tell her supervisor, first sergeant, or commander about the incident. R. at 687. She did not tell OSI about it either. *Id.* H.C. did not want to report this incident. R. at 691.

4. J.M.: "I Would say she is not a Very Truthful Person"

J.M. met A1C Serjak on the night in question. R. at 1008. A1C Serjak was the designated driver for A.C., C.W.⁴, and J.M. R. at 1009. A1C Serjak drove A.C. and A.W. to a party off-base where they met J.M. R. at 1009-10. At the party, J.M. had 5-8 red solo cups of alcohol and an unknown number of alcoholic shots. R. at 1014. By the time she left the party, she was "pretty under the influence." *Id.* A1C Serjak drove the group to a friend's house to pick up an item J.M.

⁴ Witnesses refer to Airman C.W. as C throughout the transcript. R. at 1013.

had forgotten and then they stopped at a gas station on base. R. at 1015-16.

During the drive, J.M. and A.C. (who is female), were making out in the back seat. R. at 975, 995, 1017. A.C. and J.M. are friends and A.C. is “close” to J.M. R. at 995. She does not want anything bad to happen to J.M. *Id.* While they were making out, A1C Serjak made a comment about them kissing which prompted them to briefly stop, look at one another, and then look back at A1C Serjak. R. at 991. During one of the car stops, when J.M. was not present, A1C Serjak told A.C. that he wanted talk with J.M. R. at 976. A.C. told A1C Serjak that she did not think “it’s a good idea.” R. at 976.

A1C Serjak eventually drove the group back to the dorm parking lot. R. at 1021. A1C Serjak was at his dorm room door and called out to J.M. who walked toward him. *Id.* At this point, J.M. was intoxicated, but went into A1C Serjak’s dorm room. R. at 1022. J.M. previously told OSI that she did not remember getting out of A1C Serjak’s car. R. at 1056. She had blacked because of alcohol out before. R. at 1056, 1066-67. J.M. sat on A1C Serjak’s bed and they started talking about how J.M. kissed A.C. in the backseat of the car R. at 1023, 1060. J.M. got upset with this topic of conversation because J.M. “being with her” was “not the type of person” J.M. claimed to be. R. at 1062-63. When J.M. started crying because of this, A1C Serjak told her to just go to sleep. R. at 1063. J.M. chose to go to sleep in A1C Serjak’s room. *Id.*

J.M. remembered going to sleep with her clothes on and the next thing she remembered was waking up with sweatshirt that was not hers. R. at 1024-25, 1066. J.M. said she was “blacked out” that night. R. at 1069. When she woke up, her hair was also wet—“completely soaked”—and she had no other clothes on but the sweatshirt. R. at 1025. A1C Serjak was lying next to her. R. at 1032. J.M. went to the bathroom and started “collecting [her] thoughts and trying to remember.” R. at 1033. She asked herself, “what the fuck did I do?” R. at 1079.

She remembered having a tampon inside of her the night before and it was still “still there, and it was pushed, very, very far up inside of [her].” *Id.* It is not uncommon for women to forget to take their tampon out before having sex. R. at 1130. J.M. was not even sure if penetration occurred. R. at 931. She took out the tampon and flushed it down the toilet. R. at 1034. When she took her tampon out, she found no semen or ejaculate. R. at 1080. When she came out of the bathroom she noticed that her clothes were “everywhere.” R. at 1035. J.M. eventually took her keycard and A1C Serjak’s and left his door room. R. at 1037. She returned shortly after because she realized that she had left her Apple Watch in A1C Serjak’s room. *Id.* J.M. never reported this encounter to her leadership or OSI.

When A1C Serjak woke up he texted A.C.—not J.M.—to ask that J.M. return his key card. R. at 983. She asked A1C Serjak, “why would she have your room key?” *Id.* A.C. then asked J.M. about this and J.M. confirmed that she had A1C Serjak’s key. R. at 984. This prompted A.C. to go knock on A1C Serjak’s door because she “just had a bad feeling about something.” *Id.* A.C. confronted A1C Serjak about “what happened last night?” R. at 985. This conversation was loud enough and long enough that it interrupted A1C Serjak’s phone call with his First Sergeant. R. at 882.

One of J.M.’s former best friends, who spent every day with her for two to three months said that J.M. was “not a very truthful person.” R. at 1187, 1189.

5. First Shirt: “What You’re Describing to me is Sexual Assault.”

Right before A.C. came to his dorm room, A1C Serjak called his First Sergeant to tell him what happened the night before. R. at 877. During this call A1C Serjak was “disoriented” and had a very “urgent tone in his voice.” R. at 877. A1C Serjak said the purpose of his call was to let the First Sergeant know “some events had happened the night prior and he wanted to talk to [the First

Sergeant] about it so he could get ahead of everything.” *Id.* A1C Serjak told the First Sergeant about being a designated driver and driving his people back to the dorms:

One of the young ladies was crying, so he approached her and asked her if she was okay. She said that she was not, that she was too drunk, she was lonely, she was scared, she didn’t feel good. And Airman Serjak offered to bring in his dorm room . . . he offered to bring her in to give her some Tylenol and water and just kind of help her sober up and talk to her for a little bit. He said that they talked for quite some time and they ended up falling asleep. He said that he was roused around three o’clock or so in the morning. And when he was roused, he noticed that the Airman was mostly naked, and that made it uncomfortable. So, he got up to go to the bathroom, he came out of the bathroom and the Airman was more naked than she was when he went into the restroom. And started to kiss him and tell him that she wanted to have sex, and he said “no” “you’re drunk you don’t want to do this” “I don’t want to do this” and he --excuse me, she, excuse me, *she continued to pressure him.* She talked to him she said she was sober enough and this was a decision that she had made and what she wanted to do. And he ended up, she ended up in forcing him to have sex.

R. at 878, 895 (emphasis added). The First Sergeant verified some details and then told A1C Serjak “that it was a sexual assault” and that he had to “report it to SARC and to OSI.” R. at 880. The First Sergeant was the first person who mentioned “sexual assault” and told A1C Serjak that the situation he described was “textbook sexual assault.” R. at 897. A1C Serjak did not tell the First Sergeant, “I was sexually assaulted the night before,” but the Sergeant told A1C Serjak “what you’re describing to me is sexual assault if it happened the way that it did.” R. at 987-98.

6. A1C Serjak Filed a SAFE Report—not J.M.

After the phone call with his First Sergeant, A1C Serjak completed a Sexual Assault Nurse Examination (SAFE). R. at 958. In the SAFE, A1C Serjak stated, “I told her ‘no I do not want to have sex with you and that it was a bad idea.’” Pros. Ex. 6, at 4. Then he noted that “we proceeded to have sex, reluctantly” and “she dug her nails in me at times.” *Id.* at 5. The Nurse Examiner noted that A1C Serjak had “scratch marks on right anterior upper chest, left side, right lower back, and left anterior thigh groin area. *Id.* at 10.

7. OSI Decided that J.M. was the Victim Before they Interviewed her

After A1C Serjak's SAFE, OSI interviewed J.M. as the Subject. R. at 920. However, OSI was skeptical before going into the interview that J.M. was actually the Subject of the investigation. R. at 920-21. Before interviewing J.M., they knew that her tampon was pushed "deeper inside of her from that night" so OSI planned before the interview to switch J.M. from the Subject to the Victim if she confirmed that information. R. at 921-22. OSI made the decision solely based on this information even though it is "not that infrequent that women forget to take out tampons before having sex." R. at 1130. OSI also made the decision to switch J.M. to the Victim even though they had only spoken with two other witnesses and had not collected A1C Serjak's SAFE photos. R. at 925-27. When J.M. spoke about her tampon, OSI "switched the way [they] were asking her the questions." R. at 922. After that, A1C Serjak became the Subject of the investigation and J.M. was the victim. *Id.* OSI did not have J.M. complete a SAFE. R. at 931.

Following that decision, A1C Serjak's squadron commander wrote a Commander's Critical Information Report. In that report, she said that there could be "backlash" if A1C Serjak were able to "get his story out of 'I (white male) was the victim first, now the black female is the victim.'" App. Ex. X, attachment 6. She sent this report to the Wing Commander via the Group Commander. *Id.*

8. UCI: "Third Air Force Wanted to Press with a General Court-martial . . . Obviously, I was Making the Wrong Decision"

a. Base Legal "Recommended to go the Admin Discharge Route"

After reviewing the evidence against A1C Serjak, the base legal office decided that court-martial charges against him were not appropriate. R. at 41. The legal office advised A1C Serjak's commander that "if they were to go to court-martial . . . it would be more than likely that Airman Serjak would not be found guilty of the charges." *Id.* Therefore, the base legal office and

A1C Serjak's commander decided to give A1C Serjak Letters of Reprimand and administratively discharge him. *Id.* As such, A1C Serjak's squadron commander "was recommended to go the admin discharge route" by the base legal office. *Id.* There was not a time when letters of reprimand and a discharge was not the plan because "it was always, like, that's what we were going to -- that was the advice and that was, like, let's roll with that." R. at *Id.* As part of executing this plan, the Chief of Military Justice emailed the Special Victim Counsels that she "intend[ed] to recommend to the 100 LRS Commander that A1C Serjak's misconduct should be dealt with alternative disposition." R. at 162.

A1C Serjak's squadron commander communicated this decision to her "leadership team" on "several occasions" which was the Group Commander and the Wing Commander. R. at 41-2. A1C Serjak's squadron commander had "the support of the legal office, base. Everyone was okay with it." R. at 42.

b. "Third Air Force Wants to do a General Court-martial"

15 April 2021, A1C Serjak's squadron commander issued him a Letter of Reprimand for his conduct toward B.H. and H.C. App. Ex. XIV, Attachment 8. After so doing both A1C Serjak's squadron commander and the legal office were working towards discharging him from the Air Force. R. at 64.

On 20 April 2021—five days after the Letter of Reprimand was issued—the Chief of Military Justice at Third Air Force emailed the Chief of Justice at the base legal office. App. Ex. XIV, Attachment 10. Third Air Force told base legal that they "wanted to "pump the brakes on the Serjak case." *Id.* In Third Air Force's view, this was "a pretty decent case," A1C Serjak was a "narcissistic predator," and there was "0% chance he's discharged if you give him an LOR (Defense will have a field day with that)." *Id.*

At some point after this email, the base legal office called A1C Serjak's squadron commander and told her that "Third Air Force wants to do a general court-martial." R. at 42. The squadron commander told the base legal office, "that's not what I want to do. I would rather do the admin separation route." *Id.* To A1C Serjak's squadron commander, it was "all of a sudden . . . just so you know, Third Air Force doesn't like what [she's] trying to do." *Id.* This made the squadron commander feel like, "obviously, [she] was making the wrong decision by doing an admin separation and [she] had to do a general court-martial." R. at 43. A1C Serjak's commander was "upset" about this and she told the Group Commander and Wing Commander about what had happened. R. at 65.

In the end, on 19 May 2021, A1C Serjak's squadron commander "felt as though [she] had to prefer charges" and that she was "pressured" to do so. R. at 65, App. Ex. XII, Attachment 6. "Hearing that Third Air Force wanted a general court-martial, was that the reason" the squadron commander preferred charges against A1C Serjak. R. at 43. The squadron commander preferred charges even though the Report of Investigation was not completed and even though she did not review the evidence that the base legal office gave her because "legal told [her what] was in the evidence." R. at 65.

c. Base Legal to Wing Commander: "There is Certainly now the Potential of or Appearance of UCI, Which is an Issue we DO NOT Want to Litigate"

At the Article 32 hearing, the squadron commander testified that she felt pressured to prefer charges. App. Ex. XIV, Attachment 19. As such, on 7 July 2021, pursuant to advice from the base SJA, the RAF Mildenhall Vice Commander emailed the Wing Commander notifying that him that he was going to dismiss the charges against A1C Serjak because of a "potential unlawful command

influence issue.” App. Ex. XIV, Attachment 17.⁵ Later that day, command withdrew and dismissed the charges that the squadron preferred. App. Ex. XIV, Attachment 15; R. at 66. Command withheld A1C Serjak’s squadron commander’s UCMJ authority over him. R. at 66. The “charges were dismissed because of unlawful command influence.” *Id.*

One day after the dismissal of charges, on 8 July 2021, the base legal Victim and Witness Assistance Program (VWAP) Coordinator emailed H.C.’s Special Victims Counsel (SVC) to give H.C. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime. App. Ex. XIV, Attachment 20.

On 15 July 2021, the base SJA emailed the Wing Commander and told him:

As to the way ahead for this CM, it came out in the Art 32 that [the squadron commander] felt 3 AF/CC “wanted her to send the case to a CM.” (That was my 100% office’s fault in very artfully conveying disposition advice to her as the CC. We’ve corrected that for the future.) Whilst this really isn’t an instance of clear UCI, there is certainly now the potential of or appearance of UCI, which is an issue we DO NOT want to litigate at trial. Thus and to avoid the UCI issue altogether [the Vice Commander] dismissed the prior charges last week and now 100 MXS/CC, totally unaware of the case and any of the facts, is reviewing the evidence on the 3 x Sex Assaults and making his own independent decision on whether the case should go to a CM. Assuming his review results in a new preferral (expected), the Art 32 is already complete and the case will be docketed for trial in the upcoming months.

App. Ex. XIV, Attachment 19. The same day the Wing Commander responded to the base SJA, “tracking what is likely the path going forward.” *Id.*

d. A1C Serjak Requested an Expedited Transfer, Wing Commander Denied it, and the Third Air Force SJA Coordinated on Appeal Denial

On 13 July 2021, because his charges were dismissed, A1C Serjak requested an expedited transfer from RAF Mildenhall as the victim of J.M.’s sexual assault against him. App. Ex. XIV,

⁵ This attachment is unsigned. In their motion, Defense Counsel notes the memo was signed on 8 July 2021.

Attachment 22. The request would have to be routed to the Wing Commander for action. *Id.* The Wing Commander denied A1C Serjak's expedited transfer request. App. Ex. XIV, Attachment 23. As such, A1C Serjak appealed this decision to the approval authority above the Wing Commander. *Id.*

That appeal was processed through the Spangdahlem Air Base Sexual Assault Response Coordinator (SARC). *Id.* On 21 July 2021, when that SARC received the appeal, she responded to the Mildenhall SARC, "Have the new charges still not been pressed yet?" *Id.* The Mildenhall SARC responded, "they are working towards that." *Id.*

The Spangdahlem SARC then emailed the Third Air Force SJA directly. *Id.* She told the SJA:

I know you mentioned before that the charges were going to change to be brought from Lakenheath, is there a timeline for that? Can you provide me with the verbiage to support this as I push the appeal back up? It doesn't make sense to me to keep appealing this since the member is still under investigation and WILL be charged, but since we're in this weird limbo with no charges currently.

Id. The Third Air Force SJA responded to the Spangdahlem SARC:

Command has decided not to PCS A1C Serjak to RAF Lakenheath. Currently, the new MXG/CC is re-reviewing the evidence in the case to determine whether charges should be preferred again. This new preferral was occasioned by a legal issue with the first preferral that required, in abundance of legal caution, that the process start anew. Assuming charges are preferred again, which is likely, as they have already been investigated at an Article 32 hearing, ARW/CC will decide whether to forward those charges to 3 AF/CC for disposition. The most likely disposition at this stage, given that the preliminary hearing officer has recommended they be referred to trial by general court-martial would be that 3AF/CC would refer them to such a court. I checked with ARW/JA this morning and this process will likely be completed within the next two weeks.

Id.

Meanwhile, the base SJA reached out to a new squadron commander at RAF Mildenhall to have him look at A1C Serjak's case. R. at 74. The base SJA told him he was "kind of coming in as a third party and make a determination." *Id.* The new squadron commander remembers that

the base SJA mentioned Third Air Force in their first conversation. *Id.* The very next day, a Captain from the base legal office met with this new commander and recommended that he prefer charges against A1C Serjak—before the new commander had reviewed the evidence. R. at 81. After reviewing the evidence, the new commander met with the Captain again who recommended court-martial charges again. R. at 82. Ultimately, this new squadron commander preferred the same charges against A1C Serjak that the base legal office prepared. R. at 82.

On 27 July 2021, at 0701, the Third Air Force SJA remailed the base Chief of Litigation Strategy for “update on timing please. Serjak has an expedited transfer appeal pending so looking to advise and rec denial.” App. Ex. XIV, Attachment 27. The Chief of Litigation Strategy responded at 0740: “I’m going to reach out to the MXS/CC and get a status update. I’ll get back to you ASAP!” *Id.*

Later at 1255, the Chief of Litigation Strategy emailed the Mildenhall SARC to update her on A1C Serjak’s expedited transfer appeal:

I spoke with [the Third Air Force SJA] this morning . . . A new commander has reviewed the case, and has made the decision *today* to prefer charges against the member. We anticipate the preferral will occur later this week. As such, there is no material change in circumstances and Amn Serjak will still be facing criminal charges.

App. Ex. XIV, Attachment 23 (emphasis added).

e. The Third Air Force SJA did not Approve Base Legal’s Intended Legal Advice to Base Command on an Alternative Disposition

While the Government was processing A1C Serjak’s expedited transfer request, A1C Serjak also requested that his case be handled via discharge in lieu of a court-martial. App. Ex. XIV, Attachment 25. On 16 July 2021, the base Chief of Litigation Strategy emailed the Third Air Force SJA directly, carbon copying the base SJA and other base legal office members to apprise him of this development. *Id.* The Chief of Litigation Strategy said, “We were thinking of

issuing him an Article 15 for the first two assaults, and potentially an LOR for inappropriate behavior for the third Victim (after doing a SALR).” *Id.* The Third Air Force SJA responded:

Nope. Serjak is a serial abuser of women who he targeted because he believed due to their personal circumstance and/or level of intoxication they would not report him and then he decided to brand one of his victims, who he knew was so drunk she probably would not be in a good place to deny it, as a sexual offender herself. I cannot in good conscious [*sic*] recommend letting him off without accountability, acknowledgment of his actions, and an appropriate black mark that will stay with him long into the future branding HIM the sexual offender – that’s court-martial. Feel free to pass along these sentiments to whoever needs to hear them (victims included).

Id. The Chief of Litigation Strategy at the base responded, “Copy sir, Makes complete sense! We’ll relay this to the ADC, and work with the new commander on the preferral recommendation. Hope to have the referral package up to you in the next two weeks.” *Id.*

f. New Charges are Forwarded Through the Wing Commander

On 4 August 2021, the MXS/CC preferred charges and recommended to the Mildenhall Wing Commander that charges against A1C Serjak be referred to a general court-martial. *Charge Sheet, 1st Indorsement.* On 6 August 2021, the Mildenhall Wing Commander forwarded the court-martial charges to the Third Air Force Commander and “recommend[ed] referring all charges and specifications to trial by general court-martial.” *Forwarding of Court-Martial Charges.* The Wing Commander also attached a list of potential court-martial members. *Id.*

g. Third Air Force: “Mildenhall has a Case Pending Referral for Which They Need Some More Seniority/Experience on Their Panel Before it Will Pass Muster w/[3AF/CC].”

On 9 August 2021, the Third Air Force Chief of Military Justice emailed the legal office at RAF Lakenheath to solicit members for A1C Serjak’s case. App. Ex. XIV, Attachment 29. He requested:

Mildenhall has a case pending referral for which they need some more seniority/experience on their panel before it'll pass muster w/ Gen Reed. Since Mildenhall struggles to get O-5/O-6 members, we're hoping Lakenheath can augment their pool. TSgt G [redacted] will probably reach out shortly, but could you please assist him in finding some names? Thanks very much!

Id. On 11 August 2021, the Non-commissioned Officer in Charge of Military Justice at Mildenhall—not Lakenheath—emailed the Chief of Military Justice at Third Air Force, “Please see attached for additional *senior* members requested.” App. Ex. XIV, attachment 30 (emphasis added). Of the five members he provided, three were involved in A1C Serjak’s case: 1) Colonel Wilt (A1C Serjak’s Group Commander); 2) Lt Col C [redacted] (spouse of the base Deputy SJA); and 3) Colonel T [redacted] (the 48-hour reviewing officer of A1C Serjak’s pre-trial confinement). App. Ex. XIV at 8.

h. Referral of Charges Signed by Third Air Force SJA “For the Commander”

One day after receiving additional senior members, on 12 August 2021, the Third Air Force SJA gave the Third Air Force Commander his pretrial advice, which said:

Subsequent to the preliminary hearing, [redacted] MXS/CC re-preferred the same charges and specification against Accused on 4 August 2021 in order to correct a potential issue of unlawful command influence. [redacted] ARW/CC . . . forwarded the charges and specifications for your consideration . . . [he] concurs with the PHO and recommends you refer the charged offenses to a GCM.

App. Ex. XIV, Attachment 31. On the same day, the Third Air Force Commander referred the charges and selected members. *Charge Sheet*. The Third Air Force SJA signed “FOR THE COMMANDER.” *Id.* The Third Air Force Commander chose two of the five additional, senior members, including Colonel T [redacted], the 48-hour reviewing officer. App. Ex. XIV, Attachment 7.

The Government arraigned A1C Serjak on 5 October 2021. R. at 1, 10. From the first preferral of charges on 19 May 2021, to arraignment, 139 days elapsed.

ARGUMENT

I.

A1C SERJAK WAS THE VICTIM OF SELECTIVE PROSECUTION WHEN COMMAND WROTE, “THERE COULD BE BACKLASH” IF A1C SERJAK “HAS THE OPPORTUNITY TO GET HIS STORY OUT OF ‘I (WHITE MALE) WAS THE VICTIM FIRST, NOW THE BLACK FEMALE IS THE VICTIM”

Standard of Review

This Court uses a clearly erroneous standard when reviewing findings of fact for the Military Judge’s ruling on a selective prosecution motion; this Court reviews conclusions of law *de novo*. *United States v. Redmon*, No. NMCCA 201300077, 2014 CCA LEXIS 369, at *8 (N-M Ct. Crim. App. June 26, 2014).

Law and Analysis

“A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996). While a prosecutor has wide discretion on charging decisions, “a prosecutor’s discretion is subject to constitutional constraints.” *Id.* (quotations and citations omitted).

The requirements for a selective-prosecution claim draw on “ordinary equal protection standards.” *Id.* at 465. The test for proving a selective prosecution is: 1) “An accused has a heavy burden of showing that others similarly situated have not been charged;” 2) that “he has been singled out for prosecution;” and that his “selection . . . for prosecution was invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997). One such impermissible consideration is gender. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Inherent differences between men and women, we have come to appreciate, remain cause

for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.") (quotations and citations removed).

1. Other's Similarly Situated Have not Been Charged

A1C Serjak did exactly what the Air Force tells victims of sexual to do: He called his leadership immediately, told them what happened, and got a SAFE examination. He alleged a credible assault based on the injuries that J.M. caused him—scratches all over his body. Ultimately, like many victims of sexual assault, A1C Serjak declined to participate in the investigation—which was his right as a victim. App. Ex. X, Attachment 2. Counsel is unaware of any case where a female claiming to be the victim of a sexual assault is later prosecuted by the Government.

2. A1C Serjak's Prosecution was Based on Gender—an Impermissible Consideration

Two facts prove that the Government used gender—an impermissible consideration—to prosecute A1C Serjak. First, OSI determined that J.M. could not be the victim in this case because her tampon was pushed “deeper inside of her from that night.” R. at 921-22. Even though J.M. had no recollection of what happened that night, OSI decided that she was the victim based on her gender. In OSI's mind, this was proved because no women would have sex with their tampon inside of them, even though—in reality—it is “not that infrequent that women forget to take out tampons before having sex.” R. at 1130. OSI determined that A1C Serjak was the Subject based on gender.

Second, command fully approved and bought into OSI's determination that a man could not be a victim of sexual assault. In supporting OSI's decision to switch A1C Serjak from the Victim to Subject, command was fully aware that the decision was based on gender because they were concerned about the “backlash” it would cause. App. Ex. X, attachment 6. Given the pressure

from Congress to protect females in the military, it is not surprising that command based its decision on gender: “I (white *male*) was the victim first, now the black *female* is the victim.” *Id.* (emphasis added). It never even crossed command’s mind—except for the First Sergeant—that a black, female could sexually assault a male. Unfortunately, command’s gender focused decision is outdated and not supported by the data:

As a society, we rarely think of male-victim rape. On the few occasions that we do, we assume male rape victimization occurs only in prisons. That assumption is wrong. *In fact, even outside of prisons, males are victims of rape.* A study conducted by the Bureau of Justice Statistics, based on surveys of households, estimated that more than 36,000 males age twelve and over were victims of completed rape or attempted rape during 2008 alone and that one in thirty-three men in the United States has been the victim of rape or attempted rape. Again, this number probably underestimates the frequency of male-victim rape. *Even more than female victims, male rape victims are likely to encounter disbelief or derision when they report their victimization.* In addition, male victims, both straight and gay, face the added risk of homophobia. Indeed, prior to the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas* invalidating sodomy laws, *those who came forward as rape victims risked being prosecuted as criminals in many states.*

Bennett Cappers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261-1262 (2011) (emphasis added).

WHEREFORE, A1C Serjak requests that this Court set aside his convictions and sentence.

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT ANY TAIN FROM THE UNLAWFUL COMMAND INFLUENCE THAT OCCURRED WAS OVERCOME WHEN: 1) THIRD AIR FORCE INFLUENCED THE BASE LEGAL OFFICE TO CHANGE ITS OPINION ON THE CASE TWICE; 2) THE BASE LEGAL OFFICE TOLD THE BASE COMMAND ABOUT THE UCI; AND 3) THE BASE LEGAL OFFICE THEN ADVISED COMMAND PURSUANT TO THIRD AIR FORCE’S INFLUENCE

Summary of Argument

Defense filed a comprehensive motion to dismiss with prejudice based upon UCI. App. Ex. XIV, App. Ex. XXIV. Appellant hereby adopts the facts, attachments, law, and arguments put

forth in the motion, along with evidence and arguments made on the record during the extensive motion hearing. R. at 29-115, 159-196. The Government opposed the motion. App. Ex. XV. The Military Judge denied defense's motion to dismiss for UCI. App. Ex. XLVIII.

The most pertinent factual and legal conclusion, as conceded by the government, was that the first set of charges were improperly preferred against A1C Serjak due to *actual* unlawful command influence, in that the commander who preferred the charges felt compelled to so by Third Air Force. App. Ex. XLVIII, paragraphs 50, 54 and 55, pages 14-15. The Military Judge failed, however, to recognize that the actual UCI went beyond impacting the commander, it also impacted decisions made by judge advocates in the RAF Mildenhall legal office and the RAF Mildenhall chain of command up to and including the Wing Commander.

A new set of the same charges were subsequently preferred by a different commander at RAF Mildenhall and referred to trial. The Defense claimed that these charges were tainted by and did not overcome the initial unlawful command influence. The Military Judge disagreed and ruled that any taint had been removed. He also ruled that the defense failed to establish a presumption of UCI with respect to the new set of charges. App. Ex. XLVIII, page 15. Thus, the burden to overcome the presumption did not shift to the government.

On appeal, A1C Serjak seeks relief from this Court because of flaws in the Military Judge's analysis. The key error is the failure to address or recognize the limited number of remedies available to overcome the original UCI. There were only two that should have been considered. The first and most obvious would have been to return to the status quo after dismissing the original charges, i.e., the original disciplinary and administrative discharge action the first commander took or contemplated taking in lieu of preferring charges.

The second corrective action would have involved sending the case to a different convening authority. By simply sending the case to a new squadron commander at Mildenhall, it became impossible to remedy the original actual unlawful command influence given the poisoned atmosphere that infected the RAF legal office and RAF Mildenhall chain of command. When Third Air Force intervened in overturning the original decisions to pursue an alternate disposition of the allegations, judge advocates in the base legal office changed their recommendations to support a court-martial. The Wing chain of command also change their recommendations. Thus, the poisoned atmosphere remained. This argument will be more fully presented below.

Standard of Review

On issues of UCI, this Court reviews the Military Judge's findings of fact under the clearly erroneous standard, but reviews *de novo* questions of UCI flowing from those facts. *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000).

Law and Analysis

UCI can be either actual or apparent and in either form, it is the “mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). It has also been described as “a malignancy that eats away at the fairness of our military justice system.” *United States v. Gleason*, 39 M.J. 776, 782 (A.C.M.R. 1994). To ensure a fundamentally fair trial, a Court must carefully scrutinize claims of unlawful command influence. *Id.*

There is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial. *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-3 (C.A.A.F. 2002)). The CAAF has long held “that the use of command meetings to purposefully influence the members in determining a court-martial sentence violates Article 37, UCMJ,” and the coincidental

timing of such meetings with ongoing courts-martial can require a sentence rehearing. *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001).

The test for apparent unlawful command influence is whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair. *United States v. Hutchins*, 72 M.J. 294, 312 (C.A.A.F. 2013) (Baker, C.J., dissenting) (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)); see also *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979); *United States v. Cruz*, 20 M.J. 873, 890 (A.C.M.R. 1985). “Public” refers to both the civilian population and the rank and file of the military, as well as practitioners of military justice. *Id.* An accused needs to assert facts with sufficient particularity and substantiation, which, if true, would cause a reasonable person to conclude that unlawful command influence existed. *United States v. Campos*, 42 M.J. 253, 261 (C.A.A.F. 1995). A presumption, although a rebuttable one, of prejudice exists where there is an appearance of unlawful command influence. *United States v. Crawley*, 6 M.J. 811, 813 (A.F.C.M.R. 1978); *United States v. Johnson*, 34 C.M.R. 328 (C.M.A. 1964).

At trial, defense has the burden of showing facts, if true, constitute unlawful command influence that had a logical connection to the fairness of the court-martial proceedings. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). Once defense establishes a presumption of unlawful command influence, the burden shifts to the government to prove beyond a reasonable doubt that there was no unlawful command influence. *Stoneman*, 57 M.J. at 41. This burden is high because “command influence tends to deprive servicemembers of their constitutional rights.” *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

Appellant argues that the cumulative effect of the facts stated and attached to his motion to dismiss for UCI, along with the witness testimony and arguments presented to the Military Judge, established a compelling case that the Third Air Force Commander and his Legal Staff were biased or so conflicted that they should have been disqualified from taking any further action in this case. Their decision to send the case to a new subordinate commander should not have happened and was insufficient to dissipate the poisoned atmosphere at RAF Mildenhall.

The appointment of a new squadron commander subordinate to the Third Air Force Commander to assess the case sent the wrong message from a UCI perspective. It effectively told all observers, including the judge advocate's Wing commanders at RAF Mildenhall that the original commander did something wrong, when she did nothing wrong. The prejudicial and biased actions at Third Air Force indelibly corrupted the legal process in this case.

The message sent from Third Air Force was that they would accept nothing from RAF Mildenhall commanders short of preferral of new charges. By commenting on the fact that probable cause existed and was correctly found by various individuals, including the new commander, the trial judge ignored a key part of the legal process. Establishing probable cause is an important part, but so is the exercise of prosecutorial discretion, a command function.

A recent illustration of this point is found in the publicity surrounding President Joseph Biden's mishandling of classified documents. There was no question whether probable cause existed to prosecute criminal acts. It did. The issue became one of exercising discretion about whether the case should be prosecuted for justifiable but not necessarily legal reasons. Reasonable legal minds differ on this question. In A1C Serjak's case, the commander had justifiable reasons for pursuing a different disciplinary course than preferring charges, i.e., the concern expressed by

the base legal office that the standard of proof for a court-martial, beyond a reasonable doubt, may not be met.

Furthermore, the Military Judge went to great lengths to minimize the biased and prejudicial statements made by Third Air Force judge advocates. These statements reflected a serious lack of objectivity and unwillingness to consider any other option than sending the case to a court-martial. The judge called them, “unnecessary name-calling.” App. Ex. XLVIII, paragraph 52. Referring to statements made by the Third Air Force Staff Judge Advocate, the judge wrote, “the Court does not condone Colonel [T’s] chosen language which could be objectively viewed as questioning the Accused’s ‘innocent until proven guilty’ status.” App. Ex. XLVIII, paragraph 57, page 15.

In conclusion, there was no need for the trial judge to assess the existence of actual UCI or the appearance of UCI with respect to the new commander who preferred the charges that were referred to trial. The actual unlawful command influence that he found was not remedied.

WHEREFORE, A1C Serjak requests that this Court set aside the findings and sentence.

III.

THE GOVERNMENT’S REPREFERRAL OF CHARGES SOLELY IN RESPONSE TO EVIDENCE OF UNLAWFUL COMMAND INFLUENCE IS “SUBTERFUGE” OR AN “IMPROPER REASON” UNDER *UNITED STATES V. HENDRIX*, 77 M.J. 454 (C.A.A.F. 2018) AND THUS SHOULD NOT RESET THE SPEEDY TRIAL CLOCK

Standard of Review

This Court reviews de novo whether an accused received a speedy trial. *United States v. Hendrix*, 77 M.J. 454, 456 (C.A.A.F. 2018).

Law and Analysis

“Once charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted.” *Id.*

at 457. The test to determine whether the speedy trial clock should be tolled is: “Absent a situation where a convening authority’s express dismissal is either a subterfuge to vitiate an accused’s speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect.” Here there are two reasons why the speedy trial clock was not reset and thus, “The charges must be dismissed with prejudice [because] the accused has been deprived of his or her constitutional right to a speedy trial.” R.C.M. 707(d)(1).

1. The Government Never “Dismissed” the Charges Because its Intent was to Retry him

The Government was careful to label its actions against A1C Serjak as a “Dismissal of Charges” and it never used the word “withdrawal.” App. Ex. XII , Attachment 9. However, labels are not dispositive, effects are. “Charges that are withdrawn from a court-martial should be dismissed (see R.C.M. 401(c)(1)) *unless it is intended to refer them anew promptly.*” R.C.M. 604(a), Discussion. *United States v. Leahr*, 73 M.J. 364, 370 (C.A.A.F. 2014) (Stucky, J., dissenting) (“Where it is intended to refer [charges] anew promptly, withdrawal rather than dismissal is appropriate.”).

Here, there are several facts that indicate the Government was trying to complete an end-run around the speedy trial clock by labeling its decisions as a “dismissal” when it was actually a withdrawal which would not toll the speedy trial clock. *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988) (“Unless a convening authority acts to dismiss the withdrawn charges, R.C.M. 707(b)(2) does not apply, *and the speedy-trial clock continues to run.*”) (emphasis added).

First, the day before the dismissal letter was signed, the base SJA wrote the Vice Commander to explain why the dismissal letter needed to be signed. He said, “dismissal of charges will extinguish the current court proceedings and allow a new preferral to take place.” App. Ex. XIV, Attachment 17. The Vice Commander understood what the base SJA told him because he

forwarded the email to the Wing Commander and said, “I have a call in with [the base SJA] tomorrow to confirm there is no way that this action will somehow prevent the events from going to *a future trial* at Lakenheath.” *Id.* (emphasis added). This definitively shows the intent—regardless of the labeling—was always to have A1C Serjak be re-tried.

Second, on the day after command “dismissed” the charges, the base legal VWAP Coordinator emailed H.C.’s Special Victims Counsel (SVC) to give H.C. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime. App. Ex. XIV, Attachment 20. That fact is a strong indicator that although the charges were “dismissed” the intent at the base legal office was always to “refer them anew promptly.” R.C.M. 604(a), Discussion.

Third, on 15 July 2021 the base SJA revealed to the Wing Commander that the intent was always to bring charges against A1C Serjak again:

[T]here is certainly now the potential of or appearance of UCI, which is an issue we DO NOT want to litigate at trial. *Thus and to avoid the UCI issue altogether [the Vice Commander] dismissed the prior charges last week* and now MXS/CC, totally unaware of the case and any of the facts, is reviewing the evidence on the 3 x Sex Assaults and making his own independent decision on whether the case should go to a CM. Assuming his review results in **a new preferral (expected), the Art 32 is already complete and the case will be docketed for trial in the upcoming months.**

App. Ex. XIV, Attachment 19.

These three instances show that both legal and command dismissed the charges against A1C Serjak as “subterfuge” so it could “avoid the UCI issue altogether” because that is something it “[DID] NOT want to litigate at trial.” *Id.*

2. A1C Serjak’s Rights were Violated Even if the Charges were Dismissed

A1C Serjak’s commander confirmed that the “charges were dismissed because of unlawful command influence.” R. at 66. The CAAF has said that dismissal requires command to take actions which it did not take in A1C Serjak’s case:

Dismissal, mistrial, and a break in pretrial restraint all contemplate that the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that *he is returned to full-time duty with full rights as accorded to all other servicemembers*. Reinstitution of charges requires the command to start over. *The charges must be re-preferred, investigated,* and referred in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings.

Britton, 26 M.J. at 26.

First, the Government did not conduct another Article 32 hearing to investigate the charges—a right that A1C Serjak was entitled to have. *Forwarding of Court-Martial Charges*. Although R.C.M. 405(b) states that “no further preliminary hearing is required” if an earlier preliminary hearing on the “subject matter of an offense has been conducted,” a hearing was still required in this case. The UCI changed the “subject matter” of the offense because the UCI goes directly to the probable cause determination that the Preliminary Hearing Officer must make. The more unlawful “influence” there was resulted in less probable cause to believe A1C Serjak committed an offense. Notably, a new Article 32 hearing would have been crucial in this case to determine if the unlawful command influence was, in fact, cured. The unlawful command influence was discovered at the first Article 32 hearing and there was reason to believe that it still existed after a the new preferral because the legal office was tainted from Third Air Force’s influence as well as the Wing Commander.

Second, after the charges were dismissed, A1C Serjak applied for an expedited transfer. Instead of command looking at the request with impartial eyes, it was an automatic denial because command always knew it was going to reprefer charges against him. Because he was denied an impartial review, he was not given “full rights as accorded to all other servicemembers.” *Britton*, 26 M.J. at 26. This would also, obviously, be a violation of his Article 6b rights to be “treated with fairness and with respect for the dignity . . . of the victim.”

WHEREFORE, A1C Serjak requests that you set aside his convictions and sentence.

IV.

A1C SERJAK'S CONVICTIONS ARE NOT LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

Law

Factual sufficiency requires this Court to determine “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of [the Court] are themselves convinced of the appellant’s guilt beyond a reasonable doubt.*” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, the UCMJ specifies this Court “may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.” Art. 66(d)(1)(B)(i), UCMJ; 10 U.S.C. § 866(d)(1)(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). If “the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding.”⁶

⁶ This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024). Contrary to the approach of another service court of criminal appeals, this Court does not apply a rebuttable presumption of guilt when assessing factual sufficiency. *Id.* at *22.

Art. 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii) (2024 *MCM*). Thus, to set aside a conviction for factual insufficiency, the Court “must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.” *Csiti*, 2024 CCA LEXIS 160, at *25. “In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, [this Court’s] unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt.” *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016). This authority “provide[s] a source of structural integrity to ensure the protection of service members’ rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility.” *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

In *Jackson v. Virginia*, this Court held that “the [*Thompson v. Louisville*, 362 U.S. 199 (1960)] ‘no evidence’ rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt.” 443 U.S. 307, 320 (1979). In rejecting *Thompson*, the Court embraced *In re Winship*, 397 U.S. 358 (1970), noting that “the record in *Winship* was not totally devoid of evidence of guilt.” *Id.* at 315 (emphasis added). Later, this Court explained that the Due Process Clause sets “a lower limit on an appellate court’s definition of evidentiary sufficiency.” *Tibbs v. Florida*, 457 U.S. 31, 45 (1982). Thus, *Jackson* stands for the proposition that a conviction can be legally insufficient—even with some evidence presented—if it falls below the “lower limit” of evidentiary sufficiency.

Thus, for legal sufficiency, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319. Despite this

deferential standard, the Supreme Court in *Jackson* repeatedly explained that the legal sufficiency test is not “simply a trial ritual.” 443 U.S. at 316-17. For example:

- “A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will *rationaly* apply that standard to the facts in evidence.” *Id.* at 317 (emphasis added).
- “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.” *Id.* at 318 (emphasis added).
- “This familiar standard gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts.” *Id.* at 319 (emphases added).

In his concurrence, Justice Stevens was concerned that this new test could not only do constitutional harm, but that it could also just become a “meaningless shibboleth.” *Id.* at 328.

Analysis

The three charges and four specifications of which A1C Serjak was convicted will be addressed in the following order: First, the two specifications involving the alleged sexual assault of J.M. and his related alleged false official statement to SMSgt Bybee, followed by the allegation involving H.C. (touching her buttocks and finally the non-sexual assault upon B.H. (restraining her wrists).

1. Charge II Specification 3 (Sexual Assault of J.M.)

The only complete description of what happened on the night of 19-20 February 2021 between J.M. and A1C Serjak in his room on RAF Mildenhall was given by A1C Serjak. It is found in the SAFE Report that was admitted into evidence because A1C Serjak did not testify and J.M. had little or no memory of what happened. Pros. Ex. 6 at 4. It is also found in SMSgt B’s testimony in which he describes A1C Serjak’s initial report about what happened that night. R. at 877-881. There were no other witnesses present in the room. The government failed to disprove

A1C Serjak's statement that J.M. consciously initiated their sexual acts or that A1C Serjak made a false official statement to SMSgt B beyond a reasonable doubt.

What follows in a "he said/she said" format is a comparison of their descriptions of their interaction getting to his dorm room at the at the end of the evening, in the dorm, and afterwards. The argument closes with an explanation of J.M.'s lack of memory, given the evidence that her memory loss in relation to the alleged sexual assault was based upon the fair inference that she experienced an alcohol induced blackout.

a. How did J.M. get to A1C Serjak's Room?

He said: A1C Serjak was the designated driver earlier in the evening, allowing a female friend, A.C. and anyone else he transported to freely consume alcohol at multiple locations. At the end of the evening, A1C Serjak drove A.C., C.W. and J.M. back to their respective dormitories. During the drive, J.M. received a phone call and became really upset, which was corroborated by A.C. R. at 992. Upon arrival at the dorms, A1C Serjak parked the car, and they entered the dorm. R. at 877, 990, 992, Pros. Ex. 6 at 4.

As A1C Serjak walked toward his room he called out to J.M. who was crying. He invited her to his room, and she voluntarily entered. Once inside, A1C Serjak brought her some water and Tylenol and they talked about various topics. J.M. subsequently fell asleep on his bed. Pros. Ex. 6 at 4. He did not describe any sexual activity before she fell asleep.

She said: She acknowledged that prior to falling asleep in his room, she drank alcohol through the course of the evening, rode in the car, and remembered getting out of the car and A1C Serjak inviting her to his room ("he guided me into the room"). She had no memory of receiving a phone call that upset her during the ride. R. at 1009-1013, 1016, 1022, 1053-54, 1060, 1063. Once inside he brought her some water, but she did not recall him providing her some

Tylenol. R. at 1063. She did not describe any sexual activity occurred prior to when she fell asleep. She chose to stay and sleep in his room. R. at 1063.

b. What occurred in A1C Serjak's room after J.M. fell asleep?

He said: At some point after falling asleep, approximately 0330 hours on 20 February 2021, J.M. awoke and began taking her clothes off. Pros. Ex. 6 at 4. She told A1C Serjak she wanted to have sex, adding that it was okay, and she was sober enough after he told her no, she was too drunk. *Id.* They kissed, and then “proceeded to have sex.” *Id.* She dug her fingernails into his chest, on his thighs and on his back. Pros. Ex. 6 at 4, Pros. Ex. 7. When the sexual activity ended, she went to his bathroom, took a shower, returned to the bed and they fell back asleep. Pros. Ex. 6 at 4. In the morning, when A1C Serjak woke up J.M. was gone. *Id.*

She said: J.M. testified in response to multiple questions during direct and cross-examination that that from the point she fell asleep in the room, “I don’t remember what happened.” R. at 1025, 1056. J.M.’s first recollection after initially falling asleep is waking up and finding her hair is wet. R. at 1070-71. She claimed to have no memory of any sexual activity. R. at 1068-70. Shortly after awaking later in the morning, she got dressed and left the room. R. at 1079-1081. J.M. did not describe any interaction with A1C Serjak between the point after she woke up and then left the room.

c. Charge III and the Specification thereunder (False Official Statement)

This specification states in pertinent part that A1C Serjak made a false official statement to SMSgt B by saying “that he was sexually assaulted by J.D.M.” Charge Sheet. The reasons the finding of guilt cannot stand are because the government failed to prove that A1C Serjak sexually assaulted J.M., but also because he never told SMSgt B that J.M. “sexually assaulted” him. R. at 897.

On 21 February 2021, A1C Serjak simply reported to SMSgt B that something just happened to him the prior day, but never explicitly claimed that he was sexually assaulted. After hearing A1C Serjak's factual description of what happened, SMSgt B is the one who concluded this amounted to a "textbook" sexual assault and characterized it as such. R. at 889-98. A1C Serjak never used the words "sexual assault" to characterize what happened to him.

d. Did J.M. experience an alcohol induced blackout?

Two videos captured J.M. walking outside the dorm rooms after she and A1C Serjak arrived at the dorms, the first before she entered his room and the second after she left his room. Def. Ex. B (outside A1C Serjak's room) and C (outside J.M.'s room). SA F obtained the CCTV footage during his investigation. R. at 1163. He identified J.M. and A1C Serjak as being outside A1C Serjak's room at "3:21 approximately." R. at 1166, Def. Ex. B. He identified J.M. outside her room at "0632." R. at 1168-69. Watching these videos, it becomes objectively clear that J.M. was walking by herself, without assistance and was not incapacitated from excessive alcohol consumption that night.

The key point is that the government did not prove that J.M. did not experience a blackout that night. Even she admitted that she had previously experienced blackouts. R. at 1056-1057. Based on Dr. S.N.'s un rebutted testimony in light of the evidence, it is reasonable to conclude that A1C Serjak could have honestly and reasonably believed that J.M., by her statements and behavior, was fully conscious and voluntarily engaged in sexual acts with A1C Serjak on 20 February 2021.

2. Charge II, Specification 1 (Sexual Assault of H.C.)

At trial, the defense argued that A1C Serjak was not guilty of abusive sexual contact by touching H.C.'s buttocks "with an intent to gratify his sexual desire, without her consent" based upon the testimony of H.C. standing alone. *Charge Sheet*, R. at 620-705. To the extent H.C. told him to stop doing anything in particular, he stopped. With respect to the gravamen of the offense,

H.C. testified that A1C Serjak was simply picking her up with the intent to simply place her on the bed, nothing more. R. at 685. Touching her buttocks in itself was not done with any specific intent to experience sexual gratification.

3. Charge I, Specification 2 (Assault Consummated by a Battery of B.H.)

It is difficult to understand this finding of guilty of this offense, “unlawfully restrain[ing] [B.H.’s] wrists with his hand” given that A1C Serjak was acquitted of committing the more serious allegation of abusive sexual contact assault during the same encounter with B.H. *Charge Sheet*. In light of the entirety of her testimony, the government failed to prove this offense as a matter of fact and law. R. at 737-868.

4. Conclusion

This is a very unusual case with an unusual factual and legal history as described in the argument above, but also in the remaining assigned errors. The bottom line is that the government’s case fell short of proving guilt of any offense beyond a reasonable doubt as a matter of fact and law.

WHEREFORE, A1C Serjak requests that you set aside his convictions and sentence.

V.

ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), ARE UNCONSTITUTIONALLY VAGUE BECAUSE THEY FAIL TO PUT DEFENDANTS ON FAIR NOTICE OF THE SPECIFIC CHARGE AGAINST THEM.

Additional Facts

The Government charged A1C Serjak of sexually assaulting J.M. “by penetrating her vulva with his penis, *without her consent.*” *Charge Sheet* (emphasis added). In closing argument, the Government began to argue that “either [J.M.] was so intoxicated that she wasn’t capable of and able to give that consent.” R. at 1299. Defense Counsel objected on the basis of improper argument

and said, “This isn’t charged as incapable of consenting due to alcohol.” *Id.* The Government responded, “It’s something that [the members] can consider Your Honor. It’s part of the instructions.” *Id.* The Military Judge overruled the objection. *Id.* The Government went onto argue, “Either, she was incapable of consent because she was so intoxicated that’s one of those circumstances you should consider. Or she was what she was explained, asleep when it all started and it happened. Either way accused didn’t have her consent.” *Id.*

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

Law and Analysis

In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature’s responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

From 1 October 2007 to the present date, Article 120 has undergone a sea change. Prior to 1 October 2007, Article 120 only contained the offenses of Rape and Carnal Knowledge. *MCM* at App. 20. Effective after 1 October 2007, Congress amended Article 120 to include Rape, Sexual Assault, and Other Sexual Misconduct. *Id.* at App. 21. However, that iteration of Article 120 did not contain a “without consent” charge, but rather a “declining participation in the sexual act” charge. *Id.* From 12 June 2012 to 31 December 2018, Congress updated Article 120 to include a

“bodily harm” charge, but removed the provisions regarding “declining participation in the sexual act.” *Id.* at App. 22.

It is still early days for the most recent version of Article 120 as it has existed for less than five years. Article 120, Note. The fledgling text contains a new sexual assault charge: “without the consent of the other person.” *Id.* at (b)(2)(A). Article 120, Sexual Assault, also includes the following charges that are relevant to this case:

- (2) Committing a sexual act upon another person—
 - (B) When the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; (b)(2)(B)
- (3) Committing a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
 - (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; (b)(3)(A)

The phrasing in Article 120(b)(2)(B) of asleep, unconscious, or otherwise unaware reflects three “separate theories of liability.” *Sager*, 76 M.J. at 162. As such, a sexual assault case that involves the victim drinking and sleeping could be charged under five different theories of liability (without consent, when asleep, when unconscious, when otherwise unaware, or incapable of consent due to impairment.)

“The due process principle of fair notice mandates that an accused has a right to know what offense and *under what legal theory* he will be tried and convicted.” *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (quotations and citations omitted) (emphasis added). Stated differently, “The military is a notice pleading jurisdiction...A charge and specification will be found sufficient if they, first, contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend....” *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (quotations and citations omitted). The Government “controls the charge

sheet from the inception of the charges through the court-martial itself.” *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022).

“To succeed in a typical facial attack,” an appellant must show that “no set of circumstances exists under which [Article 120(b)(2) and (g)(7)] would be valid or that the statute lacks any plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quotations and citations omitted). Article 120 is facially unconstitutional because the broad definition of “consent” allows the Government to charge one theory and then elicit evidence during trial on any other theory it prefers. The one definition of “consent” for at least four different theories of liability under Article 120(b)(2) enables this and is the reason that Article 120 is facially invalid. Because the Government can jump from theory to theory without sticking to its charging decision, an accused is never given due process fair notice. Thus, Article 120 lacks fair notice because it “hand[s] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.” *States v. Davis*, 139 S. Ct. 2319, 2325 (2019). In other words, Article 120 allows “prosecutors and courts to make it up” as the trial progresses, regardless of what crime was charged. *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring).

All of this this amounts to a “structural error” because the right at issue for A1C Serjak is not to be free from “erroneous conviction,” but rather his right to constitutional due process and fair notice. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (quotation and citation omitted). It should also be considered a structural error because the effect of the Government’s behavior is “too hard to measure” and “signal[s] fundamental unfairness.” *Id.*

In this case, the Government charged A1C Serjak under the “without the consent of the other person theory,” but then gathered, highlighted, and argued evidence on incapable of

consenting under Article 120. The Defense Counsel properly objected, stated the reason plainly, but the Military Judge overruled their objection. This Court should not permit to the Government to charge one theory of liability and then let it argue any other uncharged theory it would like.

The danger this case highlights is threefold. First, the Government can charge “without the consent” of the alleged victim and then elicit evidence during trial on whichever theory it likes. Second, when evidence comes out at trial not in line with its charged theory, the Government is free to emphasize and argue it. Third, the members can then convict an accused under a theory the Government did not charge. The Government could have avoided this issue altogether by charging in the alternative if it wanted to elicit evidence on multiple theories and argue them:

It is the Government’s responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not. In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law.

United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010). The Government chose not to charge in the alternative, making this an unforced error.

Furthermore, the Government’s exploitation of Article 120’s vagueness is not isolated to this case and is becoming common practice.⁷ The CAAF granted review in *United States v. Mendoza*, No. 23-0210/AR, 2023 CAAF LEXIS 699 (C.A.A.F. Oct. 10, 2023, *argued* 5 March 2024) which covers the overlapping issues of how the Government can charge, prove, and then argue alleged crimes under Article 120. Other cases highlight the Government’s misuse of Article 120 as well. *United States v. Williams*, 2021 CCA LEXIS 109, *57 (A.F. Ct. Crim. App. 12 March

⁷ Some of these cases fall under the 2016 version of the *MCM*; however, the Government made similar arguments by charging a “bodily harm” theory, but then arguing a different theory under Article 120.

2021) (unpub. op.) (“We see nothing infirm with the proposition that a person did not consent because that person could not consent by virtue of being incapable of consenting; therefore, inability to consent provides strong evidence of a person’s lack of actual consent.”); *United States v. Horne*, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. 27 May 2021) (unpub. op.) (finding that charging bodily harm, but arguing incapable of consent is permissible); *United States v. Weiser*, 80 M.J. 635, 642 (C. G. Ct. Crim. App 21 September 2020) (“[W]e are satisfied that Appellant was properly charged, tried, and convicted, without variance, of sexual assault by causing bodily harm and thus was not deprived of due process.”); *United States v. Gomez*, 2018 CCA LEXIS 167, *10 (N-M. Ct. Crim. App. 4 April 2018) (unpub. op.) (finding no error when “appellant argues he was charged with sexual assault and abusive sexual contact alleging bodily harm but prosecuted and convicted of those offenses under a different legal theory--that the putative victim was incapable of consenting due to impairment by alcohol.”).

This Court should not hesitate in finding that Article 120 is unconstitutionally vague. The Supreme Court recently struck down 18 U.S.C. § 924(c) because it “provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague.” *Davis*, 139 S. Ct. at 2324. This was notable because it had been enacted “33 years” prior and had been used in “tens of thousands of federal prosecutions” *Id.* at 2333 (citing to and quoting Kavanaugh, J., dissenting). In assailing the dissent, the majority underscored the importance of fair notice in our republic:

[T]he dissent seems willing to consign “‘thousands’” of defendants to prison for “years—potentially decades,” not because it is certain or even likely that Congress ordained those penalties, but because it is merely “possible” Congress might have done so. In our republic, a speculative possibility that a man’s conduct violated the law should never be enough to justify taking his liberty.

Id. at 2335. Given that the Supreme Court struck down a statute as unconstitutionally vague that was used in “*tens of thousands*” of criminal cases over 33 years, this Court should not hesitate in doing the same for a statute that has been in existence for less than five years.

Striking down Article 120 would also be acceptable under multiple canons of statutory interpretation. First, *verba cum effectu sunt accipienda*. This canon to avoid surplusage “is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. General Revenue Corp.*, 568 U.S. 371, 386, (2013); *see also United States v. Hyatt*, 28 F.4th 776, 783 (2022) (“If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). If this Court finds that the Government can charge one theory, then argue multiple others via the definition of “consent,” it renders the other theories of guilt “superfluous.” *Id.*

Second, *noscitur a sociis*. This interpretative canon means “a word is known by the company it keeps.” *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (quotations and citations omitted). Meaning, “consent” should be interpreted and limited in accordance with each individual theory of guilt under Article 120, not as an umbrella term that the Government can use to argue theories it did not charge. This makes sense because this canon “is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *Id.* (quotations and citations omitted).

Third, and finally, the canon of *expressio unius est exclusio alterius*. *Bittner v. United States*, 143 S. Ct. 713, 720 (2023). “When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to

convey a difference in meaning.” *Id.* Here, congress wrote five separate theories of liability. As such, it meant for them to “convey a difference in meaning.” *Id.* Congress did not intend for the prosecutor to amalgamate the separate provisions into one super theory of guilt.

WHEREFORE, A1C Serjak requests that this Honorable Court set aside the finding and sentence of guilty relating to J.M.

VI.

AS APPLIED, ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), DID NOT GIVE A1C SERJAK FAIR NOTICE WHEN THE MILITARY JUDGE OVERRULED DEFENSE COUNSEL’S OBJECTION TO TRIAL COUNSEL’S ARGUMENT ON UNCHARGED THEORIES OF LIABILITY.

Additional Facts

A1C Serjak incorporates the facts from Issue V. into this section.

Standard of Review

This Court reviews questions of statutory interpretation *de novo*. *Sager*, 76 M.J. at 161. “Questions pertaining to the substance of a military judge’s instructions, as well as those involving statutory interpretation, are reviewed *de novo*.” *United States v. Voorhees*, 79 M.J. 5, 15 (C.A.A.F. 2019). This Court reviews a military judge’s decision to include a requested instruction for an abuse of discretion. *United States v. Condon*, 77 M.J. 244, 245 (C.A.A.F. 2018).

Law and Analysis

A1C Serjak requests that this Court consider the Law and Analysis from Issue V for this Issue. In addition, A1C Serjak offers the following arguments. Assuming, *arguendo*, this Court does not find Article 120 unconstitutionally vague on its face, this Court should find that it was unconstitutional as applied to A1C Serjak.

One way the Government could have avoided this issue, was to charge A1C Serjak, in the alternative, with different theories of criminal liability. However, the Government is not required to do so. *Horne*, 2021 CCA LEXIS, at *61. Another way to avoid this issue was for the Military Judge to sustain the Defense Counsel’s objection or to give a tailored instruction. Because the Defense Counsel specifically said—in front of the members—“It’s part of the instructions,” the members were left with the erroneous impression that the instructions were correct. R. at 1299. Of course, it is the instructions which allow the Government to argue any theory of liability it chooses, regardless of how it charged A1C Serjak. A tailored instruction, however, could have ameliorated the structural error of Article 120.

WHEREFORE, A1C Serjak requests that this Honorable Court set aside the finding and sentence of guilty relating to J.M.

VII.

THE GOVERNMENT DID NOT GIVE A1C SERJAK “FIVE DAYS FROM RECEIPT” OF B.H.’S SUBMISSION TO THE CONVENING AUTHORITY “TO SUBMIT ANY MATTERS IN REBUTTAL” PRIOR TO THE CONVENING AUTHORITY TAKING ACTION.

Additional Facts

On 5 August 2022, A1C Serjak, through his Defense Counsel, submitted matters to the Convening Authority. *Memorandum for the Convening Authority*. Specifically, A1C Serjak requested that the Convening Authority defer his reduction in rank until action, defer his automatic forfeitures until entry of judgment, and waive the automatic forfeitures for a period of six months for the benefit of his family. *Id.* A1C Serjak noted that the Convening Authority could grant the request in whole or in part. *Id.*

On 8 August 2022, B.H. submitted matters to the Convening Authority. *Submission of Matters*. She requested that the Convening Authority “not grant Airman First Class Serjak any

leniency towards his sentence.” *Id.* B.H. claimed that A1C Serjak had “no remorse,” that he did not “take responsibility,” and that he did not apologize. *Id.* Furthermore, she argued that A1C Serjak “stared [her] down the entire time” and that he “was trying to intimidate” her. *Id.* B.H. detailed how the simple assault had “affected [her] then and continue[s] to affect [her] now.” *Id.* She concluded by repeating her request that A1C Serjak “fulfills the full sentence he was given.” *Id.*

On 19 August 2022, the Convening Authority issued his decision on action. *Convening Authority Decision on Action*. He took no action on the findings or sentence. *Id.* He denied the A1C Serjak’s request for deferment in the reduction of grade and deferment of forfeitures until entry of judgment. *Id.* The Convening Authority denied the requests partly because of “the effect on the Victims.” *Id.* The Convening Authority approved A1C Serjak’s request for waiver of automatic forfeitures. *Id.* The Convening Authority did not state that he considered matters in rebuttal from A1C Serjak. *Id.*

On 30 August 2022, Defense Counsel signed a receipt from the legal office for B.H.’s Submission of Matters, dated 8 August 2022 and for the Convening Authority Decision on Action, dated 19 August 2022. *Acknowledgement of Receipt*.

Standard of Review

This Court reviews post-trial processing de novo. *United States v. Valentin-Andino*, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Law and Analysis

A1C Serjak was entitled to receive B.H.’s submission of matters before the Convening Authority took action so that he could have “an opportunity to respond.” R.C.M. 1106(d)(3), R.C.M. 1106A(c)(2)(B), Discussion. The *Acknowledgement of Receipt*, dated 30 August 2022,

proves that the Government never gave A1C Serjak B.H.’s statement “as soon as practicable” nor did the Government give A1C Serjak an opportunity to rebut said statement. R.C.M. 1106A(c)(3). Under this Court’s precedent, such a failure is error. *Valentin-Andino*, 83 M.J. at 541.

A1C Serjak has the burden of “making a colorable showing of possible prejudice” to be entitled to relief because of the Government’s error. *Id.* at 542 (citation omitted). Specifically, he must “demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter.” *Id.* (citation omitted). A1C Serjak would have rebutted several statements, including prohibited matters that B.H. raised because they “relate[d] to the character of the accused” and were not “admitted as evidence at trial.” R.C.M. 1106A(c)(2)(A).

First, B.H. said that A1C Serjak was “staring her down” and intimidating her. This was prohibited character evidence because B.H. is arguing that the Convening Authority should not grant relief because A1C Serjak has a character for retribution, vengefulness, and revenge. This Court should find those comments to be prohibited. Regardless, A1C Serjak would have rebutted them. *See Motion to Attach*, 13 May 2024, Declaration. Second, B.H. said that A1C Serjak showed no remorse and did not take responsibility. A1C Serjak would have rebutted this argument as well. *Id.* Not only are B.H.’s statements false, but there are legal reasons why it would appear to an untrained, emotionally compromised victim—such as B.H.—that A1C Serjak did not take responsibility. *Id.* A1C Serjak would have rebutted those claims. Finally, A1C Serjak would have reminded the Convening Authority that he was only convicted of restraining B.H.’s wrists during consensual kissing. *Id.* A1C Serjak would have liked to contextualize the convicted misconduct to show that the harm B.H. recounted was not in proportion to the convicted offense. *Id.*

While the maxim is certainly outdated, the CAAF has said, “[T]he convening authority remains the accused’s best hope for sentence relief.” *United States v. Lee*, 50 M.J. 296, 297

(C.A.A.F. 1999) (quotations and citations omitted). Given that the Convening Authority said he gave relief partly because of “the effect on the Victims,” this Court cannot be certain that he declined to grant additional relief because of B.H.’s pleas. Thus, this Court cannot be certain that A1C Serjak was not prejudiced.

WHEREFORE, A1C Serjak requests that this Court disapprove two months of his adjudged confinement.

VIII.

AS APPLIED TO A1C SERJAK, THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY “DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION’S HISTORICAL TRADITION OF FIREARM REGULATION”⁸ WHEN A1C SERJAK WAS NOT CONVICTED OF AN OFFENSE INVOLVING A FIREARM.

Additional Facts

After his conviction, the Government determined that A1C Serjak’s case met the firearm prohibition under 18 U.S.C. § 922. *Entry of Judgment*. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922. *Id*.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021) (citations omitted).

Law and Analysis

One problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that A1C Serjak fell under the firearm prohibition. Thus, A1C Serjak is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be domestic violence given

⁸ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

the facts of his case. Regardless, it appears that the Government cannot meet its burden of proving a historical analog that barred offenders like A1C Serjak from possessing firearms.

The test for applying the Second Amendment is:

When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. 2111 at 2129-30 (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *argued*, 143 S. Ct. 2688 (Nov. 7, 2023). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at *3-4. Rahimi agreed to this domestic violence restraining order. *Id.* at *10.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at *6 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at *7. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* Here the issue is whether the

Founders would have “presumptively” tolerated a citizen being stripped of his right to keep and bear arms when he was not convicted of a violent offense. *Id.*

Third, the Fifth Circuit held that “[t]he Government fails to demonstrate that § 922(g)(8)’s restriction of the Second Amendment right fits within our Nation’s historical tradition of firearm regulation.” *Id.* at *30. If the Government failed to prove that our Nation’s historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it is questionable whether it can meet its burden for A1C Serjak’s conviction when he was not convicted of a violent offense.

An additional argument bolsters A1C Serjak’s position: The Fifth Circuit issued an opinion that held § 922(g)(3) unconstitutional. *United States v. Daniels*, No. 22-60596, 2023 U.S. App. LEXIS 20870 (5th Cir. Aug. 9, 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. 2023 Lexis 20870, at *3. He was later charged and convicted of a violation of § 922(g)(3). *Id.* at *4. In finding § 922(g)(3) unconstitutional, the Fifth Circuit’s bottom line was:

[O]ur history and tradition may support some limits on an intoxicated person’s right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. at *3.

WHEREFORE, A1C Serjak requests that this Court find the Government's firearm prohibition unconstitutional and order the Government to correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

FRANK J. SPINNER
Attorney at Law

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 13 May 2024.

Respectfully submitted,

S
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

N, Maj, USAF

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION TO ATTACH DOCUMENT
<i>Appellee,</i>)	
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	13 May 2024
<i>Appellant.</i>)	

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court’s Rules of Practice and Procedure, Airman First Class Isaac J. Serjak, the Appellant, hereby moves to attach the following document to the record of trial: a one-page declaration of Appellant, dated 29 April 2024. This Declaration is contained in the Appendix to this motion. This declaration is relevant and necessary, to this Court’s resolution of Appellant’s claims, raised in his Assignments of Error brief, that he was not properly served with the victim’s post-trial matters. *See* Brief on Behalf of Appellant, dated 13 May 2024.

This Court may attach this declaration to the record. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding service Courts of Criminal Appeals may consider affidavits “when doing so is necessary for resolving issues raised by materials in the record”); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) (“In addition to permitting consideration of any materials contained in the ‘entire record,’ our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record.”). Appellant’s claims were raised in the record. The record contains a receipt indicating Appellant’s counsel received a copy of the victim’s post-trial matters (after action was taken), but does not contain a receipt indicating Appellant was personally served with these matters, either

before or after action. A1C Serjak has the burden of “making a colorable showing of possible prejudice” to be entitled to relief because of the Government’s error. *United States v. Valentin-Andino*, 83 M.J. 537, 542 (A.F. Ct. Crim. App. 2023) (citation omitted). The attached Declaration is A1C Serjak’s showing of prejudice. Because these issues are raised by materials contained within the existing record but cannot be resolved by them, this Court may consider and attach Appellant’s declaration.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 13 May 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
Appellee)	
)	
v.)	
	)	ORDER
Isaac J. SERJAK)	
Airman First Class (E-3))	
U.S. Air Force)	
Appellant	)	Panel 1

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of assault, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928; one specification of abusive sexual contact and one specification of sexual assault, both in violation of Article 120, UCMJ 10 U.S.C. § 920; and one specification of false official statement in violation of Article 107, UCMJ 10 U.S.C. § 907.¹ The adjudged sentence was a dishonorable discharge, confinement for 54 months and 100 days, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On 5 August 2022, Appellant requested deferment of his reduction in grade until action, deferment of his automatic forfeitures until entry of judgment, and waiver of his automatic forfeitures for the benefit of his dependents for six months.

On 8 August 2022, one of the named victims, BH, elected to submit matters for the convening authority’s consideration. In her submission, BH stated that during the court-martial, Appellant “had no remorse at all.” Specifically, BH stated that during her testimony, Appellant “stared [her] down the entire time. It felt like he was trying to intimidate [her]” and that she felt uncomfortable by his “constant glaring.” Further BH stated that “[d]uring his unsworn statement, [Appellant] did not take responsibility for his actions. He did not reference [her] or any other victims in his statement to the court, nor did he offer an apology.” She requested the convening authority “not grant” Appellant “any leniency.”

¹ Unless otherwise noted, all references in this order to the UCMJ and to the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

On 19 August 2022, the convening authority took no action on the findings or the sentence. He denied the requested deferments but waived the automatic forfeitures for six months for the benefit of Appellant’s dependents. The convening authority concluded his decision on action by stating: “Before taking action, I considered matters timely submitted by the [Appellant] under [Rule for Courts-Martial (R.C.M.)] 1106 and by the Victim under R.C.M. 1106A.”

On 30 August 2022, eleven days after the convening authority’s action, Appellant’s area defense counsel signed a receipt for BH’s submission of matters. The date of this service formed the basis for Appellant’s assignment of error addressed below.

Appellant’s case was then docketed with this court, and on 13 May 2024, Appellant filed an assignments of error brief addressing several issues on appeal. Among the issues, Appellant raised a post-trial issue as to whether Appellant was afforded “five days from receipt” of BH’s submission to the convening authority “to submit any matters in rebuttal” prior to the convening authority taking action. Regarding this issue, Appellant requests “this [c]ourt disapprove two months of his adjudged confinement.”

Also on 13 May 2024, Appellant filed a motion to attach a declaration² by him explaining how he would have responded, had he been provided the opportunity, prior to the convening authority’s decision on action. The motion was unopposed.

We have reviewed the record, and it appears Appellant may not have been provided the opportunity to rebut the victim’s matters prior to the convening authority taking action on his case. Therefore, we order the Government to show cause why this court should not return Appellant’s record of trial for new post-trial processing.

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

ORDERED:

Appellant’s Motion to Attach Document dated 13 May 2024 is **GRANTED**.

² Appellant’s counsel states that this court may attach this declaration pursuant to *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). We agree.

Not later than 4 June 2024, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record for new post-trial processing specifically to allow Appellant the opportunity to rebut BH's matters prior to the convening authority taking action on his case.



FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>	)	ANSWER TO ORDER
	)	TO SHOW CAUSE
v.)	
	)	Panel No. 1
Airman First Class (E-3))	
ISAAC J. SERJAK, USAF,	)	ACM 40392
<i>Appellant.</i>)	

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

The United States provides this answer to this Court’s 22 May 2024 Order to Show Cause. For the reasons set forth below, this Court should not return the Record of Trial (ROT) for new post-trial processing.

STATEMENT OF THE CASE

On 22 May 2024, this Honorable Court issued an Order requiring the government to “show cause why this court should not return Appellant’s record of trial for new post-trial processing.” (See Ct. Order, 22 May 2024.) The Order was issued based on an assignment of error raised by Appellant that he was not afforded an opportunity to submit matters in rebuttal to BH’s submission of matters prior to the convening authority taking action. (Id.) In reviewing the record, this Court stated “it appears Appellant may not have been provided the opportunity to rebut the victim’s matters prior to the convening authority taking action on his case.” (Id.)

ARGUMENT

APPELLANT HAD THE OPPORTUNITY TO SUBMIT MATTERS IN RESPONSE TO A1C BH’S SUBMISSION AND, IN FACT, DID SUBMIT MATTERS IN RESPONSE TO BH’S MATTERS PRIOR TO THE CONVENING AUTHORITY TAKING ACTION ON APPELLANT’S CASE.

Standard of Review

Proper completion of post-trial processing is a question of law this court reviews de novo. United States v. Valentin-Andino, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Law

“In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.” R.C.M. 1106A(a). “The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable.” R.C.M. 1106A(c)(3).

If a crime victim submits matters under R.C.M. 1106A, “the accused shall have five days from receipt of those matters to submit any matters in rebuttal.” R.C.M. 1106(d)(3). “Before taking or declining to take any action on the sentence [in clemency], the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim.” R.C.M. 1109(d)(3)(A). In making a clemency decision, a convening authority “may not consider matters adverse to the accused without providing the accused an opportunity to respond.” R.C.M. 1106A(c)(2)(B), Discussion. The convening authority may also consider “additional matters,” including evidence introduced at the court-martial, appellate exhibits, the recording or transcription of the proceedings, the personnel records of the accused, and any other such matters the convening authority deems appropriate. R.C.M. 1109(d)(3)(B).

Statement of Facts

On 5 August 2022, Appellant, through his defense counsel, submitted matters to the convening authority requesting a deferment in his reduction in rank until action, deferment in his

automatic forfeitures until entry of judgment, and waiver of automatic forfeitures for a period of six months. (ROT, Vol. 6.)

On 8 August 2022, BH submitted matters to the convening authority. (ROT, Vol. 6.) As Appellant states in his brief and as noted by this Court in its Order, BH stated that Appellant “had no remorse at all,” and that, during his testimony, Appellant “stared me down the entire time. It felt like he was trying to intimidate me,” and that she felt uncomfortable by his “constant glaring.” (Id.) BH also said Appellant “did not take responsibility for his actions,” and that he “did not reference me or any other victims in his statement to the court, nor did he offer an apology.” BH requested the convening authority “not grant [Appellant] any leniency towards his sentence.” (Id.)

On 10 August 2022, DA, the base legal office paralegal, sent BH’s matters to Appellant’s trial defense counsel, Maj DB. (Dec. of DA at Atch 1.)¹ The notice included a memorandum entitled *Opportunity for Accused to Submit Matters in Rebuttal* signed by the base legal office Deputy Staff Judge Advocate. (Id. at Atch 2.) The notice stated, “[BH] submitted the attached matters to the convening authority. You may submit matters in response or rebuttal.” (Id.) The notice continued, “You have 5 calendar days to submit a response or waive your right to submit a response. Your response is due on 15 August 2022.” (Id.)

Two days later, on 12 August 2022, the convening authority (the Third Air Force Commander (3AF/CC)), signed a Convening Authority Decision on Action (CADA). According

¹ In response to this Court’s Order, the Government obtained a declaration from DA. A separate motion to attach DA’s declaration was filed simultaneously with this response.

to Col BT, the 3AF Staff Judge Advocate (SJA), the 3AF legal office was “unaware that there was a Defense response to a victim’s submission outstanding.” (Dec. of Col BT.)²

The same day, 12 August 2022, Maj DB, on behalf of Appellant, submitted matters in response to BH’s submission of matters to the base legal office. (Dec. of DA at Atch 3.) The document, entitled *Response to [BH’s] Submission of Matters*, states the submission by Maj DB is “[o]n behalf of my client” and acknowledges that BH’s matters “were provided to the Defense” on 9 August 2022. (Id.) Maj DB’s memorandum specifically addressed various portions of BH’s submission, including her stating Appellant did not show remorse or offer an apology, that Appellant “stared her down,” and that BH requested “that the convening authority not grant lenience to [Appellant].” (Id.) Maj DB then argued while BH’s submission was outside the scope of R.C.M. 1106A(c) and should not be considered by the convening authority.

On 15 August 2022, DA forwarded Appellant’s submission of matters in response to BH’s submission to the 3AF legal office. (Dec. of SrA DA at Atch 4.)

Upon receipt of Appellant’s response to BH’s submission, the 3AF legal office resubmitted the post-trial package to the convening authority with all the documents and included a revised push note³ stating that the reason the convening authority was seeing the package again was because of Appellant’s response to BH’s matters. (Dec. of Col BT.) Col BT states, “I made the same recommendation as to post-trial action, noted the new document

² In response to this Court’s Order, the Government obtained a declaration from Col BT. A separate motion to attach Col BT’s declaration was filed simultaneously with this response.

³ Col BT explains that he used a “push note” as “[o]ur primary method of communicating with 3AF/CC in a summary way to advise as to the reason that a package was before him and recommended action.” (Dec. of Col BT.) The push note was “a brief, 2-3 paragraph memorandum (a ½ sheet of paper) that would accompany the package of relevant documents” to the convening authority’s office. (Id.)

was attached, and to ensure legal sufficiency asked 3AF/CC to review the package again and re-sign the CADA, which he did on 19 August 2022.” (Id.)

On 19 August 2022, the convening authority issued a new CADA which stated that it “replaces my previous memo in this case, dated 12 August 2022.” (ROT, Vol 6.) As noted by this Court in its Order, the convening authority stated, “Before taking action, I considered matters timely submitted by the [Appellant] under [Rule for Courts-Martial (R.C.M.)] 1106 and by the Victim under R.C.M. 1106A.” (Id.)

Analysis

As shown by the additional documentation and declarations of DA and Col BT, Appellant, through his counsel, was provided BH’s submission of matters prior to the convening authority’s ultimate 19 August 2022 action. Additionally, Appellant, through his counsel, provided a response to those matters prior to the convening authority’s ultimate 19 August 2022 decision on action. While Appellant’s ROT contains a 30 August 2022 receipt from Maj DB regarding BH’s matters, Maj DB’s 12 August 2022 response to BH’s submission of matters (1) acknowledges the defense received the matters on 9 August 2022, and (2) specifically references various portions of BH’s submission. Thus, the record is now clear that Appellant, through his counsel, received BH’s submission, and responded to it, prior to the convening authority’s 19 August 2022 CADA.

Further, while the convening authority initially made a decision on action on 12 August 2022 (prior to receiving Appellant’s response to BH’s submission), Col BT’s declaration shows the convening authority reviewed the case anew once Appellant’s submission was received and then issued a new decision on action on 19 August 2022. Col BT’s declaration is

supported by the convening authority's 19 August 2022 decision on action which specifically states that it replaced the previous 12 August 2022 CADA.

While the Government acknowledges the attachments in DA's declaration should have been included in Appellant's ROT, these attachments, as well as DA's and Col BT's declarations, cure any appearance that "Appellant may not have been provided the opportunity to rebut the victim's matters prior to the convening authority taking action on his case." (*See Ct. Order, 22 May 2024.*) These new documents not only show Appellant was provided the opportunity to respond to BH's matters prior to the convening authority taking action on his case, but that he did, in fact, respond to those matters. Moreover, the documents show the convening authority reviewed Appellant's response prior to making a decision on action in the case on 19 August 2022. Thus, the Government has shown cause as to why this court should not return Appellant's ROT for new post-trial processing.

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Appellate Government Counsel
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MARY ELLEN PAYNE
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Air Force Legal Operations Agency
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 4 June 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>)	MOTION TO ATTACH
	)	DOCUMENTS
v.)	
	)	Panel No. 1
Airman First Class (E-3))	
ISAAC J. SERJAK, USAF,	)	ACM 40392
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(b) of this Court’s Rules of Practice and Procedure, the United States submits the following documents in support of the Government’s Answer to Order to Show Cause in the above referenced case:

- Declaration of DA, dated 30 May 2024, with four attachments, 8 pages total; and
- Declaration of Col BT, dated 3 June 2024, 2 pages.

On 13 May 2024, Appellant filed his assignments of error brief, which included a post-trial issue as to whether Appellant was afforded “five days from receipt” of BH’s submission to the convening authority “to submit any matters in rebuttal” prior to the convening authority taking action. (App. Br. at 44.) On the same date, Appellant filed a motion to attach a declaration by him explaining how he would have responded, had he been provided the opportunity, prior to the convening authority’s decision on action. (App. Mot. to Attach.)

On 22 May 2024, this Court ordered the Government to show cause why this court should not return Appellant’s record of trial for new post-trial processing. (See Ct. Order, 22 May 2024.) Within that Order, this Court agreed that Appellant’s declaration from his 13 May 2024 Motion to Attach could be attached to the record pursuant to United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020).

In response to Appellant’s raised issue and this Court’s Order, the Government received declarations from DA and Col BT, both of which provide this Court necessary background and context regarding Appellant’s claim that he was not provided the opportunity to respond to

BH’s submission of matters prior to the convening authority taking action in his case.

DA’s declaration and attachments show that Appellant, through his counsel, was provided BH’s submission and that Appellant, through his counsel, responded to BH’s submission.

DA’s declaration and attachments also show Appellant’s submission was forwarded to the convening authority’s legal office prior to the convening authority taking action on 19 August 2022. Col BT’s declaration shows that the convening authority was provided Appellant’s response to BH’s submission prior to the convening authority taking action on 19 August 2022.

Our superior Court has held matters outside the record may be considered “when doing so is necessary for resolving issues raised by materials in the record.” Jessie, 79 M.J. at 444. The Court has also concluded that “based on experience . . . ‘extra-record fact determinations’ may be ‘necessary predicates to resolving appellate questions.’” Id. at 442 (*quoting United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993)).

Here, Appellant’s post-trial processing claim is directly raised by materials in the record. Further, this Court has already concluded that Appellant’s declaration addressing this issue may be attached to Appellant’s record pursuant to Jessie. (*See* Ct. Order, 22 May 2024.) These declarations and attachments help further explain Appellant’s post-trial processing issue and directly address this Court’s Show Cause Order. Thus, this Court may consider them under Jessie.

WHEREFORE, the United States respectfully requests this Honorable Court grant this Motion to Attach Documents.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 4 June 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

added). Relevant to this case, R.C.M. 1112(f)(3) states “Any matter filed by the accused or victim under R.C.M. 1106 or 1106A” shall be attached to the certified record of trial. The attachments to DA’s declaration would fall under the category of matters filed by the accused under R.C.M. 1106 or 1106A.

Therefore, the Government’s Motion to Attach, dated 4 June 2024, which requested to attach missing documents from the Record of Trial is insufficient to comply with the requirements of R.C.M. 1112 and 1116. Notably, if this Court grants the Government’s Motion to Attach, it will have permitted the Government to skip several steps designed to safeguard the accuracy of the record, and therefore, A1C Serjak’s due process. The record will not have been returned to the Military Judge for correction, the Military Judge will not have given notice to all parties—including the Trial Defense Counsel—regarding the proposed correction, and the Military Judge will not have taken corrective action. Thus, the record will be incorrectly certified.

These steps are required because, after granting motions to attach for incomplete records, this Court has “not consider[ed] the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete.” *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 June 2022). In *United States v. Daniels*, after granting a government motion to attach, this Court tagged the attachment as a “purported copy” of the military judge’s ruling. *Daniels*, No. ACM 39407 (rem), 2022 CCA LEXIS 472, at *32 (A.F. Ct. Crim. App. 9 Aug. 2022). This Court went on to “clarify the significance of this court granting the Government’s motion to attach” by stating:

We understand this to mean that we can consider the written ruling in deciding whether the Government has rebutted the presumption of prejudice on appeal. To be clear, we are not holding that the record of trial is now complete with [the] ruling added...If the Government sought to make the record of trial complete, *it should have requested our court order a certificate of correction.*

Id. (citations and quotations omitted) (emphasis added).

The Government correctly “acknowledge[d] the attachments in DA’s declaration should have been included in Appellant’s ROT.” Answer to Order to Show Cause, 4 June 2024, at 5. However, the Government incorrectly argued that these attachments “cure any appearance” that A1C Serjak was provided the opportunity to respond to B.H. because these attachments have not been authenticated or found to have the proper foundation. *Id.* Only a remand and recertification can assure this Court that the documents are what they purport to be because a remand will allow all parties to review the records.

Furthermore, there is a new issue: The record of trial is now incomplete. According to the relevant R.C.M.’s and this Court’s previous rulings, the Government’s declaration and attachment would do nothing to resolve the issue of the record of trial being incomplete. Although this Court could grant the Government’s motion, it should not. A1C Serjak should not have to rely on a “purported copy” of required documents that should have been included in his record of trial. Rather, A1C Serjak should be able to rely on a corrected, certified copy of his record of trial so he can properly raise issues before this Court.

WHEREFORE, A1C Serjak respectfully requests that this Honorable Court to deny the Government's Motion to Attach and remand his record of trial for a certificate of correction.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.)	
	)	Panel No. 1
Airman First Class (E-3))	
ISAAC J. SERJAK, USAF,)	ACM 40392
<i>Appellant.</i>)	

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.)	
	)	Panel No. 1
Airman First Class (E-3))	
ISAAC J. SERJAK, USAF,	)	ACM 40392
<i>Appellant.</i>)	

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT] WAS THE VICTIM OF SELECTIVE PROSECUTION WHEN COMMAND WROTE, “THERE COULD BE BACKLASH” IF [APPELLANT] “HAS THE OPPORTUNITY TO GET HIS STORY OUT OF ‘I (WHITE MALE) WAS THE VICTIM FIRST, NOW THE BLACK FEMALE IS THE VICTIM’”?

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT ANY TAIN FROM THE UNLAWFUL COMMAND INFLUENCE THAT OCCURRED WAS OVERCOME WHEN: 1) THIRD AIR FORCE INFLUENCED THE BASE LEGAL OFFICE TO CHANGE ITS OPINION ON THE CASE TWICE; 2) THE BASE LEGAL OFFICE TOLD THE BASE COMMAND ABOUT THE UCI; AND 3) THE BASE LEGAL OFFICE THEN ADVISED COMMAND PURSUANT TO THIRD AIR FORCE’S INFLUENCE?

III.

WHETHER THE GOVERNMENT’S REPREFERRAL OF CHARGES SOLELY IN RESPONSE TO EVIDENCE OF UNLAWFUL COMMAND INFLUENCE IS “SUBTERFUGE” OR AN “IMPROPER REASON” UNDER UNITED STATES V. HENDRIX, 77 M.J. 454 (C.A.A.F. 2018) AND THUS SHOULD NOT RESET THE SPEEDY TRIAL CLOCK?

IV.

WHETHER [APPELLANT'S] CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT?

V.

WHETHER ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), ARE UNCONSTITUTIONALLY VAGUE BECAUSE THEY FAIL TO PUT DEFENDANTS ON FAIR NOTICE OF THE SPECIFIC CHARGE AGAINST THEM?

VI.

AS APPLIED, WHETHER ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920(B)(2) AND (G)(7), GAVE [APPELLANT] FAIR NOTICE WHEN THE MILITARY JUDGE OVERRULED DEFENSE COUNSEL'S OBJECTION TO TRIAL COUNSEL'S ARGUMENT ON UNCHARGED THEORIES OF LIABILITY?

VII.

WHETHER THE GOVERNMENT GAVE [APPELLANT] "FIVE DAYS FROM RECEIPT" OF B.H.'S SUBMISSION TO THE CONVENING AUTHORITY "TO SUBMIT ANY MATTERS IN REBUTTAL" PRIOR TO THE CONVENING AUTHORITY TAKING ACTION?

VIII.

AS APPLIED TO [APPELLANT], WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN [APPELLANT] WAS NOT CONVICTED OF AN OFFENSE INVOLVING A FIREARM?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant faced the following charges and specifications at trial:

- HC

Specification 1 of Charge I (Assault Consummated by Battery) and Specification 1 of Charge II (Abusive Sexual Contact) involved HC. (ROT, Vol. I, Charge Sheet). In Specification 1 of Charge I, in violation of Article 128, UCMJ, Appellant was charged with unlawfully touching HC's body with his hand between on or about 1 December 2020 and on or about 31 December 2020. (Id.) The member panel acquitted Appellant of this specification.

In Specification 1 of Charge II, in violation of Article 120, UCMJ, Appellant was charged with touching HC's buttocks with his hand on or about 9 January 2021. (Id.) The member panel convicted Appellant of this specification.

- BH

Specifications 2 and 3 of Charge I (Assault Consummated by Battery) and Specification 2 of Charge II (Abusive Sexual Contact) involved BH. (Id.) In Specification 2 of Charge I, in violation of Article 128, UCMJ, Appellant was charged with unlawfully restraining BH's wrists with his hand on or about 11 February 2021. (Id.) The member panel convicted Appellant of this specification.

In Specification 3 of Charge I, in violation of Article 128, UCMJ, Appellant was charged with unlawfully applying force to BH's neck with his hand on or about 11 February 2021. (Id.) The member panel acquitted Appellant of this specification.

In Specification 2 of Charge II, in violation of Article 120, UCMJ, Appellant was charged with touching BH's buttocks with his hand on or about 11 February 2021. (Id.) The member panel acquitted Appellant of this specification.

- JM

Specification 2 of Charge II (Abusive Sexual Contact) involved BH. (Id.) In that specification, in violation of Article 120, UCMJ, Appellant was charged with penetrating JM's vulva with his penis on or about 19 February 2021. (Id.) The member panel convicted Appellant of this specification.

Appellant was also charged in Charge III and its Specification of making a false official statement to SMSgt JB "that he was sexually assaulted by Amn JM, or words to that effect." (Id.) The member panel convicted Appellant of this specification.

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

ARGUMENT

I.

APPELLANT FAILED TO MEET HIS BURDEN TO PROVE THAT HE WAS VINDICTIVELY PROSECUTED.

Standard of Review

In reviewing rulings by a military judge on a motion to dismiss for selective prosecution, this Court reviews the findings of fact under a "clearly erroneous" standard, and reviews conclusions of law de novo. See United States v. Johnson, 54 M.J. 32, 34 (C.A.A.F. 2000). Typically, this Court is bound by the military judge's findings of fact unless they are "clearly erroneous." United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).

Law

To support a claim of selective or vindictive prosecution, Appellant has a "heavy burden of establishing" that (1) "while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been

singled out for prosecution,” and (2) “that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” United States v. Gargaro, 45 M.J. 99, 102 (C.A.A.F. 1996) (*quoting United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)).

There are good reasons that “[c]ourts are hesitant to review decisions whether to prosecute.” United States v. Hagen, 25 M.J. 78, 84 (C.M.A. 1987) (*internal citations omitted*). It is well settled, “[t]here is a strong presumption that the convening authority performs his duties as a public official without bias. A party complaining of a public official's bias bears the burden of rebutting that presumption.” Id. Moreover, an appellant “must show more than a mere possibility of selective prosecution; he must show discriminatory intent.” Id. at 83.

Additional Facts¹

On 16 February 2021, Appellant received a verbal counseling for his “aggressive behavior towards females in the dorms.” (App. Ex. XIV at Atch 1.) On 18 February 2021, SMSgt JB, the Logistics Readiness Squadron (LRS) first sergeant, contacted the Air Force Office of Special Investigations (AFOSI) stated that Appellant “got handsy” with HC. (Id. at Atch 2.) SMSgt JB testified during a motion hearing at Appellant’s trial that Appellant was placed on two no contact orders for HC and BH and explained the circumstances leading to those orders. (R. at 89-92.)

A few days later, on Sunday, 21 February 2021, Lt Col JS, the LRS (and also Appellant’s) commander, received a call from SMSgt JB about a call SMSgt JB received from Appellant. (R. at 29-30.) SMSgt JB said Appellant called and reported an incident from the

¹ The timeline of facts detailed below are pertinent to Issues I through III.

night before in his dorm room. SMSgt JB said Appellant began the conversation by stating, “I’m calling you to get ahead of something.” (Id.) In her motion testimony at Appellant’s court-martial, Lt Col JS said this comment made her a “bit uneasy because it just doesn’t sound right; a little, I guess, suspect.” (R. at 30.)

SMSgt JB told Lt Col JS that Appellant told him what happened the night before, including what happened in his room with another airman. SMSgt JB testified that Appellant told him he was driving two drunk girls home, the two girls began making out, and that one of the girls asked if she could come to his room when they arrived back at the dorms. (R. at 86-87.) SMSgt JB said Appellant did not know her name, only that she was called “J.” (R. at 90.) Appellant then told SMSgt JB that the two fell sleep and that Appellant was awoken by the female airman who was mostly naked and coming onto him. (R. at 87.) Appellant told SMSgt JB that the other airman kept kissing him and forced him to have sex. (Id.)

During the conversation with Appellant, SMSgt JB said he heard someone knocking on Appellant’s door and could hear the knocking airman “saying something like, ‘What did you do? What happened? What happened to my friend?’ things of that nature.” (R. at 88.)

Lt Col JS said, “That is when [SMSgt JB] was like, okay this is a sexual assault case with [Appellant] as the victim at that time.” (Id.) Lt Col JS immediately called Col AW, the Mission Support Group commander, recounting the information she heard from SMSgt JB that Appellant reported a sexual assault and “that we were going to go through the sexual assault process through the base SARC.” (R. at 31.)

On 23 February 2021, Appellant signed and swore to an AF IMT 1168 at the AFOSI Detachment. (App. Ex. XI, Atch 4.) In it, Appellant wrote, “While still pending a Special Victim Counsel (SVC), I have decided not to provide further information on the person who I

believe assaulted me, or provide any other information pertaining to the allegation, at this time. In deciding not to participate in an OSI investigation, I realize OSI initiated a substantive criminal investigation into this matter.” (Id.). Appellant also wrote, “I also do not want to participate in any military justice or criminal proceeding,” and, “Without providing details of the allegation, I understand law enforcement and prosecutors may not be able to identify my assailant.” (Id.) Appellant continued, “I have been fully advised of my options, and I understand the consequences of my decision not to participate.” (Id.)

Lt Col JS testified during the motion hearing that at that time she and SMSgt JB did not know who the other airman involved in Appellant’s allegation was. When asked if they eventually found out, Lt Col JS answered as follows:

Yes. That Monday at work, that is when, I believe, [SMSgt JB] told me that, previous to this incident over the weekend, that there were two other incidents of sexual assault with [Appellant] involving my airmen. One airman came to the First Sergeant a week prior. They were trying to handle it at lower levels. Then that airman had mentioned that another airman had been involved in a sexual assault possible situation with [Appellant]. The Shirt had those two airmen contact the SARC and OSI. That was all proceeding and then – we were trying to figure out who this person was that was involved in the incident with [Appellant].

(R. at 32.) Lt Col JS said they eventually found out who the other airman in Appellant’s room was, explaining they went through the First Sergeant network asking if any of their airmen were involved in a situation over the weekend. The Security Forces first sergeant responded that they thought it was their airman, adding that this airman had gone to the Air Force Office of Special Investigations (AFOSI) and given a statement. (Id.) That airman’s name was JM. (R. at 33.)

On 1 March 2021, AFOSI interviewed JM. (App. Ex. XI at Atch 1.) AFOSI read JM her Article 31, UCMJ, rights, and, upon hearing she was accused of sexual assault,

JM began crying. (App. Ex. X at Atch 3.) JM stated she understood her rights, did not want a lawyer, and was willing to answer questions. (Id.) After she provided her statement and answered questions, AFOSI transitioned the interview from a subject interview to a victim interview, and provided JM with a form that described her rights as a victim and resources available to her. (Id.)

At one point, after Appellant was interviewed by AFOSI, SMSgt JB testified that Appellant made a comment, “something to the effect of, ‘Isn’t it convenient that the straight white guy is, all of a sudden, the suspect.’” (R. at 95.)

The other two airman were identified as HC and BH, both members of Lt Col JS’s squadron. Lt Col JS immediately issued no contact orders for all three of the female airmen and to Appellant, stating, “No one was allowed to contact each other.” (R. at 33.) Later, upon receiving a two-page document from AFOSI regarding interviews with JM, HC, and

BH, Lt Col JS decided to put Appellant into pretrial confinement on or about 4 March 2021 upon consultation with the legal office and SMSgt JB. Lt Col JS said, “There was a trend where it would appear that [Appellant] was targeting certain females and so, basically, I wanted to put a stop to that.” (R. at 34.)

Lt Col JS sent an email to her superiors explaining she was putting Appellant into pretrial confinement because she felt he was a threat to the base and dorm population. (App. Ex. X at Atch 6.) One part of her email reads, “The other impact is that [Appellant’s] own sexual assault report with OSI has been flipped and if [Appellant] has the opportunity to get his story out of ‘I (white male) was the victim first, now the black female is the victim,’ there could be backlash.” (Id.) During motion practice, Lt Col JS explained this sentence as follows:

It’s in the Impact statement area. It says, “The other impact is that [Appellant’s] own sexual assault report with OSI has been flipped.”

Originally, he reported the sexual assault, and so he was the victim, but because of [JM's] interview, he then became the subject. Because [Appellant] had a pretty popular -- or he was very active on social media, we wanted to make sure that leadership was aware of the possible impact, if he was upset that he was the one who made the sexual assault allegation and now he is no longer the victim. He is the subject of this case.

...

It [referenced race and gender] because there was also an aspect where it might be that, because, as his commander, that maybe I was protecting a female or a female that is African-American or that there was prejudice there or something, but it was really just to make sure that leadership was aware if he had any outlash against what was occurring, that his story -- basically, that he had originally brought this story that he was the victim, but now isn't; that there was different avenues of is it race or gender or something like that.

(R. at 36.) She said the purpose of mentioning race and gender was to notify her superiors “on the possibility if there was an Airman, NCO, Senior NCO page-type thing that would get out if, I reported sexual assault and now, as a white male, I am no longer the victim. I am now the subject-type situation.” (R. at 37.) Lt Col JS said her decision to put Appellant in pretrial confinement was “purely that he would be a threat to other airmen in the dorms,” and not to keep him from getting his story out. (Id.)

Meanwhile, AFOSI opened two separate investigations (with separate investigators) related to the incident between Appellant and JM, one where Appellant was the victim and JM was the subject, and one where Appellant was the subject and JM was the victim. On 11 March 2021, AFOSI contacted Appellant’s victim’s counsel (VC) in an attempt to schedule a victim interview with Appellant. (App. Ex. XXIX at 2.) Appellant’s VC responded that Appellant declined to be interviewed by AFOSI. (Id. at 1.)

Lt Col JS stated she decided to move forward with JM’s allegations against Appellant, rather than Appellant’s allegations against JM, because JM had put her

statement in writing to AFOSI, while Appellant had only given a verbal statement to SMSgt JB and, shortly after the event occurred, became non-participatory. (R. at 38.) Meanwhile, JM had provided a written statement, pictures and a video. Lt Col JS said neither race nor gender played a role in her decision. (R. at 39.)

Lt Col JS said she then met with the RAF Mildenhall base legal office, who told her, “if they were to go to court-martial, and they were to be put in my seat, it would be more than likely that [Appellant] would not be found guilty of the charges.” (R. at 41.) Based on that advice, Lt Col JS decided to give Appellant a Letter of Reprimand (LOR), which was served on 15 April 2021. However, the LOR only included the allegations involving BH and HC. (R. at 47, 58.) The LOR did not involve JM because her case had not yet been finalized. Lt Col JS planned to initiate an administrative separation following the LOR. Appellant was released from pretrial confinement, but remained restricted to base.

As the LOR was processing, the Third Air Force Chief of Military Justice emailed the base legal office, stating, “I just wanted to see if we can pump the brakes on [Appellant’s] case . . . based on my review of the evidence, I feel weird about the idea of him getting an LOR for what is a pretty decent case, and just wanted to see if you can talk me through it.” (App. Ex. XIV at Atch 10.) The Chief of Military Justice continued, “Based on the clear picture of him as a narcissistic predator, his transparent attempts at obstruction of justice, and the 0% chance he’s discharged if you give him an LOR (Defense will have a field day with that,) I think we need to think through options here . . . maybe we arrive at the same COA, but I just need to know why.” (Id.)

After serving the LOR, Lt Col JS said the base legal office contacted her and told her that Third Air Force wanted to pursue a general court-martial. (R. at 42.) Lt Col JS said this

occurred approximately one month before she ultimately preferred charges. (R. at 43.) Lt Col JS said she ended up preferring charges because she felt she was “making the wrong decision by doing an admin separation” since Third Air Force wanted a general court-martial. (Id.) On cross-examination, Lt Col JS agreed that she felt pressured to prefer charges. (R. at 65.)

On 19 May 2021, Lt Col JS preferred charges against Appellant. On 24 June 2021, an Article 32 preliminary hearing was held in which the preliminary hearing officer found that probable cause existed for each offense and recommended trial by general court-martial. (App. Ex. XIV at Atch 13.)

Also during this timeframe, Lt Col JS was considering PCSing Appellant to RAF Lakenheath, which was five minutes from RAF Mildenhall, for a variety of reasons, including to separate him from the victims in the case and also from the flight. (R. at 49-50.) Lt Col JS said Appellant “felt like people were talking behind his back,” and that moving him to RAF Lakenheath would “give him a bit of a fresh start,” as well as give him “access to his chaplain that he regularly saw.” (R. at 50.)

Following the Article 32 hearing, held on 24 June 2021, the RAF Mildenhall/ Air Refueling Wing (ARW) Staff Judge Advocate (SJA) emailed the ARW Vice Commander (CV) recommending he dismiss the charges against Appellant. (App. Ex XIV at Atch 17.) The base SJA wrote, “Dismissal of charges will extinguish the proceedings and allow a new referral to take place.” In her “Rationale/Recommendation” section, the SJA explained as follows:

[W]e have identified a potential unlawful command influence issue whereby the Squadron Commandeer potentially felt pressured to prefer charges against the member. Dismissal ends the current case proceedings, and will allow a neutral commander to review the evidence and make a disposition decision.

(Id.) The ARW/CV then emailed the ARW Wing Commander (CC), stating, “I have a call in with [the ARW SJA] tomorrow to confirm there is no way that this action will somehow prevent the events from going to a future trial at Lakenheath.” (Id.) The charges were dismissed on 8 July 2021.

During this timeframe, in either late June or early July, Appellant was accused of inappropriate conduct involving a separate woman at the Auto Hobby Shop. (R. at 70.)

Though Appellant, after the dismissal of charges, requested an expedited transfer, Lt Col JS testified that the transfer was denied, stating, “We were already in talks about PCSing him to Lakenheath. Because of that incident, we then decided to not PCS him to Lakenheath because he was causing more issues on Mildenhall and so it didn't make any sense to send him to another base where he could potentially do that same thing over there, and their leadership team didn't need that.” (R. at 70.)

On 13 July 2021, JM's squadron commander, the Security Forces (SFS) commander (SFS/CC), recommended no action in the case of Appellant's allegation of sexual assault against JM. (App. Ex. XXVI.) The same day, ARW/CC took initial disposition in the form of no action on the case. (App. Ex. XXX.)

On 15 July 2021, the ARW SA emailed the ARW/CC detailing the concerns involving Lt Col JS's testimony that Third Air Force “wanted her to send the case to a CM” and the appearance of unlawful command influence (UCI). (App. Ex. XV at 12.) To avoid that issue, the SJA stated the charges had been dismissed and that a separate squadron commander, the Maintenance Squadron Commander (MXS/CC), would review the evidence and make “his own independent decision on whether the case should go to a CM.” (Id.) The SJA

continued, “Assuming his review results in a new preferral (expected), the Art 32 is already complete and the case will be docketed for trial in the upcoming months.” (Id.)

The ARW SJA also addressed Appellant’s expedited transfer request, stating, “the current plan for [Appellant] is to keep him here in LRS and NOT PCS him to RAFL due to his concerning behavior and advances towards a married female clerk at Auto Hobby.” (Id.) The SJA added, “More specifically, [Appellant] reportedly flirted with her, made inappropriate comments about her even after she said she was married with 2 kids and then lingered in her doorway during which she felt very uncomfortable and totally creeped out.” (Id.)

On or around 15 July 2021, Appellant’s defense counsel contacted the base legal office “proposing a Chapter 4 . . . or a disposition agreement such that [the legal office does] not prefer charges and he agrees to a UOTHC discharge.” (App. Ex. XV at 15.) Capt AB, the base legal office’s Chief of Litigation, wrote to the Third Air Force SJA regarding this proposal, adding, “We were thinking of issuing him an Article 15 for the first two assaults, and potentially an LOR for inappropriate behavior for the third victim.” (Id.) On 16 July 2021, the Third Air Force SJA replied, “Nope,” and, after explaining his reasoning, stated, “I cannot in good conscious recommend letting him off without accountability, acknowledgement of his actions, and an appropriate black mark that will stay with him long into the future branding HIM the sexual offender – that’s court-martial.” (Id. at 14.)

Maj TB testified that in July 2021, he was contacted by the ARW SJA and asked if he would “be willing to look at a case as a – kind of coming in as a third party and make a determination.” (R. at 74.) Maj TB received the evidence for the case around 21 July 2021. Maj TB met with a Capt ET from the base legal office. When asked if Capt ET gave Maj TB his “thoughts on what the legal office that was appropriate for the case,” Maj TB, answered, “He

advised me.” (R. at 81.) Maj TB would later meet again with Capt ET, who again provided his opinion on whether a court-martial was appropriate. When asked, “You concurred with that recommendation,” Maj TB replied, “I made my own determination and it was that.” (R. at 82.)

Meanwhile, Appellant appealed his expedited transfer denial to Third Air Force. In an email to the base SARC office on 22 July 2021, the Third Air Force SJA stated that because of the Auto Hobby issues,² “command has decided not to PCS [Appellant] to RAF Lakenheath.” (App. Ex. XIV at 123.) The Third Air Force SJA also stated, “Currently, the new MXG/CC is re-reviewing the evidence in the case to determine whether charges should be preferred again,” adding, “Assuming charges are preferred again, which is likely, as they have already been investigated at an Article 32 hearing, ARW/CC will decide whether to forward those charges to 3 AF/CC for disposition.” (Id.)

After reviewing the evidence, on or about 27 July 2021, Maj TB “decided that charges were warranted in this case so that it could come for a court-martial. (R. at 75-76.) Prior to making that decision, Maj TB had no conversations with any member of Third Air Force. (R. at 76.) When asked if he received any pressure from anyone at Third Air Force, Maj TB replied, “No, I did not.” (Id.) When asked if the decision to prefer charges was solely his, Maj TB replied, “Yes.” (Id.) Maj TB also said, “No,” when asked if either race, gender or sexual orientation factored into his analysis. (R. at 79.)

² In the email, the Third Air Force SJA stated, “Because of the issues identified by [Ms. SB] noted in the email below.” (App. Ex. XIV at 123.) In a prior email, Ms. SB, RAF Mildenhall’s Sexual Assault Response Coordinator, stated that Appellant “has been harassing individuals at the auto hobby shop,” adding, “One young lady after repeatedly being harassed was fairly freaked out and asked a senior enlisted member to stay back with her until [Appellant] had left.” (Id. at 125.)

Maj TB preferred the current charges against Appellant on 4 August 2021. (ROT, Vol. I, Charge Sheet.) Appellant was arraigned on those charges on 5 October 2021. (R. at 10.)

- *Appellant's Selective Prosecution Motion*

At trial, Appellant moved to dismiss the two specifications involving JM, specifically Specification 3 of Charge II and the Specification of Charge III, for selective prosecution. (App. Ex. X.) The military judge denied the motion. (App. Ex. XLVII.) In doing so, the military judge issued a 15-page decision, including 10 pages of findings of fact detailing the history of the case from the initial allegations in February through the initial preferral of charges against Appellant and the initial disposition of Appellant's allegations against JM.

In his multi-page analysis, the military judge first found Appellant failed to show that others similarly situated to him had not been prosecuted and that Appellant was singled out. (App. Ex. XLVII at 14.) Despite Appellant's argument that he and JM were similarly situated but that JM had not been charged, the military judge highlighted the differences between the two. First, the military judge said JM was highly intoxicated on the night in question while Appellant was sober. Second, Appellant's sexual assault report, while prior to JM's report, was made under suspicious circumstances considering (1) Appellant had just been given a no contact order involving another female accusing him of sexual assault and (2) he told SMSgt JB on that initial call that he "wanted to get ahead of any allegations." (Id. at 13.) Third, while JM participated in the AFOSI investigation, Appellant repeatedly notified the Government that he did not want to participate in the investigation or prosecution of JM. To this point, the military judge stated, "[Appellant] cannot refuse to participate, and then later criticize the Government for not prosecuting [JM." (Id.)

Further, despite Appellant’s claim that he was only being prosecuted because of his gender, the military judge held, “none of the Defense arguments support the claim [that Appellant] was selected for prosecution based on his gender.” (Id. at 14.) First, the military judge noted that AFOSI investigators did not make the charging decision in this case, but instead was made by the convening authority who elected to refer the charges and specifications. The military judge also noted that similar decisions were made by the probable cause officer, the pretrial confinement review officer, the initial and second preferring commanders, and the Article 32 preliminary hearing officer. (Id.) Further, even if the actions of AFOSI should be considered, the military judge highlighted that AFOSI opened two separate investigations, assigned separate investigators to each case, and that the investigation into JM was ultimately closed without the participation of Appellant. (Id.)

As to Lt Col JS’s email about a “backlash,” the military judge held, “The purpose of the comment was simply to notify wing leadership that it may have an issue to deal with when/if [Appellant] took his case to the forum of public opinion.” (Id.) Notably, in his finding of fact, the military judge stated, “After listening to all of Lt Col [JS’s] testimony and having had the opportunity to observe her demeanor on the witness stand, the court found Lt Col [JS] to be a very credible witness.” (Id. at 8.)

Ultimately, the military judge found the “Defense has failed to meet its ‘heavy burden’ and has failed to show ‘clear evidence’ rebutting the presumption that the convening authority properly performed his charging duties in this case.” (Id. at 15.)

Analysis

Just as he did at trial, Appellant now makes the same claims to this Court that proved unsuccessful before the military judge. Appellant claims he was the victim of selective

prosecution when Lt Col JS “wrote ‘there could be backlash’ if [Appellant] ‘has the opportunity to get his story out of ‘I (white male) was the victim first, now the black female is the victim.’” (App. Br. at 19.) Again, Appellant is incorrect as he fails to meet the clear criteria and heavy burden requirement to make a successful claim of selective prosecution. For the same reasons found by the military judge at trial, this Court should likewise find Appellant’s claim lacking and deny it.

As shown by the military judge’s ruling at trial and now below, the distance between Appellant’s burden and his evidence in support of that burden is extensive. Measured by the appropriate legal yardstick, Appellant’s claim falls exceedingly short and should be denied.

- ***Waiver as the Specifications of Charge I and Specifications 1-2 of Charge II***

As noted above, at trial, Appellant only sought to dismiss Specification 3 of Charge II and the Specification of Charge III for selective prosecution. In other words, Appellant only sought to dismiss the allegations involving JM. Appellant fails to note this distinction in his brief. Generally, defenses or objections based on non-jurisdictional defects in the preferral, forwarding, or referral of charges phases are forfeited absent an affirmative waiver. R.C.M. 905(b)(1), 905(e). Considering Appellant raised a selective prosecution motion only to Specification 3 of Charge II and the Specification of Charge III, thus purposefully not raising any issues related to selective prosecution as to the Specifications of Charge I and Specifications 1 and 2 of Charge II, this Court should consider Appellant’s motion, which does not include Specifications of Charge I and Specifications 1 and 2 of Charge II, an affirmative waiver as it relates to this issue for those offenses. *See also United States v. George*, ACM 40397 (A.F. Ct. Crim. App. 7 June 2024) (“Given the changes to Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A), in which Congress removed the phrase ‘should be approved,’ we no longer have

the ability to pierce waiver with regard to findings to address what would otherwise be prejudicial error.”)

- ***Appellant’s Omission of the Military Judge’s Ruling in his Brief***

Notably Appellant makes no mention of the military judge’s ruling, or even his failed motion, within his brief. While this Court reviews the military judge’s ruling on the law de novo, this Court reviews findings of fact using a clearly erroneous standard. As Appellant makes no argument that any of the military judge’s 10 pages of facts contained within his ruling are clearly erroneous, this Court should readily adopt those findings when reviewing Appellant’s claim. See Dowty, 60 M.J. at 171.

- ***Prong One:*** “*while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution*”

To begin on this prong, a military member facing a court-martial for sexual assault offense is commonplace. However, Appellant attempts to draw a distinction between himself and others prosecuted for sexual assault because he alleged he was also a victim of sexual assault, and claims that he is “unaware of any case where a female claiming to be a victim of a sexual assault is later prosecuted by the Government.” (App. Br. at 20.)

However, Appellant fails to paint the full picture of his particular circumstances. Here, Appellant is not just an airman claiming to be a victim of a sexual assault. Appellant also (1) faced allegations from two additional females of sexual misconduct; (2) had credible allegations (in the form of, among other things, written statements) from JM that Appellant sexually assaulted her; and (3) told his first sergeant that he was reporting that he had been sexually assaulted to “get ahead of something.” (R. at 30.)

Moreover, Appellant, though he did report a sexual assault, then repeatedly declined to participate in the investigation against JM. As the military judge held, “[Appellant] cannot refuse to participate, and then later criticize the Government for not prosecuting [JM.” (App. Ex. XLVII at 14.)

Simply put, Appellant was a military member accused of sexual assault and the government has a well-established history of prosecuting military members alleged to have committed a sexual assault, including military members such as Appellant who stood accused of *multiple* sexual offenses against *multiple* victims. While Appellant claimed to be a victim himself, the Government notably could not proceed against his alleged offender because Appellant repeatedly refused to participate in that investigation. Appellant was not “singled out for prosecution” here and there are no facts lending any credence to Appellant’s claim that he faced a “selective prosecution.”

Further, Appellant fails to provide this Court with even one “similarly situated” individual who was treated any differently than Appellant. While Appellant again attempts to paint himself as a typical victim of sexual assault and that he is similarly situated to a typical “female claiming to be the victim of a sexual assault,” his argument is unpersuasive considering the circumstances of this case.

Instead, a true “similarly situated” comparison would involve “others” who, despite claiming to be a victim of sexual assault, faced multiple allegations of sexual assault from three different women and reported himself as a sexual assault victim in order to “get ahead of something,” all while also repeatedly declining to participate in that investigation. Yet, Appellant makes no attempt compare himself to an actual “similarly situated” person. This is a far cry from the standard which requires displaying at least more than one instance where

“others” who were “similarly situated” were “generally” not proceeded against. *See Gargaro*, 45 M.J. at 102. Accordingly, Appellant has failed in his “heavy burden” to show he has been treated any differently than any other “similarly situated” military member. As a result, his entire claim must fail.

- **Prong Two:** *“that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.”*

Because prong one has not been met, this Court need not continue its analysis of Appellant’s issue. However, Appellant likewise fails to satisfy prong two. In this regard, Appellant renews his failed claim at trial that AFOSI and his command only prosecuted him because he was a male. (App. Br. at 20.) Appellant is again wrong.

First, as the military judge held, AFOSI had no authority to prosecute anyone. Moreover, Appellant fails to note that AFOSI conducted two separate investigations into the allegations involving Appellant and JM, and used separate investigators within those investigations. Appellant also fails to note that the investigation in which he was labeled as the victim was closed, and no action was taken because he repeatedly refused to participate in the investigation. While AFOSI did decide to begin treating JM as a victim in one investigation, AFOSI still continued to investigate Appellant’s allegation against JM. While that investigation ultimately resulted in no action being taken against JM, that action was taken due to *Appellant’s own inaction and repeated refusal to participate*, not based on any “invidious” or “bad faith” actions by AFOSI.

As to Appellant’s command, Appellant fails to put Lt Col JS’s “backlash” email in proper context. The military judge, in his ruling at trial, did not make the same mistake. Lt Col JS explained in detail at trial why she made the comment about the “backlash.” The military judge

found as fact that Lt Col JS wrote this email “simply to inform base leadership of the potential ramifications to the base if [Appellant] were to take his story to social media.” (App. Ex. XLVII at 8.) Here, Lt Col JS’s email was not to “selectively prosecute” Appellant because he was male, but rather to simply highlight to her leadership that Appellant might make such an argument if or when he told his story on social media or in the forum of public opinion.

Further, though undiscussed by Appellant in his brief, Lt Col JS explained in her motion testimony exactly why she chose to move forward on the allegations against Appellant.

Specifically, Lt Col JS said JM had put her statement in writing to AFOSI, while Appellant had only given a verbal statement to SMSgt JB and, shortly after the event occurred, became non-participatory. (R. at 38.) Meanwhile, JM had provided a written statement, pictures and a video. To the point directly at issue, Lt Col JS said neither race nor gender played a role in her decision. (R. at 39.) As previously noted, the military judge found as fact that “After listing to all of Lt Col [JS’s] testimony and having had the opportunity to observe her demeanor on the witness stand, the court found Lt Col [JS] to be a very credible witness.” (*See Id.* at 8.)

Considering the “clearly erroneous” standard which Appellant does not contest in his brief, his Court should likewise be heavily persuaded by Lt Col JS’s clear testimony on this issue.

Notably, the only evidence Appellant cites to support his “prosecution was based on gender” argument is Lt Col JS’s email. Yet, as shown above, there were no “invidious” or “bad faith” motives on the part of Lt Col JS.

To this point, Appellant in his brief does not cite the email as coming from Lt Col JS, but instead continually uses the broad term of “command” in an attempt to insinuate that all commanders and convening authorities at all levels were somehow conspiring to invidiously prosecute Appellant only because of his gender. (*See, for example, App. Br.* at 20, where

Appellant states, “command fully approved,” and “command was fully aware that the decision was based on gender because they were concerned about the ‘backlash’ it would cause.)

Yet, Appellant’s entire argument rests on the one email from Lt Col JS, who explained the full context behind the sole email and firmly stated that gender did not factor into her decision to move forward on the allegations against Appellant. Moreover, Lt Col JS was not even involved in the ultimate charges of which Appellant stands convicted since the charges she preferred were dismissed. Additionally, there is no evidence that any commander who received Lt Col JS’s email even agreed that there would be “backlash,” let alone that they later used gender as the sole reason to move forward on charges against Appellant.

There is also no evidence that Maj TB, the commander who preferred the ultimate charges against Appellant, used gender as a basis for preferring charges. There is likewise no evidence that the Article 32 preliminary hearing officer used gender as a basis for finding probable cause existed that the offenses occurred. And most importantly, there is no evidence that the Third Air Force commander, the General Court-Martial Convening Authority (GCMCA), referred the charges and specifications invidiously or in bad faith based on Appellant’s gender.

As set forth above, Appellant has failed in his “heavy burden” to show any discriminatory selection for prosecution took place in his case. Moreover, the selection of Appellant for courts-martial was not the product of invidious or bad faith. For these reasons, Appellant’s claim is without merit and must be denied.

II.

THERE WAS NO UNLAWFUL COMMAND INFLUENCE IN THIS CASE.

Standard of Review

This Court reviews allegations of unlawful command influence (UCI) *de novo*. United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013).

Law

Article 37, UCMJ, prohibits unlawful command influence (UCI). Prior to 20 December 2019, there were two types of unlawful command influence in the military justice system: “*actual* unlawful command influence and *the appearance of* unlawful command influence.” United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017) (emphasis in original). Actual UCI occurs when there “is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” Id. (citations omitted). In order to demonstrate actual UCI, an appellant “must show: (1) facts, which if true, constitute [UCI]; (2) that the proceedings were unfair; and (3) that the [UCI] was the cause of the unfairness.” Salyer, 72 M.J. at 423 (citation omitted).

“[T]he initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation.” Id. (citation omitted). The Appellant must show “some evidence” that UCI occurred. Boyce, 76 M.J. at 249. The second and third factors require the appellant to demonstrate that he suffered prejudice as a result of the UCI. See Id. at 248. If an appellant meets his initial burden, the burden shifts to the Government to prove beyond a reasonable doubt that “(1) the predicate facts do not exist; (2) the facts do not constitute [UCI]; or (3) the [UCI] did not affect the findings or sentence.” Id. (citation omitted).

Pre-20 December 2019, the second type of UCI was an appearance of UCI. Unlike actual

UCI, a claim of an appearance of UCI does not require prejudice to the appellant; rather, the prejudice is the adverse impact to the “public’s perception of the fairness of the military justice system as a whole.” *Id.* at 248-49. In order to demonstrate the appearance of UCI, an appellant must show “some evidence” of UCI. *Id.* at 249. Should an appellant meet this burden, the Government must then prove beyond a reasonable doubt that the predicate facts do not exist, the facts do not constitute UCI, or that the UCI “did not place an intolerable strain upon the public’s perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.” *Id.* (internal quotation marks, alterations, and citations omitted).

In 2020, Congress significantly amended Article 37, UCMJ. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532 (2019). The amendments to Article 37, UCMJ, went into effect on 20 December 2019. *Id.* In its current form, Article 37, UCMJ, now provides that “No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.” Article 37(c), UCMJ. This Court has held, consistent with its sister service courts, that under the amended, current version of Article 37, UCMJ, apparent UCI is no longer a viable theory because appellants are “required to demonstrate material prejudice in order to obtain relief.” *United States v. Burnett*, No. ACM 39999, 2022 CCA LEXIS 342, at *58 (A.F. Ct. Crim. App. 10 June 2022).³

In *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994), our superior Court discussed the advice of SJA and when it may constitute UCI as follows:

³ Appellant’s brief makes no reference to the amended Article 37, UCMJ, or its impact to an apparent UCI theory.

Even though an SJA is neither a commander nor a convening authority, we have held that actions by an SJA may constitute unlawful command influence, because “a staff judge advocate generally acts with the mantle of command authority.” United States v. Kitts, 23 M.J. 105, 108 (CMA 1986). We do not believe, however, that every instance of advice or expression of opinion by an SJA is attributed to his or her commander. We also do not believe that SJAs must be timid in expressing their views. SJAs frequently are asked for legal advice by subordinate commanders, and they are obliged to provide competent and candid advice. It is incumbent upon SJAs, however, to make it clear when they are expressing the view of their commanders and when they are expressing their own legal opinions.

Hamilton, 41 M.J. at 37.

Additional Facts

At trial, Appellant filed a motion to dismiss based on UCI. The military judge denied Appellant’s motion. (App. Ex. XLVIII.) In doing so, the military judge issued a 20-page decision, including 8 pages of findings of fact detailing the history of the case from the initial allegations in February through the referral of Appellant’s case to a general court-martial. Many of those facts, which are reviewed under a clearly erroneous standard, are incorporated in the Additional Facts section above in Issue I.

The military judge first looked at the initial preferral process and whether there was actual or apparent UCI. The military judge found the Third Air Force Chief of Military Justice, while engaging in “what could be considered unnecessary name-calling,” did not “overstep his bounds” because he was discussing “the direction of a case within Third Air Force,” was “not directive,” and “did not speak directly to Lt Col [JS].” (App. Ex. XLVIII at 14.) Instead, the military judge held the Chief of Military Justice “wanted to ensure his subordinate JAGs had considered all options in the case and consulted with other known victims.” The military judge

also highlighted the Chief of Military Justice was talking for himself and “never attempts to convey a position of the Third Air Force SJA, let alone the GCMCA.” (Id.)

The problem, as the military judge saw it, was how this message was relayed from the base legal office to Lt Col JS because “the message she received was that Third Air Force questioned how she was handling the case, it wanted a court-martial, and so she had to prefer charges.” (Id.) When the Government conceded this was actual UCI, Appellant sought to dismiss the charges. However, the military judge noted that “the Defense ignores the fact that the charges and specifications Lt Col [JS] preferred . . . have long since been dismissed, and are no longer before this court. (Id. at 15.) The judge continued, “The clear evidence before the court is that once the Government realized Lt Col [JS] felt coerced into preferring charges, it immediately took steps to dismiss the charges and specifications without prejudice,” and then “sought out an independent officer/commander to take a fresh look at the evidence and render an independent disposition recommendation.” (Id.)

The judge then held, “the court is convinced beyond a reasonable doubt that these circumstances, especially in light of the Government’s timely ameliorative actions, will not negatively affect the proceedings currently pending,” adding “Put simply, if there was UCI under these circumstances, it was cured when the problematic charges and specifications were dismissed without prejudice. Dismissal of the current charges and specifications, or any other remedy, is not required.” (Id.)

The military judge then reviewed claims of actual and apparent UCI in the second preferral. Despite claiming various reasons why actual UCI was present, the military judge found Appellant “failed to show ‘some evidence’ that actual UCI exists in the second preferral of charges.” (Id.) The two reasons Appellant now renews on appeal are discussed below.

First, Appellant claimed the Third Air Force SJA's reply of "nope" to a case disposition short of a court-martial, and his explanation of why a court-martial was the appropriate forum of the case, was actual UCI. However, the military judge held that the SJA was "asked for his thoughts and he provided them," adding that as "case law points out, SJAs need not be timid in rendering advice, instead they should be candid and competent." Like the Chief of Military Justice, the military judge said the Third Air Force SJA was "providing his own thoughts" and "at no point attempted to speak for his boss, the GCMCA." (Id.) The military judge held that while the Third Air Force SJA's "position regarding the appropriateness of a court-martial was firm," "he did not improperly direct or otherwise influence such an outcome." (Id. at 16.)

Next Appellant argued that the Government should not have presented the case to the MXS/CC, Maj TB, but instead should have transferred the case either away from RAF Mildenhall or completely outside of Third Air Force authority. (Id.) While the military judge said each of these were options, "it does not render the Government's ameliorative actions legally invalid." (Id.) The military judge also noted that Appellant did not move the court for a change of venue for his court-martial.

The military judge held that Maj TB was a "neutral officer who reviewed the case and ultimately chose to prefer the charges free from influence of Third Air Force," adding that Maj TB testified credibly at the motions hearing that "prior to receiving the evidence, he was not provided any specifics on the case, or any prior procedural history," and that he "made his own determination that a court-martial was appropriate and preferred charges." In noting Appellant failed to meet its burden of showing "some evidence" of actual UCI, the military judge further noted that Maj TB's decision to prefer charges "is supported by the PHO who also found probable cause to believe [Appellant] committed the offenses preferred." (Id.)

Even assuming, *arguendo*, that Appellant had shown “some evidence” of UCI, the military judge further held that the court was “left convinced beyond a reasonable doubt: (1) that these instances do not amount to actual UCI; and, (2) that these instances will not negatively affect the proceedings against [Appellant].” (Id.)

From an apparent UCI standpoint, Appellant argued, as he does here, that “there was UCI in the initial preferral, and that set the stage for the second preferral, essentially leaving Maj [TB] with no choice but to prefer charges.” (ID. at 18.) The military judge did not agree, stating that “the latter half of this argument is not supported by the facts in this case” and that Appellant’s argument was “nothing more than a ‘mere allegation or speculation’ of apparent UCI.” (Id.) Finding Appellant had failed to meet his burden of raising “some evidence” on this claim, the military judge again held that “the case was neutrally presented to Maj [TB] who reviewed all of the evidence and received advice from the RAF Mildenhall legal office before deciding on a court-martial preferring charges.” (Id.)

Even assuming, *arguendo*, that Appellant had met his burden, the military judge held that the “court is convinced beyond a reasonable doubt that an objective, disinterested observer fully informed of all the facts and circumstances would not harbor a significant doubt about the fairness of the proceedings,” adding that “[s]uch a disinterested and fully informed observer would consider the events leading up to this second preferral, and the second preferral itself.” The military judge then listed numerous reasons why this was true, as follows:

- An observer would have to consider that Lt Col JS offered the LOR focused solely on the touching offenses against Appellant “essentially ignoring the pending penetrative sexual offense involving a separate Airman;”
- An observer would find it reasonable for the Government to consider all of the alleged offenses together and that a court-martial is appropriate;

- An observer would know that only a general court-martial has jurisdiction over a penetrative offense like the sexual assault charged in this case;
- An observer would recognize “the effective and timely self-policing that occurred in this case . . . [s]pecifically, as soon as the Government discovered [Lt Col JS] felt coerced into preferring charges, it took immediate steps to dismiss those charges without prejudice;
- An observer would not find the approach taken by the Government in having Maj TB review the charges to be “unreasonable or unfair” because the case was presented to another neutral commander who was not provided the specifics of the case or the procedural history “but rather was presented the evidence (including [Appellant’s] cross complaint), and he independently determined a court-martial was appropriate; and
- An observer would know Maj TB “did not feel any pressure from Third Air Force, or anyone else, to prefer charges.

(Id. at 18-19.)

Analysis

Appellant’s continued claims of UCI in this case are unsupported by the record. As detailed above, if there was any UCI, it occurred when the base legal office in this case inartfully miscommunicated the Third Air Force Chief of Military Justice’s personal opinions to Lt Col JS. However, even there, the UCI was cured when the charges Lt Col JS preferred were dismissed and a new independent commander reviewed Appellant’s case.

Still, Appellant continues to claim UCI in this case, and claims error in the military judge’s ruling. Appellant first claims the original UCI relating to Lt Col JS was not cured by having Maj TB review his case. He claims that this avenue was improper and that only two remedies “should have been considered.” (App. Br. at 22.)

He first argues that his case should have been “return[ed] to the status quo after dismissing the original charges, i.e., the original disciplinary and administrative discharge action the first commander took or contemplated taking in lieu of preferring charges.” (Id.) However,

Appellant fails to recognize that the original administrative action, the LOR from Lt Col JS, only involved allegations concerning HC and BH. It did not include anything related to JM because her case had not been finalized at the time Lt Col JS served the LOR. The military judge, however, did recognize this distinction when he held that a reasonable observer would recognize the LOR only dealt with the less-serious touching offenses and that an observer would further find it reasonable for the Government to consider all of the alleged offenses together and that a court-martial was appropriate. (App. Ex. XLVIII at 18-19.)

Here, there was no “status quo” because the court-martial charges Appellant faced included additional charges, and involved another victim, that were not included in Lt Col JS’s original LOR. Appellant’s plan to simply revert back to the LOR would alleviate him facing any action for his penetrative sexual assault against JM. As the military judge correctly stated, “Certainly, the Defense and [Appellant] would have preferred the LOR over a court-martial, but that is not the standard.” (Id. at 19.)

Next, Appellant renews his other remedy that the case should have been sent to a separate convening authority. (App. Br. at 23.) Appellant again claims that by “simply sending the case to a new squadron commander at Mildenhall, it became impossible to remedy the original actual unlawful command influence given the poisoned atmosphere that infected the RAF legal office and RAF Mildenhall chain of command.” (Id.)

Yet, in making his claims, Appellant misses several key facts. First, the Third Air Force Chief of Justice never “intervened” or somehow directed that Lt Col JS’s decision be changed. Instead, he simply asked that the “brakes” be put on the case so that all options could be discussed. Most importantly, the Chief of Justice wrote, “I think we need to think through options here . . . *maybe we arrive at the same COA*, but I just need to know why.” (App. Ex.

XIV at Atch 10.) (emphasis added.) Appellant’s brief notably omits the Chief of Justice’s openness to potentially “arriv[ing] at the same COA.”

As the military judge held, the Chief of Justice never directed anything to the base legal office and never conveyed the position of the Third Air Force SJA or the GCMCA. While this was ultimately miscommunicated to Lt Col JS, the fact remains the Third Air Force Chief of Military Justice never “influenced the base legal office to change its opinion” as Appellant claims. (*See* App. Br. at 21.)

Likewise, with relation to the Third Air Force Base SJA, the base legal office in its communication specifically asked for the SJA’s opinion on potential alternative dispositions, including a Chapter 4 discharge request, stating, “We wanted to get your thoughts on this before we talk to the SVCs, and get their input.” (App. Ex. XV at 15.) In response, the SJA simply provided the base legal office his *personal* opinion on the matter, stating “I cannot in good conscious recommend” (Id. at 14.) *See* Hamilton, 41 M.J. at 37. The SJA did not speak for the GCMCA, and did not direct anything to the base legal office. Here, as he did at trial, Appellant has failed to show “some evidence” that the Third Air Force legal office’s actions in this case amounted to either actual or apparent UCI.

To this point, Appellant provides no evidence that the Third Air Force commander (the GCMCA), or any commander at Third Air Force, did anything in this case that amounted to either actual or apparent UCI. While Appellant repeatedly uses the phrase “Third Air Force” throughout his brief, he only then references actions by either the Third Air Force Chief of Military Justice or the SJA, never any commander at Third Air Force. (*See* App. Br. at 1, 21 (“Third Air Force Influenced”), 12 (“Third Air Force’s view”), 23 (“When Third Air Force intervened”), 25 (“The prejudicial and biased actions at Third Air Force” and “The message sent

from Third Air Force).) Here, Appellant never points to any action by the GCMCA or any other commander at Third Air Force that amounted to any sort of UCI. Further, as shown above, the actions by either the SJA or the Chief of Military Justice at Third Air Force did not rise to either actual or apparent UCI.

Still, Appellant finds fault because he thinks appointing “a new squadron commander subordinate to the Third Air Force Commander to assess the case sent the wrong message from a UCI perspective.” (App. Br. at 25.) The military judge disagreed by repeatedly holding that the Maj TB was a “neutral officer” who was not provided any specifics or procedural history of the case, and who “made his own determination that a court-martial was appropriate and preferred charges.” (App. Ex. XLVIII at 17.) Considering Maj TB had no knowledge of the procedural history of the case, there is no possibility that he could have felt undue pressure to prefer charges.

The military judge also found that Maj TB testified credibly, which, as noted above, should receive considerable deference from this Court, especially considering Appellant alleges no fault in that finding. The military judge also held that a reasonable observer would recognize, based on Maj TB’s clear testimony, that he felt no pressure from Third Air Force, or anyone else, to prefer charges. Indeed, when directly asked at trial if he felt any pressure from anyone at Third Air Force, Maj TB responded, “No, I did not,” while agreeing that the decision to prefer charges was solely his. (R. at 76.)

Here, any UCI issues related to Lt Col JS were remedied when the charges she preferred were dismissed, and Maj TB conducted a new, independent review of Appellant’s case, all free of any pressure from anyone, including those at Third Air Force. Additionally, Appellant has failed to show “some evidence” of actual UCI in the present charges to which Appellant stands

convicted. Even if he had, for the same reasons listed by the military judge in his ruling, this Court should be convinced beyond a reasonable doubt, just as the military judge was trial, that these instances do not amount to actual UCI, and that these instances did not negatively affect the proceedings against Appellant.

Any apparent UCI claim also fails because under the current version of Article 37, UCMJ, apparent UCI is not a viable theory of relief since appellants are required to demonstrate personal prejudice in order to obtain relief. Burnett, unpub. op. at *58. Yet, even if it is still a viable theory, Appellant's claim still fails for the same reasons listed in the military judge's ruling, namely that an objective, disinterested observer fully informed of all the facts and circumstances would not harbor a significant doubt about the fairness of the proceedings. Accordingly, Appellant's claim must fail.

III.

APPELLANT'S SPEEDY TRIAL RIGHTS WERE NOT VIOLATED.

Standard of Review

Speedy trial claims are reviewed de novo. United States v. Guyton, 82 M.J. 46, 151 (C.A.A.F. 2022) (*citing* United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016) and United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014).

Law

An accused must "be brought to trial within 120 days after . . . [p]referral of charges." R.C.M. 707(a)(1). For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." R.C.M. 707(b)(1). Ordinarily, when an accused is not under pretrial restraint and charges are dismissed, a new 120-day time period begins on the date of repreferral. R.C.M. 707(b)(3)(A)(i) (2019 ed.); *see also* United States v. Hendrix, 77 M.J. 454, 456 (C.A.A.F. 2018).

“If charges are merely withdrawn and not subsequently dismissed, however, the R.C.M. 707 ‘speedy-trial clock continues to run.’” United States v. Leahr, 73 M.J. 364, 367 (C.A.A.F. 2014) (quoting United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988)).

“Absent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect.” Leahr, 73 M.J. at 369; *see also* R.C.M. 707(b)(3)(A)(iii) (“In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run.”) In Leahr, our superior Court defined a proper reason (in the context of a discussion of R.C.M. 604 which governs withdrawal of charges from court-martial) as “a legitimate command reason which does not ‘unfairly prejudice an accused.’” 73 M.J. at 369.

Additional Facts

At trial, Appellant moved to dismiss the charges against him due to an alleged violation of his speedy trial rights under R.C.M. 707, Article 10, UCMJ, and the Sixth Amendment. The military judge denied the motion. (App. Ex. XLVI.)

In relation to whether the Government dismissed the original charges for an improper purpose or subterfuge,⁴ the military judge found that the original charges were recommended to be dismissed “to avoid a potential issue involving UCI” and that the original charges were dismissed without prejudice. (Id. at 13.) Appellant, as he does here, argued that the dismissal of charges to fix the UCI issue was an improper purpose.

⁴ As Appellant’s current issue focuses solely on this subterfuge/improper reason issue, this section will not address the military judge’s ruling with regards to other R.C.M. 707, Article 10, UCMJ, and Sixth Amendment issues. (See App. Br. at 26-29.)

Finding no cases specifically discussing whether dismissing charges to correct a potential UCI issue was either a proper or improper purpose, the military judge turned to our superior Court's holdings in Leahr and United States v. Weasler, 43 M.J. 15 (C.A.A.F. 1995). In Leahr, the military judge stated that "the Government was not stuck with Article 134 offenses that failed to state an offense, instead it was allowed to dismiss and re-prefer specifications that included the terminal element, and thus legal stated offenses." (App. Ex. XLVI at 13.) In Weasler, the military judge stated the "court suggested the Government was not stuck with charges preferred by an accuser who felt coerced into preferring charges, instead, dismissal and re-preferred of untainted charges would be proper." (Id.)

Comparing these cases to Appellant's, the military judge held, "when the Government discovered [Lt Col JS] had felt pressured into preferring charges, it dismissed those charges, presented the evidence to a different commander and untainted charges were later preferred," and concluded, "The dismissal in this case was not for an improper purpose." The military judge continued, "Additionally, the dismissal was not subterfuge," concluding, "The dismissal was not accomplished to deceive or conceal, or as a strategy to avoid a speedy trial violation or to vitiate [Appellant's] speedy trial rights." (Id.)

Analysis

Appellant has shown no error in his claim. Here, Appellant complains that "repreferment of charges solely in response to evidence of unlawful command influence is 'subterfuge' or an 'improper reason' . . . and thus should not reset the speedy trial clock." (App. Br. at 26.)

Appellant is incorrect.

First, the record is clear as to why the original two charges were dismissed – to alleviate any potential UCI issues involving Lt Col JS. There is no evidence showing the dismissal was

for any other purpose. Certainly, there is no evidence that the dismissal was due to the Government “trying to complete an end-run around the speedy trial clock by labeling its decisions as a ‘dismissal’” as Appellant claims. (*See* App. Br. at 27.) Thus, there was no subterfuge or any other nefarious actions by the Government as Appellant blindly alleges.

Appellant seems to acknowledge the dismissal was not subterfuge to avoid a speedy trial violation on the following page of his brief when he states “both legal and command dismissed the charges against [Appellant] as ‘subterfuge’ so it could ‘avoid the UCI issue altogether’” (App. Br. at 28.) Instead of “subterfuge,” which in this sense is limited to where the Government is “vitiat[ing] an accused's speedy trial rights,” Appellant’s claim is better suited as a claim of alleged “improper purpose” for dismissal. *See* Leahr, 73 M.J. at 369; *see also* R.C.M. 707(b)(3)(A)(iii).

However, Appellant fails to explain how dismissing charges to cure a potential UCI issue is an “improper purpose” or cite to any authority where either our superior Court, this Court, or any of our sister courts have ever held that curing potential UCI issues is an improper purpose for dismissal.

As noted by the military judge, however, our superior Court in Leahr found that dismissing charges so that defective Article 134 charges could be cured by adding in the terminal element was a proper reason to withdraw and dismiss the charges. *See* Leahr, 73 M.J. at 368. Further, this Court has found no error when a military judge remedies an apparent UCI issue by dismissing without prejudice the original charges, therein allowing the Government to re-prefer the charges. *See* United States v. Arnold, ACM 39194, 2018 CCA LEXIS 322 (A.F. Ct. Crim. App. 27 June 2018). Additionally, this Court had held that one option a military judge has when remedying a UCI issue is to “dismiss[] the charges without prejudice, while noting his belief that

any new commander who prefers the charges should not be informed about the problematic history of the case.” United States v. Saunders, Misc. Dkt. No. 2014-15, 2015 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 April 2015).

Here, rather than potentially facing an adverse finding at either the trial or appellate level regarding this potential UCI issue that would result in the charges being dismissed without prejudice and returned for further review by an untainted commander, the Government proactively sought to remedy the issue by doing exactly what this Court has said a proper remedy should be – dismiss the charges without prejudice and provide the case to an untainted commander for review. There was no improper purpose in the dismissal.

Still, Appellant finds fault by claiming the dismissal was not a dismissal at all, but rather simply a withdrawal. (App. Br. at 27.) Appellant believes this because the Government’s “intent was to retry him.” Appellant contends that since the Government intended to retry him, the charges were effectively withdrawn versus dismissed.

Appellant is incorrect again. First, Appellant’s original charges were never referred to a court-martial. Thus, the charges could not be withdrawn as there was no court-martial to withdraw them from. *See United States v. Bolado*, 34 M.J. 732, 737 (N-M. Ct. Crim. App. 1991) (“Withdrawal of charges merely takes them out of the court-martial proceedings to which they were referred . . . Additionally, R.C.M. 604 indicates that withdrawal of charges only occurs after those charges have been referred to a court-martial.”)

Second, Appellant misses a key distinction in this case. Here, the charges could not be simply withdrawn because a withdrawal would still keep the existing/original charges alive. *Id.* (“[Withdrawn] charges are nonetheless viable and may be re-referred without re-preferral and re-investigation.”) Here, however, because the UCI originated at the accuser/preferral level, the

Government knew it needed to dismiss the charges outright, not simply withdraw them, so that a new commander, untainted by any UCI concerns, could review the case and determine if new charges would be preferred. Simply withdrawing the charges would not have cured the potential UCI issue.

Appellant's case is also distinct from Britton, which Appellant cites multiple times within his brief. In Britton, the appellant initially faced five charges, which were referred to a special court-martial. Britton, 26 M.J. at 25. However, at trial, a ruling affected three charges that were then appealed via Article 62, UCMJ. While that appeal was pending, additional offenses came to light. On the same day, the convening authority withdrew the two unaffected charges from the special court-martial, preferred three new charges, and ordered an Article 32 hearing on the five charges. Id. The five charges were then referred to a general court-martial.

When the appellant was arraigned, 143 days had passed since the two original charges (which had been referred to a special court-martial, withdrawn from the special court-martial, and were now referred to a general court-martial) were preferred. Our superior Court held that the convening authority only withdrew the two original charges and never dismissed them. Id. at 26. The Court found the convening authority "did not act to dismiss," and that since he withdrew the two original charges and preferred the three new charges on the same day, this showed "his intent was not to dismiss the charges at all." Id.

In Leahr, our superior Court highlighted this distinction, stating, "In Britton, however, the convening authority issued a clearly identified withdrawal and did not take additional action to dismiss the charges." Leahr, 73 M.J. at 368, *citing* Britton, 26 M.J. at 24-26. The Court

continued, “As explained above, the circumstances in this case clearly indicate ‘an additional affirmative action’ by the convening authority to dismiss the withdrawn charges.”⁵ Id.

In Appellant’s case, there was never a withdrawal because there was no convened court-martial to withdraw his charges from. Moreover, the charges were expressly dismissed, which is highlighted by the fact that (1) the convening authority intended for Appellant’s case to be reviewed by an independent commander; and (2) the charges were later re-preferred anew by a separate, independent accuser.

Next, Appellant’s belief that the Government cannot dismiss charges that it intends to retry is misplaced. Our superior Court in Leahr laid to rest such a claim, stating:

It is true that the convening authority expressly stated the reason for the withdrawal and dismissal, and clearly contemplated further action against Appellant at some point in the future. But we disagree that the mere fact that a convening authority intends at the time of dismissal to pursue future action against an accused is dispositive as to whether a dismissal was intended and effective. Although some cases note that dismissal “contemplate[s] that the accused no longer faces charges,” Britton, 26 M.J. at 26, the rules clearly envision situations where repreferment is both anticipated and permitted. *See* R.C.M. 707(b)(3)(A)(i) (“If charges are dismissed . . . a new 120-day time period under this rule shall begin on . . . the date of repreferment.”); R.C.M. 401(c)(1) Discussion.

Leahr, 73 M.J. at 368. Thus, while the base SJA’s discussions with the Wing Commander and Vice Commander discussed the possibility of “a new preferment” after the initial charges were dismissed, and the Government in this case was preparing to continue to prosecute Appellant’s case *if* the new commander decided to prefer charges, such preparations were not impermissible and did not negate that the dismissal of Appellant’s initial charges was intended and effective.

⁵ In Leahr, the convening authority issued a document expressly stating the charges were dismissed and the appellant was notified that the original charges were dismissed. Leahr, 73 M.J. at 368.

Next, Appellant claims that even if the charges were dismissed, his rights were still violated because he did not have a second Article 32 hearing after his charges were preferred anew. (App. Br. at 29.) However, as our superior Court highlighted in Leahr, Article 32(c), UCMJ, does not require further investigation unless an accused demands it. *See Leahr*, 73 M.J. at 368 (*citing* Article 32(c), which states, “If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation . . . no further investigation of that charge is necessary . . . *unless it is demanded by the accused after he is informed of the charge.*”) (emphasis added.) Here, as in Leahr, Appellant never demanded further investigation of the original charges.

Still, Appellant claims error because he says the new Article 32 hearing was necessary to “determine if the unlawful command influence was, in fact, cured.” (App. Br. at 29.) Appellant, however, fails to cite any authority requiring a second Article 32 hearing for the sole purpose of reviewing UCI issues. Further, Appellant’s continued UCI concerns were litigated at his trial before a military judge. Appellant was well afforded the opportunity to raise his continued UCI concerns; thus, Appellant’s rights were not violated when the Government did not pursue a second Article 32 hearing.

Finally, Appellant claims his rights were violated as well because, according to Appellant, his expedited transfer request “was an automatic denial because command always knew it was going to reprefer charges against him.” (App. Br. at 29.) However, as detailed above, Appellant’s expedited transfer request denial was not because any potential repreferment of charges. Instead, the record shows Appellant’s PCS to Lakenheath was not pursued because of Appellant’s continued inappropriate conduct, this time involving a separate woman at the Auto

Hobby Shop. As Lt Col JS stated, “Because of that incident, we then decided to not PCS him to Lakenheath because he was causing more issues on Mildenhall and so it didn't make any sense to send him to another base where he could potentially do that same thing over there, and their leadership team didn't need that.” (R. at 70.) The ARW SJA stated in an email that Appellant would not be moving “due to his concerning behavior and advances towards a married female clerk at Auto Hobby.” (App. Ex. XV at 12.) Finally, the Third Air Force SJA in an email stated Appellant’s “command has decided not to PCS [Appellant] to RAF Lakenheath” due to the Auto Hobby issues. (App. Ex. XIV at 123.)

In sum, Appellant’s “subterfuge” and “improper reason” claims are unsupported by the record. Instead, the record shows Appellant’s original charges were dismissed (not withdrawn) for a proper reason, and no speedy trial violation took occurred in this case. Accordingly, Appellant’s claim must fail.

IV.

APPELLANT’S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

While this Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ, this Court has agreed that Congress intended this new statutory standard to “make [] it more difficult to [an appellant] to prevail on appeal.”⁶ See United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024) (*quoting* United States v. Scott, 83 M.J. 778, 780 (A. Ct. Crim. App. 27 Oct.

⁶ While one of the specifications at Appellant’s court-martial included a charging timeframe prior to 1 January 2021, all specifications that resulted in a conviction occurred after 1 January 2021.

2023). This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

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

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

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

(B) Factual sufficiency review

(i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

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

Pending before the Court of Appeals for the Armed Forces (CAAF) is the impact of the new Article 66 on this Courts' review of factual sufficiency. That is, they have granted review of the issue of whether, as the Navy-Marine Court of Criminal Appeals (NMCCA) held, there is a rebuttable presumption of guilt on appeal:

We find that the revised statute requires a departure from the prior practice, and the standard for factual sufficiency has become harder for an appellant to meet. It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty.

United States v. Harvey, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 23 May 2023), rev. granted, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). *But see* Scott, 83 M.J. at 780-81 (rejecting Harvey's creation of rebuttable presumption of guilt on appeal).

This Court, in Csiti, declined to apply Harvey's rebuttable presumption standard just as the Army Court of Criminal Appeals did in Scott. However, this Court did “agree with our CCA counterparts to the extent that Congress intended this new statutory standard to “make it more difficult for [an appellant] to prevail on appeal.” Csiti, at *21 (*quoting* Scott, 83 M.J. at 780;

Harvey, 83 M.J. at 693 (“[T]his [c]ourt will weigh the evidence in a deferential manner to the result at trial.”)

This Court also agreed with Harvey in that the “specific showing of a deficiency of proof” provision “does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review,” but rather, “the statute requires Appellant ‘identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.’” Csiti, at *18 (citing Harvey, 83 M.J. at 691).

Though the new language states that after an appellant makes this showing a CCA “may consider whether the finding is correct in fact,” this Court declined to decide whether it might properly decline to proceed further with a factual sufficiency analysis. Id., at *18-19.

As to the “weighing the evidence and determining controverted questions of fact” provision, this Court noted the term “appropriate deference” was not defined, but broadly agreed with the NMCCA that “appropriate deference” is a “more deferential standard than ‘recognizing,’⁷ but not one which deprives the CCA of the power to determine the credibility of witnesses.” Id. at *19-20 (quoting Harvey, 83 M.J. at 692). This Court added that the significance of the credibility of particular witnesses or testimony will vary depending on the circumstances of the case. Id.

Regarding the “Clearly convinced that the finding of guilty was against the weight of the evidence” provision, this Court inferred that “Congress intended the beyond a reasonable doubt

⁷ The prior version of Article 66(d)(1) required CCAs to “recognize that the trial court saw and heard the witnesses.”

standard to continue to apply in questions of factual sufficiency,” but also recognized that “Congress has overlaid the requirement that the CCA be ‘clearly convinced’ the evidence is insufficient before granting relief.” *Id.* at *22. This Court then held that “in order to set aside a finding of guilty, we must not only find the weight of the evidence does not support the conviction; we must be clearly convinced this is the case,” adding, “Put another way, in order to set aside a finding of guilty we must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.” *Id.* at *22-23.

Analysis

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

- ***Specification 2, Charge I: Assault Consummated by Battery of BH***

Additional Facts

BH testified that she interacted with Appellant on three occasions. (R. at 739.) She first interacted with Appellant in late January 2021 during a training session. (R. at 740.) She said they talked about cars. The second time she saw him was at the DFAC when Appellant approached her and the two began talking about issues BH was having with her car. (R. at 742.) Since Appellant seemed to know things about cars, BH asked if he could help her and give him her SnapChat information. (R. at 743.)

One evening at 2200 hours, Appellant sent BH a message saying, “hey, are you awake?” (R. at 745.) BH was on a long-distance call with her girlfriend at the time, who

later became her wife. Appellant said he was bored and asked if he could come over. BH said “sure.” This would be the third interaction BH had with Appellant.

BH said Appellant arrived at her dorm room quickly and came right into her room when BH opened the door. Appellant took off his shoes when he entered her room and sat down on her bed while she sat at her desk. (R. at 751.) BH thought something was wrong because “we didn’t really know each other that well, so I thought it was weird that he was reaching out to me.” (Id.) However, BH was new to the base and wanted to make a friend, adding, “or if there was something wrong, I wanted to be able to help.” (Id.)

Appellant told BH that he was “lonely” and “bored.” The two talked about the gym and Appellant showed BH videos of he and his friends wrestling. (R. at 752.) Appellant asked BH about her girlfriend and if she was “gay” or “bi.” (R. at 753.) BH told Appellant she was gay. Appellant then noticed BH’s laptop and asked if she had any movies on it. BH logged into Netflix and told Appellant to pick out a movie. (R. at 754.) Appellant picked out a movie and began watching it on BH’s bed while BH sat at her desk.

Appellant then invited BH to sit on the bed. When she sat down, BH said Appellant “slowly got closer to me and then kind of wrapped his arms around me, and kind of laid on me.” (R. at 756.) Appellant then asked for a message, which surprised BH because they had only ever spoken twice before. (R. at 757.) Still thinking Appellant was upset about something, BH said she began patting his back and saying something like, “hey, it’s okay, I don’t know like, what you’re going through?” (R. at 758.)

The two continued watching the movie when “probably like halfway in, [Appellant] all of a sudden, didn’t say anything, and just kind of crawled near the foot of the bed, closed the laptop,

and just set it on the ground next to my bed.” (R. at 759.) Appellant then crawled on top of BH and started kissing her neck. (R. at 760.) BH said this all happened very abruptly, that she did not want Appellant to kiss her, and that she was “a bit in shock and processing what was happening.” (R. at 760-61.) At some point while kissing her, BH said Appellant said something “like, ‘your girlfriend’s not here,’” and that she needed “some dick in my life.” (R. at 768-69.) When asked if she was breathing heavier during this time, BH said yes. (R. at 860.) When asked if she was breathing heavier because she was enjoying what was happening, BH responded, “No, I was scared, so I think I was breathing faster.” (Id.)

At some point, Appellant’s phone rang and he got off the bed to answer it. (R. at 770.)

BH picked her laptop off the ground and put it on her desk. Appellant got off the phone, picked BH up, and “kind of threw me onto my bed.” (R. at 772.) BH said Appellant’s breathing “had just gotten very heavy, very aggressive,” and that Appellant “grabbed both of my wrists, as soon as he got on top of me, and then pulled them up, where my head, above my head.” (R. at 772-73.) BH said she wanted to pull her hands out of Appellant’s grip but could not. BH said Appellant continued to kiss her neck while holding her wrists above her head. (R. at 772-75.) Appellant eventually let go of BH’s wrists when he flipped her over on top of him. (R. at 776.) Appellant continued to kiss and touch BH on various parts of her body, including grabbing her buttocks underneath her shorts. (R. at 777-81.)

When Appellant tried to kiss BH, BH responded, “no, like, that’s not happening.” (R. at 779.) Appellant then moved his hands from BH’s shorts and began “trying to go up my shirt.” (R. at 780.) BH grabbed his hand and said, “no, like, no, that’s not happening.” (R. at 782.) BH said Appellant then “went back to like under my shorts grabbing my butt.” (Id.)

Eventually, BH said Appellant stopped because “he realized what he wanted wasn’t going to happen,” and he “started to cool down.” (Id.) After “just la[ying] there” for a little bit, Appellant left. (R. at 782-84.)

Elements of the Offense

The military judge instructed the members as to the elements of this offense, pursuant to Article 128, UCMJ, are as follows:

- (1) That on or about 11 February 2021, at or near Royal Air Force Mildenhall, United Kingdom, [Appellant] did bodily harm to [BH] by restraining her wrists with his hand;
- (2) That the bodily harm was done unlawfully; and,
- (3) That the bodily harm was done with force or violence.

(R. at 1229.) “Bodily harm” was defined as “an offensive touch of another, however slight.” (R. at 1230.) The military judge further instructed, “An infliction of bodily harm is ‘unlawful’ if done without legal justification or excuse and without the lawful consent of the victim.” (Id.)

Analysis

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

As detailed above, BH testified that while Appellant was kissing her against her will, he aggressively grabbed both of her wrists and pulled them above her head. (R. at 772-73.)

BH said she wanted to pull her hand out of Appellant’s grip but could not. Based on her testimony, Appellant committed bodily harm against BH by restraining her wrists, the harm

was done unlawfully because it was against BH's will, and the harm was done with force because Appellant held BH's wrists with enough force that she could not free herself from his grip. Considering this testimony, Appellant's conviction is factually and legally sufficient.

Still, Appellant claims fault but provides no argument directly related to the convicted offense. Instead, Appellant simply says, "It is difficult to understand this finding of guilty of this offense . . . given that [Appellant] was acquitted of committing the more serious allegation of abusive sexual contact assault during the same encounter with [BH." (App. Br. at 36.)

Here, the members finding on a wholly separate offense (abusive sexual assault charged under Article 120), involving a wholly separate act (touching BH's buttocks) and separate elements, has no bearing on whether his conviction for assaulting BH by grabbing her wrists is legally and factually sufficient. Even if it had some bearing, the members could have theoretically found either BH consented to having her buttocks grabbed or that Appellant had a mistake of fact as to whether BH consented to having her buttocks grabbed, while also determining Appellant committed unlawful bodily harm against BH by grabbing her wrists with force or violence.

No matter the case, Appellant has failed to make a specific showing of a deficiency of proof as to his assault conviction. His acquittal of a separate abusive sexual contact offense, which involves a separate act and separate elements, is not a specific showing of a deficiency of proof as to the elements of his assault conviction. Even if he did, the evidence shows Appellant assaulted BH by unlawfully grabbing her wrists with force. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing BH testify and demonstrate how Appellant held her wrists, this Court should *not* be clearly convinced that the weight of the evidence does not support the

conviction beyond a reasonable doubt. Accordingly, Appellant’s factual sufficiency claim must fail.

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

- *Specification 1, Charge II: Abusive Sexual Contact of HC*

Additional Facts

HC arrived to RAF Mildenhall in August 2019 and met Appellant during the COVID-19 pandemic. (R. at 621.) Appellant was in quarantine in his dorm room and shouted from his window to HC, who was in the parking lot, asking if she could help him with food. (R. at 622.) The two communicated through SnapChat once Appellant was out of quarantine and

HC said Appellant came over a few times to use her WiFi. (R. at 623.) HC said their relationship started off just casual but became “really weird for me” because Appellant started “making comments” on SnapChat about “sexual comments and the things he would do to me if I was straight.” (R. at 624.)

Prosecution Exhibit 1 shows SnapChat messages from Appellant to HC, including one that read, “God the things I would do, if you were straight.” (R. at 628.) HC said these types of messages were pretty frequent but she would “just kind of ignore it.” (R. at 629.) Appellant would also bring up threesomes, different sexual positions, and, at one point, said, “well maybe you would want to strap me instead then.” (Id.) HC said “strap,” meant where you take “a fake penis and you like put it on yourself and then you start doing intercourse to the

other person.” (R. at 654.) HC said Appellant knew she was gay, stating, “I had a gay flag in my room and then we also talked about girls and the troubles that I would have with girls.” (R. at 630; *see also* Pros. Ex. 2.)

One night, Appellant came to her dorm room to charge his phone and they ended up watching a movie. (R. at 631.) The two initially sat upright on HC’s bed, but once the movie started, “Appellant kind of like started moseying down, laying down onto the bed, and kind of started crossing his arms across my body.” (R. at 632.) HC said Appellant put his arms around her back and asked for a massage. HC said she began patting his back because “Well there was a man on top of me and I was really scared,” adding, “And so, I was being as cautious as I could with the situation.” (Id.)

Appellant then moved his hands from her lower back up towards HC’s bra line. (R. at 633.) However, HC moved her elbows to force his hand back down. HC said, “No,” when asked if she wanted Appellant to touch her. (R. at 634.) HC continued:

He wanted to take his shirt off and so he lifted his shirt up towards his shoulders and I was still, like, patting it and he was like moaning and then he expressed how he was getting turned on.

(R. at 635.) HC said she got “more uncomfortable” and “shut down a little bit.” (Id.)

HC suggested to Appellant that it was time to go and, with some convincing, Appellant left. (R.

at 638.) HC said that Appellant “wanted to have like a sleepover.” (Id.)

After this incident, the two saw each other in passing in the dorms, but did not hang out again except for a time when the two went to get Appellant’s car. (R. at 639.) In either late December or early January, Appellant needed a ride to get his car that was 30 minutes away. (R. at 640.) HC said Appellant sat silently on the way there and then they went to a gas station after getting Appellant’s car so he could get some gas.

When Appellant's card would not work, HC told Appellant he could use hers. HC then said, "He was handing me my card and his head came into the window and that's when the kiss happened." (R. at 640.) HC said both she and Appellant were wearing masks at the time but that the kiss was on the lips. (R. at 641.) HC said she rollup up the window and Appellant followed her back to base. When they got back to base, Appellant asked to come over, but HC said, "no I don't really want to, I'm just going to go to bed." (R. at 642.)

Afterwards, HC said she remained friendly with Appellant because she did not like confrontation, but she "kind of kept my distance." (Id.) HC said Appellant would reach out "[e]very once in a while but for the most part we didn't talk at all." (Id.) However, one night, HC was woken up to Appellant pounding on her door and "a bunch of missed calls from him." (R. at 643.)

When she opened the door, Appellant was standing there with another person. Appellant stepped into HC's room, told the other person that "he was going to be fine here" and Appellant shut the door. (Id.) Appellant then leaned towards HC like he was trying to kiss her. When HC said, "no, no, no, that's not going to happen," HC testified that Appellant said, "no, I was just going to go in for a hug," and then put his arms around her waist. (Id.)

HC could smell alcohol on Appellant. Sitting on the edge of HC's bed, Appellant then professed his feelings for her even though he knew she was gay. HC replied, "I'm glad you know I'm gay, so there's no feelings on my side." (R. at 644.) HC then told Appellant that he could not stay, to which Appellant started trying to convince her to let him stay. HC said Appellant "was like, 'I can sleep on the floor, but preferably sleep in the bed.'" (R. at 645.)

Then, HC said Appellant “kind of leaned in for another hug and that’s when he like, took his hands down my body and tried to like, lift me up and turned toward the bed.” (R. at 645.) In doing so, HC said Appellant’s hands “were around my waist and they moved down into the pickup stance,” adding, “His like, fingers were near the like, the crack of my butt.” (Id.) When asked, “[Appellant’s] hands touch your butt,” HC answered, “Yes.” (R. at 683.) When asked how long Appellant’s hands were on her butt, HC replied, “Long enough to attempt to initiate picking up and turning with me.” (R. at 654.) HC said she did not ask Appellant to grab her butt, that she did not want him to grab her butt, and that she did not consent to him grabbing her but. (R. at 655.)

HC grabbed Appellant’s hands, again told Appellant that he needed to go and that “that’s not going to happen here.” (R. at 646.) Appellant eventually left. That was the last time

HC was around Appellant, stating, “I never had anything like that happen, so I definitely put that wall where it needed to be.” (Id.)

When Appellant left, HC said she sent a message to her friend Ms. CJ explaining what happened. (R. at 647.) A few days later, HC also told her friend SR. A month later, HC informed her leadership about the incident. She said what led her to tell her leadership was when BH “told me something happened to her and I kind of guess who it was.” (R. at 649.) HC explained that BH told her that “[s]omething weird had happened to her” and that it was similar to what had happened to HC. (R. at 651.)

Because a similar incident happened again, HC decided to report her incident with Appellant to TSgt TN. (Id.) HC said she initially wanted to “just keep it at like [the] supervisory level,” but “it just kind of like, within a week blew up into an investigation.” (Id.)

HC also stated the issue escalated when Appellant was given a no contact order, but

afterwards Appellant “still came to my dorm and that’s when I started taking up levels.” (R. at 702.)

Ms. CJ testified that HC sent her a Facebook message regarding an incident where someone came into her room. (R. at 718.) Prosecution Exhibit 3 are the messages exchanged between Ms. CJ and HC. There, HC said that Appellant “tried to like . . . [g]et some,” adding that Appellant “[t]ried to grab my face and kiss me as he shut the door behind him.” (Pros. Ex. 3.) HC continued, “Then like, [he] reached around and like, both hands around my butt and tried to lift me onto the bed and I was like, no dude, not happening” (Id.) HC continued that Appellant confessed that he liked her and then “grabbed my face, kissed my forehead a bunch of times and left.” (Id.)

Elements of the Offense

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

- (1) That on or about 11 February 2021, at or near Royal Air Force Mildenhall, United Kingdom, [Appellant] committed sexual contact upon HC by touching her buttocks with his hand; and
- (2) That the accused did so without the consent of HC.

(R. at 1235.)

Analysis

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

To begin, the record is replete with evidence that Appellant was sexually attracted to HC. He made sexual comments to her, to include talking about things he would do to her if she were straight and even telling her that “maybe you would want to strap me.” (R. at 628.) Then, on another occasion, Appellant asked for a massage from HC and tried to move his hands up her shirt toward her bra line. (R. at 632-33.) On another occasion, he kissed her. (R. at 640-41.)

Then, on the night in question, Appellant showed up at HC’s door, tried to kiss her, expressed his feelings for her, talked about sleeping in her bed, and, when he leaned towards her for a hug, put his hands around her waist, had his fingers “near . . . the crack of my butt,” and put his hands on her butt. (R. at 645, 683.) All of this was done in an attempt to put HC on her bed. Recognizing Appellant’s clear sexual intent in his actions, HC sent her friend Ms. CJ a message once Appellant left that read Appellant tried to “[g]et some,” kiss her, and used “both hands around my butts and tried to lift me onto the bed.” (Pros. Ex. 3.) Considering these facts, the panel had clear evidence that Appellant touched HC’s buttocks without her consent and to gratify his sexual desire.

Appellant, though, finds fault because he claims HC “testified that [Appellant] was simply picking her up with the intent to *simply* place her on the bed, *nothing more*.” (App. Br. at 36.) (emphasis added.) Appellant’s version of HC’s testimony wholly misses the context of the circumstances described by HC at trial. Again, Appellant was not “simply” picking her up to put her on her bed and “nothing more.” Appellant was in the act of trying to kiss her, asking to sleep in her bed, and expressing his feelings for her. HC knew this at the time when she told him “not happening” and when she told her friend that Appellant was trying to “get some.” Appellant’s contention that he was just “simply” picking her up to put her on her bed and “nothing more” is wholly unsupported by the evidence.

Here, Appellant has failed to make a specific showing of a deficiency of proof as to his abusive sexual contact conviction against HC because the context of HC’s testimony does not show she “testified that [Appellant] was simply picking her up with the intent to *simply* place her on the bed, *nothing more.*” (App. Br. at 36.) (emphasis added.). Yet, even if he did, the evidence shows Appellant committed an abusive sexual contact against HC by grabbing her buttocks without her consent to gratify his sexual desire. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing HC testify, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant’s factual sufficiency claim must fail.

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

- ***Specification 3, Charge II: Sexual Assault of JM***

Additional Facts⁸

SMSgt JB testified about the call he received from Appellant on 21 February 2021. (R. at 877.) SMSgt JB said, Appellant “had called me and said some events had happened the night prior and he wanted to talk to me about it so he could get ahead of everything.” (R. at 877.)

SMSgt JB continued:

[Appellant] had called me to let me know that he had gone out the night prior as a DD for a party. And then when he was driving home

⁸ These facts are also pertinent to the False Official Statement conviction analysis below.

at about one o'clock in the morning, he was witnessing watching two young ladies make out in the backseat of his car or the car he was driving at the time. And when he got back to the parking lot at RAF Mildenhall, to the dorms. One of the young ladies was crying, so he approached her and asked her if she was okay. She said that she was not, that she was too drunk, she was lonely, she was scared, she didn't feel good. And [Appellant] offered to bring in his dorm room.

...

Well, he offered to bring her in to give her some Tylenol and water and just kind of help her sober up and talk to her for a little bit. He said that they talked for quite some time and they ended up falling asleep. He said that he was roused around three o'clock or so in the morning. And when he was roused, he noticed that the Airman was mostly naked, and that made it uncomfortable. So, he got up to go to the bathroom, he came out of the bathroom and the Airman was more naked than she was when he went into the restroom. And started to kiss him and tell him that she wanted to have sex, and he said "no" "you're drunk you don't want to do this" "I don't want to do this" and he -- excuse me, she, excuse me, she continued to pressure him. She talked to him she said she was sober enough and this was a decision that she had made and what she wanted to do. And he ended up, she ended up in forcing him to have sex.

(R. at 877-78.) SMSgt JB said he recalled Appellant "saying that he didn't want to [have sex] and she did and she forced him into having it." (R. at 881.) SMSgt JB recalled Appellant saying

JM was "[k]issing him against his will, saying that she was sober enough and wanted to have sex." (R. at 880.)

SMSgt JB told Appellant that "what he explained to me was that he had been sexually assaulted and I had a duty to report it." (Id.) SMSgt JB asked Appellant again if everything he recounted was correct and Appellant "said they were." (Id.) When asked, "And did you ask him, once you said that sounded describing a sexual assault, did you ask him if he like, understood that," SMSgt JB replied, "I did, yes, sir. And I also made sure he understood that I was a mandatory reporter and what that meant." (R. at 886.) SMSgt JB continued, "I asked him

very specifically 'are you sure that that's the way it happened,' and he said 'yes it was' and I said 'okay, than I have to report it and I have to set you up with referral agencies.'" (R. at 887.)

When asked if Appellant ever specifically said he was sexually assaulted, SMSgt JB said, "No, I don't believe so." (R. at 902.) When asked, 'And when he described that situation to you, you then said to him what you've described is sexual assault,'" SMSgt JB replied, "Based off the fact that he said he was kissed against his will, absolutely." (Id.)

SMSgt JB stated that after the phone call, Appellant agreed to go to the SAPR office for sexual assault services. (R. at 901.)

In a written statement provided during his SANE exam, Appellant stated that he was a designated driver for his friend and that a girl decided to come back with them. (Pros. Ex. 6 at 4.) Appellant drove back to base, the group went to another persons' room for 20 to 30 minutes, and then a group, including Appellant and JM, went to McDonalds. (Id.) The group returned to the same building and Appellant waited in his car and JM and another person dropped off food. Appellant said they went to another dorm and that JM "was crying and I asked if she was okay." (Id.) Appellant said JM was walking to her room and asked if she wanted to talk. Appellant said, "She walked over to my room," and he offered her Tylenol and water. (Id.)

Appellant said Amn JM asked if she could come in and that she sat on his bed while Appellant sat at his desk. After talking for an hour or two, Appellant said JM "said she wanted to go to sleep" and they both fell asleep. Appellant wrote:

I woke up and she was taking her clothes off and she said she was trying to get comfortable. I felt uncomfortable and went to the bathroom. When I came back, she started making sexual advances. I told her "no I do not want to have sex with you and that it was a bad idea." She said she was sober and it was all good. I told her sobriety did not mean anything. She kissed me and started getting

on top of me. Reluctantly, we proceeded to have sex. Everytime I tried to move away she wrapped her legs around me. A few times she dug her nails on me. When we were done, she got up and had a shower. I gave her some clothes of mine. We both fell asleep. When I woke up, she was gone.

(Id.)

AFOSI Special Agent (SA) SF testified about his conversation with Appellant as follows:

[Appellant] had said that he was designated driver the previous night for some Airman his friends. And then he was walking back to his dorm room, found a female who was crying and offered her to come back to his dorm room for Tylenol and water. When he did that they set and chat for a few hours eventually, she asked to go to sleep. He said "okay go to sleep", he also went to sleep. And then at some unknown time later, he woke up to her kind of getting undressed, he went to the bathroom, came back from the bathroom.

And she had on a T-shirt and kind of underwear and then she said "let's have sex," he said "no" she said "she was sober and it's okay" he said "no" that's all. And then there was some kissing, she began to straddle him and that's where he stopped communicating me and said he would like to speak to an SVC at that moment.

(R. at 913-14.)

AC gave a first-hand account of the night's initial events. (R. at 966.) That evening, she, JM, Appellant, and another airman went to a get together. (R. at 969.) AC said the other three did not know Appellant that well. At the party, AC said Appellant was "standoffish" and not with the rest of the group. (R. at 971.) When asked if JM was drinking, AC said, "It was a lot." (R. at 972.) She said between the three that were drinking, they consumed a whole bottle of liquor. AC said she never saw any contact between Appellant and JM at the party. (R. at 973.)

On the way back to base, AC and JM were "making out" in the backseat while the other airman sat in the front seat and Appellant drove. (R. at 975.) When they stopped at a friend's house along the way, JM and the other airman went inside while AC and

Appellant stayed in the car. (R.at 976.) AC said Appellant turned around to her and said he wanted to talk to JM. AC explained, “It was something along the lines of like, ‘I’m trying to get at her’ or ‘I’m trying to get at that,’ something like that.” (Id.) AC told Appellant that was not “a good idea because she’s drunk.” (Id.)

Also on the way home, the group stopped at a gas station because Appellant “volunteered to buy more alcohol.” (R. at 977.) After Appellant bought the group more alcohol, the group drove through McDonalds where Appellant made an offhand comment about AC and JM making out. (R. at 978.) AC replied, “No,” when asked if Appellant and JM were talking or flirting with each other during this time. (R. at 979.) At some point, AC said JM got a phone call and became upset, though AC did not remember her crying. (R. at 992-93.)

Back on base, the group went to a friend’s dorm room and continued drinking. (R. at 980.) AC said JM was intoxicated and was not walking straight. After a half-hour, the group left and AC went to her room. (R. at 982.)

The next day, Appellant sent AC a SnapChat message asking to get his room key from Amn JM. (R. at 983.) AC went to Appellant’s door because “I just had a bad feeling about something” because “I just didn’t know why she would have his room key if like, she was drunk that night.” (R. at 984.) AC said Appellant was already on the phone with someone who she though was his supervisor or first shirt. (Id.)

JM testified that she only interacted with Appellant one time – the night of the incident. (R. at 1007-08.) JM never interacted with Appellant before or since that night. On that night, AC told JM that a one of her friends would be the designated driver for the night. That friend was Appellant. (R. at 1012.) At the party, JM said she did not

interact with Appellant or have any conversation with him. JM did say that she noticed Appellant staring at her from a distance. (R. at 1013.) JM said she drank five to eight drinks and some shots and that, by the time they were leaving the party, she was “pretty under the influence.” (R. at 1014.) She said she did not “really remember much about the walk out of the house,” but did remember “parts of the car ride after though.” (R. at 1015.) She estimated they were at the party for two to two-and-a-half hours.

After leaving the party, JM said they stopped at a friend’s house to get her wallet. She and the fourth airman with the group went inside while AC and Appellant stayed in the car. From there, the group went to a gas station where Appellant bought a bottle of gin. (R. at 1016.) During the ride, JM said she and AC were in the backseat kissing. (Id.) JM said Appellant was “eyeing us” through the rearview mirror. JM did not remember stopping at McDonalds. (R. at 1048.) She also did not remember if she got a phone call in Appellant’s car or if something happened in the car that made her upset. (R. at 1057.)

Once back on base, the group went to a friend’s dorm room and began drinking the gin Appellant bought. (R. at 1019.) JM said there was a group of people in the dorm room, including Appellant who was “standing near the door not talking to anyone. (Id.) JM said she had no conversations with Appellant in this dorm room.

After 35 to 45 minutes, JM said she was “[a] lot more intoxicated than I was, we ended up finishing the bottle of gin with everybody in the room.” (R. at 1020.) She, AC, Appellant, and the fourth airman left at the same time. JM said she was told that AC had to help her walk down the stairs from the dorm. (R. at 1052.) Appellant drove them back to their dorm. When JM got out, she began walking toward her dorm room when Appellant called her name and said, “come here, come here.” (R. at 1021.) Appellant, standing in front of

his open dorm room door, asked, “where are you going,” as he guided JM in and said, “come in here, come in here.” (R. at 1022.) When asked about going into his room, JM said, “He seemed concerned as if there was an emergency.” (R. at 1059.) JM said at this point she was “extremely intoxicated and I wanted to go to bed.” (R. at 1022.)

Inside Appellant’s room, Appellant told JM to sit on the side of his bed while he went and got a cup of water for her. JM did not remember Appellant giving her Tylenol. (R. at 1063.) JM testified that Appellant then pulled up a chair from his desk, got directly in front of JM’s face, and began telling her that “me kissing [AC] was not the type of person I was,” and “just a lot of stuff that was really out of the ordinary.” (R. at 1023.) Appellant told JM that “he could tell that I was really depressed,” and that “I was going through a lot of things and that he would be there for me through everything.”

JM said she was caught off guard by this because she had never talked to him before and “at that point I didn’t even know his name.” (Id.) She said Appellant began talking about “emotional things that kinda triggered me,” and she became upset, saying, “you don’t know me at all,” and “you’ve never met me before.” (R. at 1024.) JM said she got upset because Appellant “started kind of, pretending like he knew who I was and making accusations about me that he couldn’t have known.” (R. at 1060.) Appellant told her “to calm down and to lay over and just go to sleep.” (R. at 1024.) JM said, “At that point I was already headed to my room, because I was tired[,] I was extremely drunk, and I laid down and went to sleep.” (R. at 1063.) She said when she went to sleep, she “was not attracted to [Appellant] in any way, I just planned on going to sleep.” (R. at 1089.)

JM said she then remembered falling asleep and that, besides her shoes, all of her clothes were on. (R. at 1024.) On cross-examination, Appellant’s trial defense counsel

repeatedly questioned JM about taking off her clothes to “get more comfortable.” (R. at 1065-66.) However, JM continually denied taking off her clothes. (Id.)

When JM next woke, she was in “a new sweatshirt,” her “hair was wet, completely soaked, there was a hood over my head, it was tied in a knot under my neck, under my chin.” (R. at 1025.) She said, “I had no other clothes on, underwear, everything, socks were all off.” (Id.)

JM said she was scared, that she was “trying to figure out how to move my body,” and she was not sure whose room she was in. (R. at 1026.)

JM said she used her cellphone flashlight and took a video over her shoulder to see who was behind her. (Id.) She said it was Appellant and that she “deleted it, just I panicked and deleted it.” She then took a few videos of herself, adding that she was “trying to see stuff, mainly,” and that she was “still really intoxicated.” (Id.) Prosecution Exhibit 8 is the video JM recorded and shows her laying down and appearing to be crying. (R. at 1027.) JM said she was “scared” and “didn’t really know what to do next.” (R. at 1032.)

When asked on cross-examination, “Isn’t it true that what was going through [your] mind was ‘what the fuck did I do,’” JM answered, “I do remember saying that, in that sense of that statement that I had made, it was more of like, while I was intoxicated, ‘what situation did I put myself in?’ ‘why did I walk[] back to his room?’” (R. at 1076.)

JM decided to get up to go the bathroom but when she did, Appellant grabbed her arm and tried to pull her back down. JM told him she was going to the bathroom so he let go. She went to the bathroom and locked the door. She sat on the toilet for a while and remembered that night that she had a tampon in. She said that she “checked to see if it was still there, and it was pushed very, very far up inside of me.” (R. at 1033.) JM said she “no,” when asked if she normally had sex while menstruating.

On cross-examination, was asked again about her tampon. (R. at 1077.) JM said the tampon was “[r]eally, like, extremely far.” When Appellant’s counsel followed up by asking, “And again your thought was, ‘what the fuck have I done?’, JM responded, “No, at that point my thought was ‘what did he do?’” (Id.) When asked why she told AFOSI that her thought at this moment was “oh, what the fuck did I do,” JM said, “That statement again, that I had made, was more of the ‘what situation did I get myself in?’” (R.at 1079; *see also* R. at 1089-90.) JM added, “I was disgusted and I was kind of just blaming myself that something like that would happen to me.” (R. at 1090.)

JM knocked on the bathroom door of Appellant’s roommate, which adjoined at the bathroom, but no one answered. (R. at 1035.) When she went back into Appellant’s room, she said the “room was just like destroyed,” adding that her clothes were all over the floor and the chair Appellant had been sitting in was broken. She put on her pants on, but not her shoes and, after knocking on the kitchen door that connected to Appellant’s roommate’s room, JM decided to leave through Appellant’s main door. She grabbed both her and Appellant’s room key card because she did not know which one was hers (they were identical), opened the door and walked out. (R. at 1036-37.) She said, “I didn’t shut the door all the way behind me,” and that she “ran to my room.” (R. at 1037.)

JM said she immediately showered and changed clothes. She then went back to Appellant’s room because she realized she left her Apple watch there. She said Appellant’s door was still open and she was able to grab it off the edge of the bed and leave without him waking up. She said when she initially went to sleep in Appellant’s room, she was wearing the watch. (Id.)

JM said she did not remember getting undressed that night, did not know how her hair got wet, did not remember scratching Appellant, did not remember Appellant taking his clothes off, and did not remember Appellant having sex with her. (R. at 1038.) When asked, “When you had gone to sleep were you at all attracted to [Appellant],” JM replied, “No, sir.”

Elements of the Offense

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

- (1) That on or about 19 February 2021 at or near Royal Air Force Mildenhall, United Kingdom, [Appellant] committed a sexual act upon [JM] by penetrating her vulva with his penis; and
- (2) That [Appellant] did so without the consent of [JM].

(R. at 1235.)

Analysis

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

Further, Appellant has failed to show his conviction is legally insufficient.

Here, the first element, namely whether Appellant penetrated JM’s vulva with his penis, is not at issue. As shown by both JM’s testimony and Appellant’s statements, it is clear that sexual intercourse took place. The issue at hand is whether JM consented to sexual intercourse. The evidence adduced at trial shows she clearly did not.

To start, JM testified that prior to the night in question, she had never met Appellant. She further testified that at no point during the evening did she express an interest in Appellant or appear to express an interest such that Appellant might mistakenly believe she was interested in him. These facts are corroborated by AC's testimony.

In contrast, evidence shows Appellant was interested in JM from the start. At the party, JM testified that she noticed Appellant staring at her. Then, while in his car and after witnessing JM and AC kissing, Appellant told AC something to the effect that "I'm trying to get at her" or "I'm trying to get at that." (R. at 976.)

Despite AC plainly telling Appellant that was not a good idea because JM was drunk, Appellant continued his pursuit. First, he volunteered to buy the group more alcohol even though JM was clearly inebriated. (R. at 977.) Then, once the night was over and JM was walking towards her dorm room, Appellant called out to JM, who he knew to be extremely intoxicated, and beckoned her into his room. (R. at 1020-22.) Then, once in his room, Appellant told JM that she was not the type of person to kiss AC, another female, and, instead, told her that "he would be there" for her. (R. at 1023.)

Thus, at the point Amn JM went to sleep, all evidence pointed to Appellant as the sole person who was interested in any sort of sexual activity that night. Which is why what Appellant claims happened next is so far-fetched. Appellant claims he was awoken by JM who was suddenly the sexual aggressor and wanted sex from him, and that Appellant was the one who rebuffed her advances and said it was "a bad idea." (Pros. Ex. 6 at 4.) Of course, this story is at complete odds with Appellant's statement to AC early that night when, even though he knew JM was extremely drunk, said, "I'm trying to get at her" or "I'm trying to get at that."

(R. at 976.) His statement to AC is also at odds with his claim that he *reluctantly* had sex with JM. (Pros. Ex. 6 at 4.)

Given his actions throughout the night, Appellant's claims that JM was the aggressor, despite all the evidence showing she exhibited no interest in him at all that night while evidence shows he continually showed interest in her and actively participated in getting her more intoxicated, were unpersuasive to the members at trial and should be as well to this Court.

Further, Appellant's description of how the sex between he and JM occurred (she was "on top of me") does not correlate with the scratches found on Appellant's body. While the scratches on his chest may have matched up, the scratches on his back, side, and inner thigh would have been impossible to make if JM was on top of Appellant. Instead, the more likely cause of those scratches was from Appellant being on top of her and the scratches were from JM's attempts to get away from him.

Moreover, the next day, Appellant exhibited a clear consciousness of guilt when he called his first sergeant for the sole purpose of "get[ting] ahead of everything." (R. at 877.) Bearing in mind that Appellant already knew that two other airmen had reported him for inappropriate actions and he was already under no contact orders for those two airman, Appellant knew he had committed yet another act of sexual misconduct against a third airman and knew he had to "get ahead" of what he had done, indicating a clear guilty conscious.

All of this properly brought the members to the conclusion that Appellant's version of events simply was not true. The truth, as testified to by JM is that she (1) was never interested in or attracted to Appellant in any way that night; (2) she was walked to her room when Appellant called her back; (3) she was extremely intoxicated and Appellant knew it; (4) Appellant tried to convince her she was not the type of person to kiss girls, which upset

JM; (5) she wanted to go to sleep and, indeed, went to sleep with her clothes on; (5) when she woke up, she had been undressed and her hair was wet; (6) she filmed a video of herself while in Appellant's bed where she appears to be extremely upset and scared; and (7) when she went to the bathroom, she realized her tampon had been pushed very far inside of her. Given these circumstances, the evidence is clear JM did not consent to Appellant placing his penis in her vulva that night.

Considering all of these facts and circumstances, this mountain of evidence provided the panel at Appellant's trial significant proof of Appellant's guilt beyond a reasonable doubt that Appellant penetrated JM's vulva with his penis and did so without her consent. Still, Appellant finds fault. He first provides a "he said/she said" comparison between his statement during his SANE exam to JM's sworn testimony at trial. However, with regards to the initial events of the night, Appellant notably omits key facts discussed above, specifically AC's testimony that Appellant expressed a clear sexual interest in JM and that Appellant volunteered to buy more alcohol for an already intoxicated JM to consume.

Appellant then compares his version of events in his room to JM's sworn testimony, before questioning whether Amn JM experienced a blackout that evening. (App. Br. at 33, 35.) Appellant then argues that "it is reasonable to conclude that [Appellant] could have honestly and reasonably believed that [JM], by her statements and behavior, was fully conscious and voluntarily engaged in sexual acts with [Appellant] on 20 February 2021. (Id. at 35.)

Yet, as discussed above, Appellant's version of events regarding JM's behavior when she was supposedly in a blacked-out state is completely inapposite to everything that happened previously that night. The evidence shows Appellant was in pursuit of JM, not vice versa. Appellant (1) stared at JM during the party; (2) told AC that was "trying

to get at that;” (3) volunteered to buy an already intoxicated JM more alcohol; (4) beckoned JM to his room as she was walking to her dorm room; and (5) tried to convince JM was “not the type of person” to be kissing AC, a female. Considering these multiple actions, Appellant’s claim now that JM suddenly became the sexual aggressor and that he was the person who not only did not want sex, but was unable to keep JM from having sex with him, is simply not steeped in reality. Further, the location of Appellant’s scratches on his body do not match his version of events. And finally, Appellant showed his consciousness of guilt when he called his first sergeant to “get in front of everything.” Blacked out or not, the evidence shows Appellant was the sexual aggressor that night and that he committed a sexual assault against JM without her consent and free of any supposed mistake of fact as to her consent.

Notably, each of Appellant’s claims here were raised squarely before the panel at his trial. Again, this Court must give “appropriate deference to the fact that the trial court saw and heard” JM’s testimony and demeanor and convicted Appellant beyond a reasonable doubt of the offense.

Here, Appellant has failed to make a specific showing of a deficiency of proof as to his abusive sexual contact conviction against JM. Yet, even if he did, the evidence shows Appellant committed a sexual assault against JM by placing his penis inside her vulva without her consent. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including hearing JM’s sworn testimony and AC’s testimony highlighting Appellant’s pursuit of JM, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant’s factual sufficiency claim must fail.

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

- *Specification of Charge III: False Official Statement*

Elements of the Offense

The military judge instructed the members as to the elements of this offense, pursuant to Article 107, UCMJ, are as follows:

- (1) That on or about 21 February 2021, at or near Royal Air Force Mildenhall, United Kingdom, [Appellant] made to [SMSgt JB] a certain official statement, that is: that he was sexually assaulted by [JM], or words to that effect;
- (2) That such statement was totally false;
- (3) That the accused knew it to be false at the time he made it; and
- (4) That the false statement was made with the intent to deceive.

(R. at 1247.)

Analysis

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

Here, Appellant claims fault with his false official statement conviction "because the government failed to prove that [Appellant] sexually assaulted [JM], but also because he

never told SMSgt [JB] that [JM] ‘sexually assaulted’ him.” (App. Br. at 34.) Appellant is again mistaken. First, as shown above, the Government proved beyond a reasonable doubt that Appellant sexually assaulted JM.

As to Appellant’s second contention, the specification against Appellant states that he made a certain official statement “that he was sexually assault by [JM], *or words to that effect.*” (See Charge Sheet.) (emphasis added.) Thus, Appellant never had to use the actual words “sexual assault,” but only words to that effect.

As shown by SMSgt JB’s testimony, Appellant’s version of events as told to SMSgt JB detail a clear sexual assault allegation. Appellant said JM began kissing him, that he said, “no” and “I don’t want to do this,” and that she continued to pressure him into eventually having sex. As Appellant well knew, his words here amounted to him claiming he was sexually assaulted by JM. Then, to remove any doubt, SMSgt JB told Appellant that what he had just described was a sexual assault and that he would have to report it. (R. at 877-880.) Yet, instead of telling SMSgt JB that he was not sexually assaulted or that was not what he was claiming, Appellant responded affirmatively when SMSgt JB asked him, “are you sure that’s the way it happened.” (R. at 887.)

Further, Appellant’s subsequent actions, including taking part in a SANE exam and requesting a victims’ counsel, show Appellant’s clear intent to report a sexual assault allegation against JM to SMSgt JB that morning.

Finally, Appellant’s claim now that he did not intend to report a sexual assault to SMSgt JB is seemingly at odds with multiple parts of his current brief. For instance, Appellant states that he “did exactly what the Air Force tells victims of sexual [assault] to do: He *called his leadership immediately, told them what happened,* and got a SAFE examination.” (App. Br. at

20.) Here, Appellant refers to himself as a sex assault victim and that he called his leadership (i.e., SMSgt JB), and “told them what happened.” (Id.) Appellant then says he “alleged a credible assault,” again acknowledging that what he told his leadership was meant to be a sexual assault allegation. (Id.) Appellant then says he is “like many victims of sexual assault” and that he had rights “as a victim.” (Id.)

Here, the record is abundantly clear that Appellant called SMSgt JB that morning to claim he had been sexually assaulted by JM, *or words to that effect*, that this statement was false, that Appellant knew it was false, and that it was done with the intent to deceive.

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant’s guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his false official statement conviction. Yet, even if he did, the evidence shows Appellant made a false official statement to SMSgt JB. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant’s factual sufficiency claim must fail.

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

V.

ARTICLE 120(B)(2), UCMJ, IS NOT FACIALLY VOID FOR VAGUENESS BECAUSE IT PROVIDES REASONABLE MILITARY MEMBERS FAIR NOTICE OF WHAT CONDUCT IS PROSCRIBED.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. United States v. Prather, 69 M.J. 338, 341 (C.A.A.F. 2011) (*citing* United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005)).

Law and Analysis

Appellant mounts a facial “void for vagueness” challenge to the military’s sexual assault “without consent” provision in Article 120(b)(2), UCMJ, 10 U.S.C. § 920(b)(2) (as well as the definition of “consent” in subsection (g)(7) of the same statute) in Issue V of his Assignments of Error, and an “as applied” constitutional challenge to Article 120(b)(2) and (g)(7) in Issue VI. (*Compare* App. Br. at 41 (“This Court should not hesitate in finding that Article 120 is unconstitutionally vague”), with 43 (“Assuming, *arguendo*, this Court does not find Article 120 unconstitutionally vague on its face, this Court should find that it was unconstitutionally as applied to” Appellant.”).) Both constitutional challenges collapse under the weight of well-established authority.

The Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V, “requires ‘fair notice’ that an act is forbidden and subject to criminal sanction” before a person can be prosecuted for committing that act. United States v. Vaughn, 58 M.J. 29, 31 (C.A.A.F. 2003) (*quoting* United States v. Bivens, 49 M.J. 328, 330 (C.A.A.F. 1998)). Due process “also requires fair notice as to the standard applicable to the forbidden conduct.” *Id.* (*citing* Parker v. Levy,

417 U.S. 733, 755 (1974)). In other words, “[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.” Parker, 417 U.S. at 757 (citing United States v. Harriss, 347 U.S. 612, 617 (1954)).

A void for vagueness challenge requires inquiry into whether a reasonable person in Appellant’s position would have known that the conduct at issue was criminal. See Vaughn, 58 M.J. at 31; see also United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (“Vague laws contravene the ‘first essential of due process of law’ that statutes must give people ‘of common intelligence’ fair notice of what the law demands of them.” (citations omitted)). In addition, due process requires that criminal statutes be defined “in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983). This “more important aspect of the vagueness doctrine” requires that the statute “establish minimal guidelines to govern law enforcement” rather than “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” Id. at 358 (alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 574-75 (1974)).

“A facial challenge equates to a ‘request that the court go beyond the facts before it’ to consider whether the law is constitutional.” United States v. Wright, 48 M.J. 896, 899 (C.A.A.F. 1998) (rejecting a facial challenge to the constitutionality of Mil. R. Evid. 413) (quoting Sanjour v. E.P.A., 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (*en banc*)). “The Supreme Court has noted that a facial challenge is the most difficult challenge on which to succeed, because ‘the challenger must establish that no set of circumstances exists under which the [law] would be valid.’” Id. at 900 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Therefore, to prevail here, Appellant “must demonstrate that no possible application of [Article 120(b)(2)] would survive

constitutional scrutiny.” Id. Outside of the First Amendment context, a challenger must also “prove that the statute is vague as applied to him.” Sessions v. Dimaya, 138 S. Ct. 1204, 1250 (2018) (citations omitted).

Here, Appellant’s facial challenge against Article 120(b)(2), UCMJ, strikes out because that provision provides notice that nonconsensual sexual acts are forbidden and subject to criminal sanction, and the statute does not encourage arbitrary and discriminatory enforcement. In addition, Appellant has failed to demonstrate that no possible application of the law could survive constitutional scrutiny, and (in Issue VI) Appellant provides no basis to find that the statute is vague as applied to him.

Article 120(b)(2), UCMJ, states the following:

Any person subject to this chapter who—

(2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring is guilty of sexual assault and shall be punished as a court-martial may direct.

10 U.S.C. § 920(b)(2).

“Consent” is later defined in Article 120(g)(7) as follows:

(A) The term “consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

10 U.S.C. § 920(g)(7).

Both statutory provisions plainly separate innocent acts (i.e., consensual sexual acts) from wrongful conduct and provide reasonably “fair notice” as to what acts are forbidden and subject to criminal sanction. *See Vaughn*, 58 M.J. at 31. Specifically, these provisions prohibit non-consensual sexual acts—either when the victim is sleeping, unconscious, or incompetent, *cf. United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (finding that each of the circumstances listed in Article 120(b)(2)(B) is a separate theory of criminal liability), or where the victim does not consent. Rather than being vague, Article 120(b)(2) captures those foreseeable scenarios where a victim cannot or simply does not consent. Such a statute, which attempts to include different theories of criminal liability stemming from non-consensual sexual acts, is not a vague law; it is a thorough and specific one that strives to communicate to military members that non-consensual sexual contact—in its various forms—is illegal. That the statute merely gives different options to prove that lack of consent does not render it void for vagueness.

Appellant seems to assert that Article 120(b)(2)(A), which specifically covers acts done “without the consent of the” victim, improperly captures other non-consensual conduct that is prohibited by separate statutory provisions—where, for example, a victim is asleep, unconscious, or otherwise unaware, *see* Article 120(b)(2)(B), or where the victim “is incapable of consenting

to the sexual act due to ... impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person,” *see* Article 120(b)(3)(A). (App. Br. at 38.) Because the statute operates in this manner, Appellant claims “Article 120 is facially invalid” because “the Government can jump from theory to theory with sticking to its charging decision,” adding that in this case “the Government charged [Appellant] under the ‘without the consent of the other person theory,’ but then “argued evidence on incapable of consenting under Article 120. (App. Br. at 39-40.) The threefold danger with this statutory scheme, Appellant further asserts, is that the Government can (1) charge “without consent” then prove “whichever theory it likes”; (2) “emphasize and argue” evidence not in line with its charged theory; and (3) request that the members convict an accused under a theory “the Government did not charge.” (App. Br. at 40.)

Yet charging “without consent” using Article 120(b)(2) only allows the Government to pursue a theory of guilt based on *that the victim did not consent*. How the victim manifested that lack of consent may indeed be proven by the Government using different evidentiary means within the bounds of the definition of consent in Article 120(b)(2), but that does not mean that the statute fails to outline what is illegal and what is not. *See United States v. Brown*, 65 M.J. 356, 358 (C.A.A.F. 2007) (“A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.”); *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (Government may “argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.”).

Similarly, merely because Article 120(b)(2) and Article 120(b)(3)(A) address situations where the victim is intoxicated at the time of the sexual act “does not mean that the government

is foreclosed from attempting to carry the arguably heavier burden of affirmatively proving a lack of consent when intoxication is at issue.” United States v. Roe, No. 20200144, 2022 CCA LEXIS 248, at *14-15 (A. Ct. Crim. App. 27 April 2022). In many cases—perhaps especially when a victim has been consuming alcohol—a victim’s exact state of mind at every given moment may not be scientifically clear (for example, a victim may be asleep one moment, incompetent in another, and expressly communicating the lack of consent in yet another), but that does not foreclose the Government from proving at trial, beyond a reasonable doubt, that the victim did not or could not consent. Given the myriad of potential factual scenarios demonstrating the lack of consent, there are “many situations where the government [can] exercise[] its discretion to charge one of multiple potential offenses.” Id. at *15. The mere “fact that there is evidentiary overlap between ... theories of liability ... is not unusual in the criminal law.” Id.

While the due process principle of fair notice indeed mandates “that an accused has a right to know what offense and under what legal theory he will be tried and convicted,” United States v. Riggins, 75 M.J. 78, 84 (C.A.A.F. 2016) (finding that the government may not pursue a theory not “alleged in its charging documents”), appellants need not be put on notice exactly how the Government plans on proving its case. *See, e.g.,* United States v. Gallo, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000) (“the military is a notice pleading jurisdiction”); United States v. Nelson, No. 20140758 2016 CCA LEXIS 645, at 4 (A. Ct. Crim. App. 31 October 2016) (the evidence adduced “at trial will not always match word for word the specification alleged”). Here, Appellant was on notice of the conduct proscribed as well as the legal theory to be (and was in fact) pursued by the Government during trial: a legal theory that JM did not consent to the sexual act.

All told, “Appellant does not assert that he was not on notice that his conduct would subject him to criminal prosecution.”⁹ United States v. Palacios Cueto, No. ACM 39815, 2021 CCA LEXIS 239, at *21 (A.F. Ct. Crim. App. 18 May 2021) (rejecting notice challenge to “bodily harm” theory pursued at trial where government proved lack of consent). His “reliance on the Due Process Clause is [thus] misplaced.” Id. Nor can Appellant demonstrate here that Article 120(b)(2) in any way encourages arbitrary and discriminatory enforcement—instead, Appellant seems to argue that the statute can be enforced based on different factual scenarios involving non-consensual acts, which is indeed true—though, as discussed, perfectly legal. *See*, e.g., United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109, at *53-54 (A.F. Ct. Crim. App. 12 March 2021) (rejecting due process challenge where a theory of bodily harm was charged and the victim “had no recollection of whether she did nor did not consent, presumably as a result of intoxication.”); United States v. Horne, No. ACM 39717, 2021 CCA LEXIS 261, at *69-70 (A.F. Ct. Crim. App. 27 May 2021) (“We find no due process violation because Appellant was convicted of sexual assault by bodily harm, and the record does not support a conclusion that he was convicted of an uncharged offense.”); United States v. Miller, No. 202100273, 2023 CCA LEXIS 103, at *24 (N-M Ct. Crim. App. 28 February 2023) (“because the Government charged sexual assault without consent, the trial counsel was permitted to

⁹ In arguing that Article 120(b)(2) fails to provide constitutional notice, Appellant provides this Court with three canons of construction that justify “[s]triking down Article 120.” (App. Br. at 42-43.) But “[o]nly if an attempt to discern the plain meaning fails because a statute is ambiguous, do[es the Court] resort to canons of construction.” Green v. City of New York, 465 F.3d 65, 78 (2d Cir. 2006). Appellant does not claim Article 120(b)(2) is ambiguous; he asserts it is vague. These canons of construction are therefore unhelpful.

reference the victim’s sleep state, incapacitation, or impairment to show” why she demonstrated a lack of consent and why her memory contained gaps).

Finally, since Appellant is lodging a facial challenge to Article 120(b)(2), he was required but failed to “establish that no set of circumstances exists under which the [law] would be valid.”¹⁰ Salerno, 481 U.S. at 745 (1987)). Instead, Appellant admits in Issue VI that Article 120(b)(2) itself is not the problem, but, rather, it is the Government’s charging scheme that is problematic: “One way the Government could have avoided this issue, was to charge [Appellant], in the alternative, with different theories of criminal liability.” (App. Br. at 44.) This tacit admission reveals Appellant himself understands that Article 120(b)(2) is facially constitutional, but his complaint is really with how the Government chose to charge him. Because Article 120(b)(2) and (g)(7) provides a person of ordinary intelligence fair notice of what conduct is proscribed, and the provisions do not invite arbitrary or discriminatory enforcement, they are not facially unconstitutional. Appellant is thus unentitled to any relief.¹¹

¹⁰ Appellant highlights an unrelated statute that the Supreme Court found unlawfully vague in Davis and argues that, because that statute was found unconstitutional, “this Court should not hesitate in doing the same for a statute that has been in existence for less than five years.” (App. Br. at 41-42.) Putting aside the fact that Article 120 has been in existence in various iterations for much longer than five years, Appellant provides no analysis as to why Article 120(b)(2) is like the one contemplated in Davis, nor does he discuss the countless other federal criminal statutes that have withstood vagueness challenges on appeal and why this case should be any different.

¹¹ A recent case, United States v. Casillas, ACM 40302, 2023 CCA LEXIS (A.F. Ct. Crim. App. 15 December 2023), raised this exact issue. This court summarily dispatched this issue, finding that it did not require discussion or warrant relief. Id. at *2 (*citing* United States v. Guinn, 81 M.J. 195, 204 (C.A.A.F. 2021); United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)).

VI.

ARTICLE 120(B)(2), UCMJ, IS NOT UNCONSTITUTIONAL AS APPLIED SINCE IT PROVIDED APPELLANT WITH FAIR NOTICE OF WHAT CONDUCT WAS CRIMINAL.

Standard of Review

This Court reviews whether a statute is unconstitutional as applied de novo. See United States v. Goings, 72 M.J. 202, 205 (C.A.A.F. 2013) (citing United States v. Ali, 71 M.J. 256, 265 (C.A.A.F. 2012)). The determination whether a statute is unconstitutional “as applied” is fact specific. Ali, 71 M.J. at 265.

Law and Analysis

Appellant next argues that Article 120(b)(2) and (g)(7) are unconstitutionally vague “as applied” to Appellant. (App. Br. at 43.) Specifically, he asserts that, because the “military judge overruled defense counsel’s objection to trial counsel’s argument on uncharged theories of liability,” denied counsel’s request for a tailored jury [sic] instruction”, “Article 120 was “unconstitutional as applied to [Appellant].” (Id. at 43.) Like his first constitutional argument, Appellant’s constitutional, “as applied” challenge falls flat.

As discussed in Issue V, constitutional “[d]ue process requires ‘fair notice’ that an act is forbidden and subject to criminal sanction” before a person can be prosecuted for committing that act. Vaughn, 58 M.J. at 31 (quoting United States v. Bivens, 49 M.J. 328, 330 (C.A.A.F. 1998)). The ‘void for vagueness’ doctrine requires the criminal activity to be defined with sufficient clarity such that ‘ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’” United States v. Caporale, 73 M.J. 501, 504 (A.F. Ct. Crim. App. 2013) (quoting Kolender, 461 U.S. at 357).

In this case, Appellant was properly put on notice that he was charged with committing sexual assault for committing a sexual act “without the consent of the other person” under Article 120(b)(2), UCMJ. Appellant does not appear to question that the charge and specification expressly alleged every required element, and he seems to acknowledge he was fairly informed that he was required to defend against sexual assault “without the consent of another,” so that he is now able to plead a conviction of this offense if a future prosecution occurred for the same offense.¹² See Horne, 2021 CCA LEXIS 261, at *61 (citing United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011)). Nevertheless, Appellant still argues that Article 120(b)(2) is unconstitutional as applied to him, though he asserts that such an error could have been easily fixed by the Government. (See App. Br. at 40, where Appellant states, “The Government chose not to charge in the alternative, making this an unforced error.”)

Specifically, Appellant claims that this alleged unconstitutional application of the statute would have been remedied by (1) the Government charging him with two separate offenses under Article 120 “in the alternative,” or (2) by the military judge either sustaining his counsel’s objection or, *sua sponte*, providing a tailored instruction. (App. Br. at 44.) But Appellant does not explain how such a profound constitutional notice deficiency could be so easily remedied by being charged with two separate crimes. Had the Government done so, it would have used the same (supposedly unconstitutional) statute—Article 120(b)—and would have elicited the very same evidence from the victim. Moreover, by stating that the Government would have been right to charge Appellant “in the alternative,” Appellant overlooks an equally possible

¹² Appellant does not allege that he was convicted of an offense under Article 120(b)(3)(A), UCMJ. See Horne, 2021 CCA LEXIS 261, at *60. Even if he did make such an allegation, however, the record demonstrates “Appellant was convicted of the charge offense under” Article 120(b)(2). Id.

contingency: Based on the evidence elicited, the Government could have charged Appellant with *both* Article 120(b)(2) (without consent) *and* Article 120(b)(3) (incapable of consenting). But surely Appellant is not arguing that, for Article 120 to be constitutionally applied to him, he should have been tried and convicted of two (or more) crimes as opposed to being convicted of just one? See United States v. Harris, No. ACM 39640, 2020 CCA LEXIS 299, at *27 (A.F. Ct. Crim. App. 2 September 2020) (“It is hardly a novel situation that the available evidence in a particular case might meet the elements of multiple offenses, affording the Government some discretion in its charging decisions.”) (*citing* United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014)). Taken to their logical conclusions, however, Appellant’s arguments seem to indicate that this is precisely the outcome he prefers.

This Court has previously held in similar cases that the “Government ha[s] the discretion to charge [appellants] with both offenses in the alternative, or either offense [*or both offenses*] based on its assessment of the evidence.” Horne, 2021 CCA LEXIS 261, at *61. Accordingly, this Court found “no merit to [the] claim that [appellants have] a due process right to have both offenses charged in the alternative.” Id. The same conclusion should follow here.

With respect to Appellant’s contention that the judge should have provided a tailored instruction to the members, this Court should again be unpersuaded. The military judge properly provided the members the standard and correct instruction—derived directly from the statute—that “consent” means a “freely given agreement to the conduct at issue by a competent person.” The extent to which JM was intoxicated at the time Appellant committed the sexual act were all part of the “surrounding circumstances” that are appropriately “considered in determining whether [JM] gave consent,” in accordance with Article 120(b)(2), UCMJ.

See also Article 120(g)(7)(B) (“A sleeping, unconscious, or incompetent person cannot consent.”). Therefore, Appellant’s allegation of instructional error also lacks merit.

In sum, Appellant’s argument that Article 120(b)(2) is unconstitutionally vague as applied to him fails. He is accordingly not entitled to relief.

VII.

APPELLANT HAD THE OPPORTUNITY TO SUBMIT MATTERS IN RESPONSE TO BH’S SUBMISSION AND, IN FACT, DID SUBMIT MATTERS IN RESPONSE TO BH’S MATTERS PRIOR TO THE CONVENING AUTHORITY TAKING ACTION ON APPELLANT’S CASE.

Standard of Review

Proper completion of post-trial processing is a question of law this court reviews de novo. United States v. Valentin-Andino, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Law

“In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110.” R.C.M. 1106A(a). “The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable.” R.C.M. 1106A(c)(3).

If a crime victim submits matters under R.C.M. 1106A, “the accused shall have five days from receipt of those matters to submit any matters in rebuttal.” R.C.M. 1106(d)(3). “Before taking or declining to take any action on the sentence [in clemency], the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim.” R.C.M. 1109(d)(3)(A). In making a clemency decision, a convening authority “may not consider matters adverse to the accused without providing the accused an

opportunity to respond.” R.C.M. 1106A(c)(2)(B), Discussion. The convening authority may also consider “additional matters,” including evidence introduced at the court-martial, appellate exhibits, the recording or transcription of the proceedings, the personnel records of the accused, and any other such matters the convening authority deems appropriate. R.C.M. 1109(d)(3)(B).

Statement of Facts

On 5 August 2022, Appellant, through his defense counsel, submitted matters to the convening authority requesting a deferment in his reduction in rank until action, deferment in his automatic forfeitures until entry of judgment, and waiver of automatic forfeitures for a period of six months. (ROT, Vol. 6.)

On 8 August 2022, BH submitted matters to the convening authority. (ROT, Vol. 6.) As Appellant states in his brief and as noted by this Court in its Order, BH stated that Appellant “had no remorse at all,” and that, during his testimony, Appellant “stared me down the entire time. It felt like he was trying to intimidate me,” and that she felt uncomfortable by his “constant glaring.” (Id.) BH also said Appellant “did not take responsibility for his actions,” and that he “did not reference me or any other victims in his statement to the court, nor did he offer an apology.” BH requested the convening authority “not grant [Appellant] any leniency towards his sentence.” (Id.)

On 10 August 2022, DA, the base legal office paralegal, sent BH’s matters to Appellant’s trial defense counsel, Maj DB. (Dec. of DA at Atch 1.)¹³ The notice included a memorandum entitled Opportunity for Accused to Submit Matters in Rebuttal signed by the base legal office Deputy Staff Judge Advocate. (Id. at Atch 2.) The notice stated, “[BH]

¹³ The Government moved to attach this declaration and attachments on 4 June 2024. This Honorable Court granted that motion on 11 June 2024.

submitted the attached matters to the convening authority. You may submit matters in response or rebuttal.” (Id.) The notice continued, “You have 5 calendar days to submit a response or waive your right to submit a response. Your response is due on 15 August 2022.” (Id.)

Two days later, on 12 August 2022, the convening authority (the Third Air Force Commander (3AF/CC)), signed a Convening Authority Decision on Action (CADA). According to Col BT, the 3AF Staff Judge Advocate (SJA), the 3AF legal office was “unaware that there was a Defense response to a victim’s submission outstanding.” (Dec. of Col BT.)¹⁴

The same day, 12 August 2022, Maj DB, on behalf of Appellant, submitted matters in response to BH’s submission of matters to the base legal office. (Dec. of DA at Atch 3.) The document, entitled Response to [BH’s] Submission of Matters, states the submission by Maj DB is “[o]n behalf of my client” and acknowledges that BH’s matters “were provided to the Defense” on 9 August 2022. (Id.) Maj DB’s memorandum specifically addressed various portions of BH’s submission, including her stating Appellant did not show remorse or offer an apology, that Appellant “stared her down,” and that BH requested “that the convening authority not grant lenience to [Appellant].” (Id.) Maj DB then argued while BH’s submission was outside the scope of R.C.M. 1106A(c) and should not be considered by the convening authority.

On 15 August 2022, DA forwarded Appellant’s submission of matters in response to BH’s submission to the 3AF legal office. (Dec. of SrA DA at Atch 4.)

Upon receipt of Appellant’s response to BH’s submission, the 3AF legal office resubmitted the post-trial package to the convening authority with all the documents and

¹⁴ The Government moved to attach this declaration on 4 June 2024. This Honorable Court granted that motion on 11 June 2024.

included a revised push note¹⁵ stating that the reason the convening authority was seeing the package again was because of Appellant's response to BH's matters. (Dec. of Col BT.) Col BT states, "I made the same recommendation as to post-trial action, noted the new document was attached, and to ensure legal sufficiency asked 3AF/CC to review the package again and re-sign the CADA, which he did on 19 August 2022." (Id.)

On 19 August 2022, the convening authority issued a new CADA which stated that it "replaces my previous memo in this case, dated 12 August 2022." (ROT, Vol 6.) In the CADA, the convening authority stated, "Before taking action, I considered matters timely submitted by the [Appellant] under [Rule for Courts-Martial (R.C.M.)] 1106 and by the Victim under R.C.M. 1106A." (Id.)

Analysis

As shown by the declarations of DA and Col BT, Appellant, through his counsel, was provided BH's submission of matters prior to the convening authority's ultimate 19 August 2022 action. Additionally, Appellant, through his counsel, provided a response to those matters prior to the convening authority's ultimate 19 August 2022 decision on action. While Appellant's ROT contains a 30 August 2022 receipt from Maj DB regarding BH's matters, Maj DB's 12 August 2022 response to BH's submission of matters (1) acknowledges the defense received the matters on 9 August 2022, and (2) specifically references various portions of BH's submission. Thus, the record is now clear that Appellant, through his counsel,

¹⁵ Col BT explains that he used a "push note" as "[o]ur primary method of communicating with 3AF/CC in a summary way to advise as to the reason that a package was before him and recommended action." (Dec. of Col BT.) The push note was "a brief, 2-3 paragraph memorandum (a ½ sheet of paper) that would accompany the package of relevant documents" to the convening authority's office. (Id.)

received BH's submission, and responded to it, prior to the convening authority's 19 August 2022 CADA.

Further, while the convening authority initially made a decision on action on 12 August 2022 (prior to receiving Appellant's response to BH's submission), Col BT's declaration shows the convening authority reviewed the case anew once Appellant's submission was received and then issued a new decision on action on 19 August 2022. Col BT's declaration is supported by the convening authority's 19 August 2022 decision on action which specifically states that it replaced the previous 12 August 2022 CADA.

While the Government acknowledges the attachments in DA's declaration should have been included in Appellant's ROT, these attachments, as well as DA's and Col BT's declarations, refute Appellant's claims that "the Government never gave [Appellant] B.H.'s statement," or that the Government did not "give [Appellant] an opportunity to rebut said statement." (App. Br. at 46.) These documents not only show Appellant was provided the opportunity to respond to BH's matters prior to the convening authority taking action on his case, but that he did, in fact, respond to those matters. Moreover, the documents show the convening authority reviewed Appellant's response prior to making a decision on action in the case on 19 August 2022. Thus, there is no error and this claim should be denied.

VIII.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ.

Law and Analysis

This Court has repeatedly rejected the same claim Appellant raises now. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it “lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition” in a court-martial order. Yet, Appellant argues here that because our superior Court in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Appendix at 8-9).

In doing so, Appellant repeats similar arguments this Court rejected in multiple cases. In United States v. Maymi, ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. 5 October 2023), this Court summarily dispatched this issue by stating, “As recognized in United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement.”

In United States v. Casillas, ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. 15 December 2023), this Court denied Appellant's claim, stating that it did not require discussion or warrant relief.

In United States v. Saul, ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. 29 December 2023), this Court summarily dispatched this issue by stating, “consistent with our reasoning in United States v. Lepore, we find this court lacks authority under Article 66, UCMJ, 10 U.S.C. § 866, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition in the staff judge advocate's indorsement to the STR.”

In United States v. Fernandez, ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. 9 January 2024), this Court again denied the claim, finding that no aspect of that appellant’s case “cause us to revisit or overrule the decision in Lepore.”

In United States v. Jackson, ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. 11 January 2024), this Court cited Lepore and held, “this court lacks authority under Article 66, UCMJ, to direct modification of that portion of the staff judge advocate's indorsement to the Statement of Trial Results.” This Court continued, “We do not read United States v. Lemire, 82 M.J. 263 n* (C.A.A.F. 2022) (unpub. op.), to provide a basis to consider Appellant's claim, as Appellant suggests, when in that case the CAAF merely directed the court-martial promulgating order ‘be corrected.’”

In United States v. Denney, ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024), this Court denied Appellant’s claim, stating that it did not require discussion or warrant relief.

Finally, in United States v. Vanzant, ACM 22004, 2024 CCA LEXIS 215 (A.F. Ct. Crim. App. 28 May 2024), this Court denied Appellant’s claim, stating, “For the reasons stated in Fernandez, we are not persuaded the CAAF's decision in Lemire gives us cause to revisit or overrule Lepore.”

Here, Appellant reiterates the same argument from these cases that an asterisk footnote in a summary decision provides this Court jurisdiction to review his claim. However, as this Court has repeatedly stated over the last six months, it does not. Consistent with those decisions, this Court should continue to follow Lepore and find that it lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. Accordingly, Appellant's claim must fail.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

FOR

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 12 June 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>	)	MOTION TO EXCEED
	)	PAGE LIMITATIONS
v.)	
	)	Panel No. 1
Airman First Class (E-3))	
ISAAC J. SERJAK, USAF,	)	ACM 40392
<i>Appellant.</i>)	

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant’s Assignments of Error in excess of Rule 17.3’s length limitations. This Answer requires exceeding this Honorable Court’s length and word limitations due to the nature and number of issues raised by Appellant in his 57-page Assignments of Error brief. Appellant raises a total of eight issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

FOR

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate counsel, and the Air Force Appellate Defense Division on 12 June 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR ENLARGEMENT OF TIME OUT OF TIME TO FILE REPLY BRIEF
<i>Appellee,</i>)	
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3),	)	No. ACM 40392
ISAAC J. SERJAK,)	
United States Air Force,	)	21 June 2024
<i>Appellant.</i>)	

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

Pursuant to Rule 23.3(m)(6) and (7) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) out of time (OOT) to file a Reply to the Government Answer filed on 12 June 2024, and accepted by this Court on 18 June 2024. Appellant requests an enlargement for a period of seven days, which will end on **2 July 2024**. The record of trial was docketed with this Court on 19 December 2022. From the date of docketing to the present date, 550 days have elapsed. On the date requested, 561 days will have elapsed.

On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. Record (R.) at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings,

no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 19 August 2022.

The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined.

Good cause exists for filing this request out of time and for granting this request. First, Appellant requested that civilian counsel provide him the Government's Answer so he could provide input on the Reply; however, because of communication problems with the confinement facility and the confinement counselor being on leave, the Answer was not delivered to Appellant until today. Second, given the length of the Government's Answer, Appellant was not able to read it before a phone call today that counsel had with Appellant. Also, because of the length of the Government's Answer, additional time is needed to adequately respond to the Government's arguments. Third, counsel has a phone call to discuss the Government's Answer with Appellant on Tuesday, 25 June 2024, the date the Reply is due. This phone call could not take place sooner because of the weekend and because of work civilian counsel has in other cases that must be completed on Monday. Finally, in addition to all of the above, civilian counsel had a family funeral last week which required his personal time and attention.

This case is the number one priority for civilian and military counsel. Military appellate counsel is assigned 20 cases, with four cases pending initial review before this Court. Counsel also has two CAAF grant briefs he is currently working on. Although civilian counsel does have deadlines on Monday, June 24, 2024, in other cases (*US v. Sherman*), this case remains his number one priority.

Through no fault of Appellant, counsel have been unable to complete a Reply draft at the time of this extension request. Appellant has been informed of his right to speedy appellate review, was updated and consulted in regard to this specific request, and agrees with this extension request so that he can personally provide input on the Reply Brief. Accordingly, an enlargement of time is necessary to allow counsel to fully consult with Appellant and prepare a Reply accordingly.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 21 June 2024.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME – OUT
	)	OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM 40392
ISAAC J. SERJAK, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

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

First, 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 550 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. If this Enlargement of Time is granted, the Appellant's delay will have consumed nearly the entirety of the 18-month standard for this Court to issue a decision, which leaves virtually no time 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 25 June 2024.

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

included the chain of command above the new squadron commander and the legal office) had been poisoned and the poison could not be removed by giving the case to a different commander.

The RAF Mildenhall Vice Commander and Commander were fully briefed on the new course of action and why. App. Ex. XIV, Attachment 19. They knew UCI had occurred. *Id.* They knew the original squadron commander lost authority to take further action in the case. R. at 66. They knew the Third Air Force SJA spoke for the Third Air Force Commander. *See* App. Ex. XIV, Attachment 23; App. Ex. XIV, Attachment 27; App. Ex. XIV, Attachment 25. They knew what Third Air Force wanted and “expected” would happen. App. Ex. XIV, Attachment 19.

One day after the dismissal of charges, on 8 July 2021, the base legal Victim and Witness Assistance Program (VWAP) Coordinator emailed H.C.’s Special Victims Counsel (SVC) to give H.C. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime. App. Ex. XIV, Attachment 20. The base SJA emailed the Wing Commander and told him: “Assuming his review results in a new preferral (*expected*), the Art 32 is already complete and *the case will be docketed for trial in the upcoming months.*” App. Ex. XIV, Attachment 19 (emphasis added). The same day the Wing Commander responded to the base SJA, “tracking what is likely the path going forward.” *Id.*

In fact, there was no new Article 32 hearing to assess not only whether probable cause existed, but also to assess whether referral to a court-martial was the proper disposition. Thus, the recommendation of the hearing officer, part of the poisoned well, stood. At a minimum, removing the poison also should have included appointing a new Article 32 hearing officer. Given the history of this case, there is no way the RAF Mildenhall legal office or chain of command could think they had the independent ability to resolve the case if they honestly believed an alternate disposition was appropriate. The “handwriting was on the wall.”

Given that the base legal office and base command were poisoned by the UCI, Third Air Force could have remedied the unlawful UCI appropriately by doing one of the three things. First, Third Air Force could have returned to the status quo after dismissing the original charges, i.e., the original disciplinary and administrative discharge action the first commander took or contemplated taking in lieu of preferring charges. Second, as originally planned, Third Air Force could have given A1C Serjak's case to a new base for its action. This would have resulted in three things: 1) an untainted legal office; 2) an untainted chain of command; and 3) a new start for Third Air Force not to override the base legal office's and command's independent decisions. Third, Third Air Force could have preferred, referred, and tried A1C Serjak's case with its own staff. Undoubtedly, Third Air Force would not want to do this because it would result in more work for itself. However, Third Air Force should have realized its options were limited given its unlawful command influence upon RAF Mildenhall. Because Third Air Force unlawfully influenced the case against A1C Serjak and did not appropriately remedy its unlawful influence, this Court should find that the Military Judge erred and should set aside A1C Serjak's conviction.

WHEREFORE, A1C Serjak requests that this Court set aside the findings and sentence.

Respectfully submitted,

S
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

N, Maj, USAF

FRANK J. SPINNER
Attorney at Law

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 2 July 2024.

Respectfully submitted,

S
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

N, Maj, USAF

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40392
<i>Appellee</i>)	
)	
v.)	
	)	NOTICE OF
Isaac C. SERJAK	)	PANEL CHANGE
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>)	

It is by the court on this 16th day of August, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.



TANICA S. BAGMON
Appellate Court Paralegal