

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF PANEL CHANGE
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to Panel 1 for appellate review.

This panel letter supersedes all previous panel assignments.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Greg A. VELAZQUEZ

Airman First Class (E-3)

U.S. Air Force

Appellant

)
) **NOTICE OF APPEARANCE**
)

) Before Panel 1
)

) No. ACM 40815
)

) 7 May 2025
)

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

In accordance with Rule 12 of this Court's Rules of Practice and Procedure, I hereby appear in the above-captioned case. I am a member in good standing of the highest court of the State of Michigan, Bar Number P80426. I am also admitted to practice before this Honorable Court, the Court of Appeals for the Armed Forces, and the United States Supreme Court. I have not acted in any way which might tend to disqualify me in this matter.

Respectfully submitted,


JOSHUA TRAEGER, Esq.
Founding Attorney


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 May 2025.

Respectfully submitted,

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JOSHUA TRAEGER, Esq.
Founding Attorney

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 1

On 28 May 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First), requesting an additional 60 days to submit Appellant's assignments of error. The Government generally opposed the motion.

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

Accordingly, it is by the court on this 4th day of June, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **19 August 2025**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.



FOR THE COURT

[Redacted signature]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (FIRST)
v.	)	
	)	Before Panel 1
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	28 May 2025

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

In accordance with Rule 23.3(m)(1) and (2) of this Court’s Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file his brief. Appellant’s brief is currently due on 20 June 2025. Appellant requests an enlargement for a period of sixty (60) days, which will end on **19 August 2025**.

This case was docketed on 21 April 2025, with thirty-seven (37) days having elapsed since docketing. If this Motion is granted and the first enlargement is granted, 120 days will have elapsed between docketing and the date the brief will be due.

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

Respectfully submitted,


JOSHUA TRAEGER, Esq.
Founding Attorney


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 May 2025.

Respectfully submitted,

A large black rectangular redaction box covering the signature of the Founding Attorney.

Founding Attorney

A large black rectangular redaction box covering the contact information of the Founding Attorney.

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
	)	OF TIME
v.	)	
	)	
	)	Before Panel No. 1
Airman First Class (E-3)	)	
GREG A. VELAZQUEZ,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	
	)	3 June 2025

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

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

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

[REDACTED]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

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



JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	CONSENT MOTION TO
	)	EXAMINE SEALED MATERIAL
v.	)	
	)	Before Panel 1
GREG A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	18 June 2025

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

Pursuant to Rules 3.1(c) and 23.3(f) of this Court’s Rules of Practice and Procedure and Rule for Courts-Martial 1113(b)(3)(B)(i), Appellant moves for both parties to examine the following sealed material:

- Appellate Exhibit XII (Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XIII (Attachments to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XIV (Government Response to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XV (Attachment to Government Response to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XVI (Victim Counsel Response: Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XVII (Attachment to Victim Counsel Response: Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XXIII (Defense Motion to Admit Evidence under Mil. R. Evid. 412)
- Appellate Exhibit XXIV (Government Response to Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XXV (Victim (S.L.) Response to Defense Motion to Admit Evidence under M.R.E. 412)
- Appellate Exhibit XXVI (Ruling – Defense Motions to Admit Evidence Under M.R.E. 412)
- Appellate Exhibit XXIX (Medical Records of S.L. (disc))
- Trial Transcript pages 29 through 170

All parties participated in the sealed Article 39(a) sessions that are the subjects of the sealed trial transcript pages. *See* Trial Tr. at 27-28. Given the nature of the sealed exhibits, which

concerned litigation under Military Rule of Evidence 412 and a Motion to Compel that involved mental health diagnosis and treatment, it is likely that all parties at trial had access to the exhibits.

Appellate Defense Counsel's review of the sealed materials is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf.

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

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

Respectfully submitted,

A large black rectangular redaction box covering the signature area.

JOSHUA TRAEGER, Esq.
Founding Attorney

A large black rectangular redaction box covering the contact information.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

A large black rectangular redaction box covering the signature area.

JOSHUA TRAEGER, Esq.
Founding Attorney

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 1

On 18 June 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Specifically, Appellant requests counsel for both parties be permitted to examine the following materials sealed by the military judge: Appellate Exhibits (A.E.) XII–XVII; XXIII–XXVI; XXIX;¹ and transcript pages 29–170. These materials were viewed by trial counsel and trial defense counsel at trial.

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.” R.C.M. 1113(b)(3)(B)(i).

The court has considered Appellant’s motion, the Government’s consent, 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 responsibilities.

Accordingly, it is by the court on this 9th day of July, 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **A.E. XII–XVII; XXIII–XXVI; XXIX; transcript pages 29–170 and although not requested, the closed hearing audio.**

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

¹ Upon review of this material, the Court noted this file is password protected, and the appropriate password to open the document is located in A.E. XXX.

No counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.



FOR THE COURT



OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	CONSENT MOTION TO
	)	EXAMINE SEALED MATERIAL
v.	)	
	)	Before Panel 1
GREG A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	18 June 2025

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

Pursuant to Rules 3.1(c) and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial 1113(b)(3)(B)(i), Appellant moves for both parties to examine the following sealed material:

- Appellate Exhibit XII (Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XIII (Attachments to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XIV (Government Response to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XV (Attachment to Government Response to Defense Motion to Admit Evidence Mil. R. Evid. 412)
- Appellate Exhibit XVI (Victim Counsel Response: Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XVII (Attachment to Victim Counsel Response: Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XXIII (Defense Motion to Admit Evidence under Mil. R. Evid. 412)
- Appellate Exhibit XXIV (Government Response to Defense Motion to Admit M.R.E. 412 Evidence)
- Appellate Exhibit XXV (Victim (S.L.) Response to Defense Motion to Admit Evidence under M.R.E. 412)
- Appellate Exhibit XXVI (Ruling – Defense Motions to Admit Evidence Under M.R.E. 412)
- Appellate Exhibit XXIX (Medical Records of S.L. (disc))
- Trial Transcript pages 29 through 170

All parties participated in the sealed Article 39(a) sessions that are the subjects of the sealed trial transcript pages. See Trial Tr. at 27-28. Given the nature of the sealed exhibits, which

concerned litigation under Military Rule of Evidence 412 and a Motion to Compel that involved mental health diagnosis and treatment, it is likely that all parties at trial had access to the exhibits.

Appellate Defense Counsel's review of the sealed materials is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf.

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

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

Respectfully submitted,

A black rectangular redaction box covering the signature of Joshua Traeger.

JOSHUA TRAEGER, Esq.
Founding Attorney

A large black rectangular redaction box covering the contact information of Joshua Traeger.

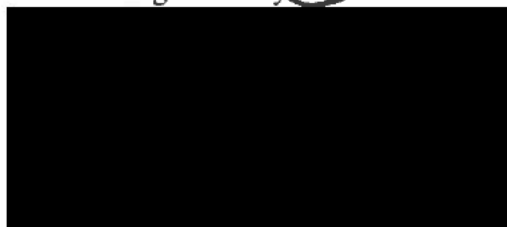
CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

A large black rectangular redaction box covering the signature of Joshua Traeger.

JOSHUA TRAEGER, Esq.
Founding Attorney

A large black rectangular redaction box covering the contact information of Joshua Traeger.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S CONSENT MOTION
	)	FOR LEAVE TO FILE AND MOTION
	)	TO PERMIT TRANSMISSION OF
<i>Appellee,</i>	)	SEALED MATERIAL
	)	
v.	)	
	)	
GREG A. VELAZQUEZ	)	Before Panel 1
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force,	)	
<i>Appellant.</i>	)	14 July 2025

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

COMES NOW APPELLANT, pursuant to Rules 23.3 of this Honorable Court’s Rules of Practice and Procedure, and moves for leave to file this motion and for permission to transmit sealed materials to Appellant’s retained civilian appellate counsel, who is located approximately 600 miles straight-line distance from this Court. Counsel for the United States have authorized stating to the Court that they consent to this motion.

On 9 July 2025, pursuant to Rule for Courts-Martial 1113(b)(3)(B)(i), this Court ordered that appellate defense counsel and appellate government counsel may examine certain sealed materials. Having determined that examination by retained civilian appellate counsel (whose office is in Traverse City, Michigan) at or near the Court is impracticable, Appellant now requests this Court authorize undersigned counsel to scan a copy of the sealed exhibits and transcript pages and forward them to Joshua Traeger, Esq., retained civilian counsel, via a DoD SAFE encrypted transmission. Such transmission is necessary to facilitate counsel’s preparation of Appellant’s Assignments of Error. *See* A.F. Ct. Crim. App. R. 23.3(f)(3). To provide the parties with equal access to these materials, Appellant also moves to allow the undersigned counsel to forward the same materials to appellate government counsel via DoD SAFE encrypted transmission and to

permit Mr. Traeger, appellate government counsel, and undersigned counsel to retain the materials until finality of appellate review of this case in accordance with Article 76, Uniform Code of Military Justice, 10 U.S.C. § 876 (including, if applicable, review by the United States Court of Appeals for the Armed Forces and United States Supreme Court), at which point counsel will destroy their copies of the sealed materials. Appellant further moves that this Court order that counsel receiving copies of the sealed exhibits and transcript pages will not disclose or make available their contents to any other individual without this Court's prior written authorization.

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

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 July 2025.

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 1

On 9 July 2025 this Court granted permission for both parties to view the following sealed materials in the above captioned case: Appellate Exhibit (A.E.) XII–XVII; XXIII–XXVI; XXIX; transcript pages 29–170 and the closed hearing audio.

On 14 July 2025, counsel for Appellant submitted a Consent Motion for Leave to File and Motion to Permit Transmission of Sealed Material. Specifically, Appellant now requests this Court “authorize undersigned counsel to scan a copy of the sealed exhibits and transcript pages and forward them to Joshua Traeger, Esq., retained civilian counsel, via a DoD SAFE encrypted transmission.” Appellant avers “[s]uch transmission is necessary to facilitate counsel’s preparation of Appellant’s Assignments of Error. *See* A.F. Ct. Crim. App. R. 23.3(f)(3).”

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.” R.C.M. 1113(b)(3)(B)(i).

The court has considered Appellant’s motion, the Government’s consent, and this court’s Rules of Practice and Procedure. The court finds Appellant’s counsel has made a colorable showing that transmission of the sealed materials to Mr. Joshua Trager, Esq., is necessary to fulfill counsel’s responsibilities.

Accordingly, it is by the court on this 15th day of July, 2025,

ORDERED:

Appellant’s Consent Motion for Leave to File and Motion to Permit Transmission of Sealed Material is **GRANTED**.

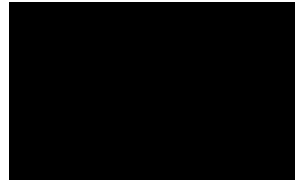
Appellant's military counsel is permitted to scan a hardcopy of the sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by civilian appellate defense counsel, Mr. Trager;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

Except as outlined in this order, no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

Mr. Traeger, appellate government counsel, and undersigned counsel to retain the materials until finality of appellate review of this case in accordance with Article 76, Uniform Code of Military Justice, 10 U.S.C. § 876 (including, if applicable, review by the United States Court of Appeals for the Armed Forces and United States Supreme Court), at which point counsel will destroy their copies of the sealed materials.



FOR THE COURT



SEAN J. SULLIVAN, Maj, USAF
Acting Clerk of Court

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 1

On 14 July 2025, counsel for Appellant submitted a Consent Motion for Leave to File and Motion to Permit Transmission of Sealed Material in the above captioned case, specifically to transmit Appellate Exhibits XII–XVII, XXIII–XXVI, and XXIX; transcript pages 29–170; and the closed hearing audio. Appellant requested this court “authorize undersigned counsel to scan a copy of the sealed exhibits and transcript pages and forward them to Joshua Traeger, Esq[ui]re, retained civilian counsel, via a DoD SAFE encrypted transmission.” Appellant averred “[s]uch transmission is necessary to facilitate counsel’s preparation of Appellant’s Assignments of Error.”

Additionally, Appellant requested that this court “allow the undersigned counsel to forward the same materials to appellate government counsel via DoD SAFE encrypted transmission and to permit Mr. Traeger, appellate government counsel, and undersigned counsel to retain the materials until finality of appellate review of this case.”

On 15 July 2025, this court granted permission for Appellant’s military counsel to transmit files containing sealed materials encrypted or password-protected to Mr. Traeger via DoD SAFE. The court’s order did not specifically address the additional request to transmit the sealed materials to the appellate government counsel and allow the Government to retain the same. However, it is not the court’s practice to permit the transmission of sealed materials to appellate counsel geographically located within the National Capital Region. Therefore, this order clarifies the court’s 15 July 2025 order.

The court has considered Appellant’s motion, the Government’s consent, and this court’s Rules of Practice and Procedure. The court finds Appellant’s counsel has made a colorable showing that transmission of the sealed materials to Mr. Traeger is necessary to fulfill counsel’s responsibilities; however, the court finds that Appellant has not made a colorable showing that transmission

of the sealed materials to appellate government counsel is necessary to fulfill that counsel's responsibilities. Therefore, we amend the 15 July 2025 order.

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

ORDERED:

Appellant's Consent Motion for Leave to File is **GRANTED**. The Motion to Permit Transmission of Sealed Material is **GRANTED IN PART**.

With respect to the sealed materials previously requested—**Appellate Exhibits XII–XVII, XXIII–XXVI, and XXIX; transcript pages 29–170; and the closed hearing audio**—Appellant's military counsel is permitted to scan a hardcopy of the sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by civilian appellate defense counsel, Mr. Traeger; and transmit files containing sealed materials encrypted or password-protected to Mr. Traeger via DoD SAFE. Appellant's military appellate counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "CUI – sealed materials under R.C.M. 1113," and place it in a sealed envelope containing the same identifying information. Appellant's military defense counsel is also permitted to send sealed materials to Mr. Traeger via U.S. mail, Federal Express, or by similar secure means of shipment. Such sealed materials will not be transmitted to appellate government counsel.

Except as outlined in this order, no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

Mr. Traeger and undersigned counsel may retain these sealed materials until finality of appellate review of this case in accordance with Article 76, Uniform Code of Military Justice, 10 U.S.C. § 876 (including, if applicable, review by the United States Court of Appeals for the Armed Forces and United States Supreme Court), at which point Appellant's counsel will destroy their copies of the sealed materials.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF PANEL CHANGE
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

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

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.



FOR THE COURT



AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION FOR LEAVE
	)	TO FILE AND MOTION TO
<i>Appellee,</i>	)	WITHDRAW MOTION TO COMPEL
	)	
v.	)	
	)	
GREG A. VELAZQUEZ	)	Before Panel 3
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force,	)	
<i>Appellant.</i>	)	4 August 2025

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

COMES NOW APPELLANT, pursuant to Rule 23(a) and Rule 23(d) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and Rule 23.1 and Rule 23.3 of this Honorable Court’s Rules of Practice and Procedure, and moves for leave to file and moves to withdraw his motion to compel filed on 31 July 2025.

The Air Force Government Trial and Appellate Operations Division (JAJG) obtained and provided Appellant’s counsel with the password necessary to open Appellate Exhibit XXIX. Appellant’s counsel have verified that the CD-ROM containing that exhibit opens with the password that JAJG provided. Accordingly, Appellant moves to withdraw the motion to compel filed on his behalf on 31 July 2025.

Appellant’s counsel appreciate and commend JAJG’s expeditious resolution of this matter.

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

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 4 August 2025.

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION TO
<i>Appellee,</i>	)	COMPEL
	)	
v.	)	
	)	
GREG A. VELAZQUEZ	)	Before Panel 1
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force,	)	
<i>Appellant.</i>	)	31 July 2025

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

COMES NOW APPELLANT, pursuant to Rule 23.3(e) of this Honorable Court’s Rules of Practice and Procedure, and moves to compel the Government to provide the password required to open Appellate Exhibit XXIX.

On 9 July 2025, in accordance with Rule for Courts-Martial 1113(b)(3)(B)(i), this Court granted a consent motion to allow counsel for both parties to examine sealed materials in this case, including Appellate Exhibit XXIX. *United States v. Velazquez*, No. ACM 40815 (A.F. Ct. Crim. App. July 9, 2025) (order). Appellate Exhibit XXIX is a password-protected CD ROM that the record of trial’s exhibit index describes as: “**SEALED**Medical Records of S.L., dated January 2025; 1 disc**SEALED**.” When one of Appellant’s counsel attempted to open the document, he discovered that the CD ROM is password-protected. He subsequently asked the Non-Commissioned Officer-in-Charge (NCOIC) of the Appellate Records branch of the Military Justice Law & Policy Division (JAJM) for the password. The NCOIC responded that he did not have the password, but volunteered to contact the base legal office to seek it. Upon doing so, the NCOIC learned that the base legal office also did not have the password. Accordingly, the exhibit appears to be inaccessible to counsel.

To fully review the record of trial as this Court authorized in its 9 July 2025 order, Appellant's counsel require access to Appellate Exhibit XXIX. Accordingly, Appellant moves that this Court compel the Government to provide the password required to access that exhibit.

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

Respectfully submitted,

Dwight H. Sullivan
Appellate Defense Counsel

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 31 July 2025.

Respectfully submitted,

Dwight H. Sullivan
Appellate Defense Counsel

Counsel for Appellant

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 3*

On 8 August 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Second) 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 12th day of August, 2025.

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **18 September 2025**.

Any subsequent motions for enlargement of time shall also include the number of days that will have elapsed since docketing on the date requested, as required by Rule 23(m)(4) of this court's Rules of Practice and Procedure. That calculation was absent from Appellant's 8 August 2025 motion.



FOR THE COURT



AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

* On 4 August 2025, the court issued a panel change letter referring Appellant's case to Panel 3.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (SECOND)
v.	)	
	)	Before Panel 1
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	8 August 2025

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

In accordance with Rule 23.3(m)(1) and (2) of this Court’s Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file his brief. Appellant’s brief is currently due on 19 August 2025. Appellant requests an enlargement for a period of thirty (30) days, which will end on **18 September 2025**.

This case was originally docketed on 21 April 2025, with 110 days having now elapsed. Appellant filed a Motion for Enlargement of Time (First) on 28 May 2025, which the Court granted on 4 June 2025, extending the original brief deadline to 19 August 2025. On 18 June 2025, the Appellant filed (and the Court granted) a Consent Motion to Examine Sealed Materials. On 31 July 2025, having reviewed the referenced sealed materials, the Appellant filed a Motion to Compel due to password protection on a disc containing relevant material. Subsequently, the Government provided a password that unlocks the disc, but the sealed materials remain under review.

Good cause exists for this enlargement of time. The Appellant’s counsel continues to review the sealed materials in preparation for filing its brief, to include the password-protected disc containing 100+ pages of material that was only recently unlocked. In short, the Appellant’s counsel requires additional time to review material and formulate its arguments to the Court.

This case involves two litigated specifications, one alleging sexual assault and the other alleging abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice. At trial, which concluded on 16 January 2025, the Appellant was convicted of the specification of sexual assault and sentenced to a reprimand, reduction in grade to E-1, twenty-four (24) months' confinement, and a dishonorable discharge. The convening authority approved both the findings and the sentence as adjudged. The record of trial includes four volumes and a transcript of 681 pages, along with eleven (11) prosecution exhibits, thirty-one (31) defense exhibits, forty-five (45) appellate exhibits, and one (1) court exhibit. The Appellant remains confined.

The Appellant has been advised of his right to a timely appeal, the current status of counsel's progress in his appeal, and this enlargement of time. The Appellant agrees with this request for enlargement.

If this Motion is granted and the second enlargement is granted, 150 days will have elapsed between docketing and the date the brief will be due.

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

Respectfully submitted,

A large black rectangular redaction box covering the signature of the Founding Attorney.

Founding Attorney

A large black rectangular redaction box covering the contact information of the Founding Attorney.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 August 2025.

Respectfully submitted,

A large black rectangular redaction box covering the signature area.

JOSHUA TRAEGER, Esq.
Founding Attorney

A large black rectangular redaction box covering the contact information.

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
	)	OF TIME
v.	)	
	)	
	)	Before Panel No. 1
Airman First Class (E-3)	)	
GREG A. VELAZQUEZ,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	
	)	11 August 2025

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

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

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

[REDACTED]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 11 August 2025.

[REDACTED]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (THIRD)
v.	)	
	)	Before Panel 3
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	11 September 2025

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

In accordance with Rule 23.3(m)(1) and (2) of this Court’s Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file his brief. Appellant’s brief is currently due on 18 September 2025. Appellant requests an enlargement for a period of thirty (30) days, which will end on **18 October 2025**.

This case was originally docketed on 21 April 2025, with 143 days having now elapsed. Appellant filed a Motion for Enlargement of Time (First) on 28 May 2025, which the Court granted on 4 June 2025, extending the original brief deadline to 19 August 2025. On 18 June 2025, the Appellant filed (and the Court granted) a Consent Motion to Examine Sealed Materials. On 31 July 2025, having reviewed the referenced sealed materials, the Appellant filed a Motion to Compel due to password protection on a disc containing relevant material. Subsequently, the Government provided a password that unlocks the disc, but the sealed materials remain under review. On 8 August 2025, the Appellant filed a Motion for Enlargement of Time (Second), which the Court granted on 12 August 2025, extending the original brief deadline to 18 September 2025.

Good cause exists for this enlargement of time. The Appellant’s counsel is completing final review of the court-martial material and formulating appellate arguments to the Court.

Although additional issues may arise, the Appellant's counsel anticipates filing its brief in October. This enlargement would permit the time necessary for a well-reasoned brief.

This case involves two litigated specifications, one of sexual assault and one of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice. At trial, which concluded on 16 January 2025, the Appellant was convicted of the specification of sexual assault and sentenced to a reprimand, reduction in grade to E-1, twenty-four (24) months' confinement, and a dishonorable discharge. The convening authority approved both the findings and the sentence as adjudged. The record of trial includes four volumes and a transcript of 681 pages, along with eleven (11) prosecution exhibits, thirty-one (31) defense exhibits, forty-five (45) appellate exhibits, and one (1) court exhibit. The Appellant remains confined.

The Appellant has been advised of his right to a timely appeal, the current status of counsel's progress in his appeal, and this enlargement of time. The Appellant agrees with this request for enlargement. If this Motion is granted and the third enlargement is granted, 180 days will have elapsed between docketing and the date requested.

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

Respectfully submitted,

A large black rectangular redaction box covering the signature of the Founding Attorney.

Founding Attorney

A large black rectangular redaction box covering the contact information of the Founding Attorney.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 September 2025.

Respectfully submitted

JOSHUA TRAEGER, Esq.
Founding Attorney

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
	)	OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	Before Panel No. 3
GREG A. VELAZQUEZ,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	
	)	12 September 2025

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

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

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

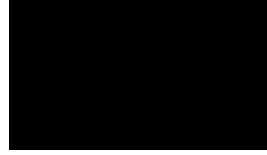
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KATE E. LEE, Maj, USAF
Appellate Government Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 12 September 2025.



KATE E. LEE, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME (FOURTH)
v.	)	
	)	Before Panel 3
Greg A. VELAZQUEZ	)	
Airman First Class (E-3)	)	No. ACM 40815
U.S. Air Force	)	
<i>Appellant</i>	)	8 October 2025

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

In accordance with Rule 23.3(m)(1) and (2) of this Court’s Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file his brief.

Appellant’s brief is currently due on 18 October 2025. Appellant requests an enlargement for a period of thirty (30) days, which will end on **17 November 2025**.

This case was originally docketed on 21 April 2025, with 170 days having now elapsed. Appellant filed a Motion for Enlargement of Time (First) on 28 May 2025, which the Court granted on 4 June 2025, extending the original brief deadline to 19 August 2025. On 18 June 2025, the Appellant filed (and the Court granted) a Consent Motion to Examine Sealed Materials. On 31 July 2025, having reviewed the referenced sealed materials, the Appellant filed a Motion to Compel due to password protection on a disc containing relevant material. Subsequently, the Government provided a password that unlocks the disc, but the sealed materials remain under review. On 8 August 2025, the Appellant filed a Motion for Enlargement of Time (Second), which the Court granted on 12 August 2025, extending the original brief deadline to 18 September 2025. Finally, on 11 September 2025, the Appellant filed a Motion for Enlargement of time (Third), which the Court granted, extending the brief deadline to 18 October 2025.

Good cause exists for this enlargement of time. The Appellant's counsel is completing final review of the court-martial material and formulating appellate arguments to the Court. Although additional issues may arise, the Appellant's counsel anticipates filing its brief within this requested enlargement of time. This enlargement would permit the time necessary for a well-reasoned brief.

In accordance with Rule 23.3(m)(6) of this Court's Rules of Practice and Procedure, counsel note the following. The undersigned civilian counsel owns and operates his own legal practice, which is balancing a criminal case load of approximately forty-five (45) cases, including a special court-martial, five general courts-martial, multiple state-level misdemeanor cases, and multiple state- and federal-level felony cases. The court-martial cases, along with multiple felony cases, are being fully litigated. Many of the state-level cases have ongoing and regularly scheduled hearings. However, beyond that docket, this case has the undersigned counsel's top priority. A brief has been fully outlined and partially drafted, with a submitted brief expected within this requested enlargement of time.

This case involves two litigated specifications, one of sexual assault and one of abusive sexual contact, both in violation of Article 120, Uniform Code of Military Justice. At trial, which concluded on 16 January 2025, the Appellant was convicted of the specification of sexual assault and sentenced to a reprimand, reduction in grade to E-1, twenty-four (24) months' confinement, and a dishonorable discharge. The convening authority approved both the findings and the sentence as adjudged. The record of trial includes four volumes and a transcript of 681 pages, along with eleven (11) prosecution exhibits, thirty-one (31) defense exhibits, forty-five (45) appellate exhibits, and one (1) court exhibit. The Appellant remains confined.

The Appellant has been advised of his right to a timely appeal, the current status of counsel's progress in his appeal, and this enlargement of time. The Appellant agrees with this request for enlargement. If this Motion is granted and the fourth enlargement is granted, 210 days will have elapsed between docketing and the date requested.

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

Respectfully submitted,



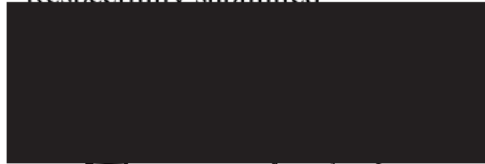
JOSHUA TRAEGER, Esq.
Founding Attorney



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 October 2025.

Respectfully submitted

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JOSHUA TRAEGER, Esq.
Founding Attorney

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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
	)	OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	Before Panel No. 3
GREG A. VELAZQUEZ,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	
	)	9 October 2025

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

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

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

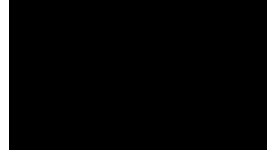
[REDACTED]

KATE E. LEE, Maj, USAF
Appellate Government Counsel

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 9 October 2025.



KATE E. LEE, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT'S MOTION TO AMEND
<i>Appellee,</i>	)	PLEADING
	)	
v.	)	
	)	Before Panel 3
Airman First Class (E-3)	)	
Greg A. Velazquez,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	24 November 2025

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

COMES NOW Appellant, Airman First Class Greg A. Velazquez, by and through his undersigned counsel, and moves pursuant to Rule 23.3(n) of this Honorable Court's Rules of Practice and Procedure to amend the redacted version of his brief filed on 12 November 2025.

As discussed during today's status conference in the case, certain additional redactions are appropriate to protect information derived from sealed material in this case. The amended pleading makes those additional redactions.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,



JOSHUA R. TRAEGER, Esq.
Founding Attorney



DWIGHT H. SULLIVAN
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 24 November 2025.

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan

Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	Before Panel 3
	)	
v.	)	
	)	No. ACM 40815
GREG A. VELAZQUEZ,	)	
Airman First Class (E-3)	)	
United States Air Force	)	12 November 2025
<i>Appellant</i>	)	

BRIEF ON BEHALF OF APPELLANT

JOSHUA R. TRAEGER, Esq.
Founding Attorney



DWIGHT H. SULLIVAN
Air Force Appellate Defense Division



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

Assignments of Error

I.

WHETHER THE FINDINGS OF GUILTY TO SPECIFICATION 1 OF THE CHARGE ALLEGING A VIOLATION OF ARTICLE 120(b)(2)(A), UNIFORM CODE OF MILITARY JUSTICE, ARE LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO PRESENT ANY CREDIBLE EVIDENCE THAT APPELLANT DIGITALLY PENETRATED THE ALLEGED VICTIM'S VULVA AND FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ANY TOUCHING OCCURRED WITHOUT HER CONSENT, PARTICULARLY GIVEN HER UNCONSCIOUS STATE WHICH RENDERED HER INCAPABLE OF COMMUNICATING NON-CONSENT UNDER THE GOVERNMENT'S CHOSEN LEGAL THEORY.

II.

WHETHER THE MILITARY JUDGE ERRED BY IMPROPERLY EXCLUDING HIGHLY PROBATIVE EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412 THAT WAS ESSENTIAL TO APPELLANT'S DEFENSE OF REASONABLE MISTAKE OF FACT AS TO CONSENT, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION, AND TO PRESENT A COMPLETE DEFENSE, AND COMPOUNDING THE LEGAL AND FACTUAL INSUFFICIENCY OF THE GOVERNMENT'S CASE.

Statement of the Case

Airman First Class Greg A. Velazquez was tried by military judge alone at a general court-martial convened at Joint Base Elmendorf-Richardson, Alaska, on 13-16 January 2025. R. at 176-180. Contrary to his pleas, Appellant was found guilty of Specification 1 of the Charge alleging sexual assault by digital penetration in violation of Article 120(b)(2)(A), UCMJ. Consistent with his pleas, he was found not guilty of Specification 2 of the Charge alleging abusive sexual contact. R. at 647. He was sentenced to be reprimanded, to be reduced to the grade of E-1, to be confined for twenty-four (24) months, and to be dishonorably discharged from the service. R. at 681. The

convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.) Appellant is currently confined.

Statement of Facts

A1C Greg Velazquez has dedicated his life to service and helping others. Before joining the Air Force at age thirty-one, he worked seven years in social work with underprivileged youth, foster children, and those with mental health issues after earning his degree in psychology. R. at 207-208. His decision to enlist reflected a natural extension of his commitment to serving those in need—trading civilian social work for military service while maintaining his core mission of helping others navigate life’s challenges. R. at 208. Upon arriving at Joint Base Elmendorf-Richardson, A1C Velazquez carried these same values into his military service, quickly becoming a trusted friend and mentor to younger airmen. His peers knew him as someone who genuinely cared about their wellbeing, offering his dorm room as a safe place where fellow airmen could “vent” about personal challenges and seek guidance from someone with both life experience and professional training in helping others. R. at 187. This compassionate approach to leadership and friendship would prove central to understanding the events that led to these charges. R. at 187.

The Friendship with S.L.

A1C Velazquez developed a close friendship with Senior Airman S.L., who was ten years his junior. R. at 186-187. Their relationship was characterized by frequent texting - between 40 and 1,000 messages over several months - with S.L. regularly visiting his dorm room to discuss personal problems, relationships, and her desire to leave the military. R. at 187, 212. S.L. felt comfortable enough with A1C Velazquez to sleep in his bed on multiple occasions, including the night before the alleged incident when she slept there alongside another airman. R. at 214-216.

Multiple witnesses, including S.L.’s best friend Airman K.K., testified they never observed any romantic attraction between the parties. R. at 269, 271. However, A1C Velazquez told the Air Force Office of Special Investigations that in the days before the incident, S.L. had become “a little bit more comfortable,” asking him to bring her gifts from his deployment, borrowing his clothes, and physically showing him a bruise on her inner thigh by guiding his hand to touch it. R. at 212-214.

The Night in Question

On the evening of April 15-16, 2023, S.L. came to A1C Velazquez’s room wanting to drink alcohol. R. at 188. Both parties consumed significant amounts of alcohol—she had three to four drinks despite weighing only 128 pounds, while he consumed multiple shots of whiskey and was “super twisted” (extremely intoxicated). R. at 220-221, 228, 419. S.L. changed into “short shorts” and practiced handstands while drinking. R. at 219-220.

When both became tired, S.L. chose to sleep in A1C Velazquez’s bed rather than return to her own room just steps away. R. at 188. According to S.L.’s testimony, she fell asleep and later “woke up” to find his hand touching her. R. at 320-321. She turned away and pushed his hand away, then went back to sleep until morning. R. at 325, 431, 581.

The Aftermath and Investigation

The next morning, A1C Velazquez felt troubled about the night’s events and immediately sent S.L. an apology text. R. at 221-222. When she didn’t respond, he wrote a handwritten letter acknowledging his shame and stating he would only have acted that way with someone where there were “mutual feelings.” R. at 189, 239, 612. S.L. initially seemed receptive to working through the situation but changed her mind after speaking with Airman K.K., who encouraged her to report the incident as sexual assault. R. at 275-276, 279.

Argument

I.

THE FINDINGS OF GUILTY TO SPECIFICATION 1 OF THE CHARGE ALLEGING A VIOLATION OF ARTICLE 120(b)(2)(A), UNIFORM CODE OF MILITARY JUSTICE, ARE LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO PRESENT ANY CREDIBLE EVIDENCE THAT APPELLANT DIGITALLY PENETRATED THE ALLEGED VICTIM'S VULVA AND FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ANY TOUCHING OCCURRED WITHOUT HER CONSENT, PARTICULARLY GIVEN HER UNCONSCIOUS STATE WHICH RENDERED HER INCAPABLE OF COMMUNICATING NON-CONSENT UNDER THE GOVERNMENT'S CHOSEN LEGAL THEORY.

Standard of Review

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

The test for legal sufficiency is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The test for legal sufficiency “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.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Under Article 66(d)(1)(B), UCMJ, this Court may conduct factual sufficiency review upon request of the accused if the accused makes a specific showing of a deficiency in proof. UCMJ art.

66(d)(1)(B)(i), 10 U.S.C. § 866(d)(1)(B)(i) (2021). For this Court to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met: first, this Court must decide that the evidence, as it weighs it, does not prove that appellant is guilty beyond a reasonable doubt; and second, this Court must be clearly convinced of the correctness of this decision. *United States v. Harvey*, 85 M.J. 127, 132 (C.A.A.F. 2024). The quantum of proof necessary to sustain a finding of guilty during factual sufficiency review is proof beyond a reasonable doubt, the same standard required at trial. *Harvey*, 85 M.J. at 131.

Law and Analysis

A. Legal Framework for Article 120(b)(2)(A) Sexual Assault

The Government’s failure to prove either essential element of the charged offense—digital penetration or lack of consent—renders the conviction factually insufficient under both prongs of the *Harvey* analysis.

1. Elements of the Offense

To sustain a conviction under Article 120(b)(2)(A), the Government must prove beyond a reasonable doubt: (1) that the accused committed a sexual act upon another person; (2) that the sexual act was committed without the consent of the other person; and (3) that the accused did so with the intent to gratify the sexual desire of any person. Manual for Courts-Martial, United States, pt. IV, ¶ 60.b.(2)(a) (2019 ed.)¹. The term “sexual act” includes “the penetration, however slight, of the vulva or penis or anus of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” UCMJ art. 120(g)(1)(C), 10 U.S.C. § 920(g)(1)(C). Here, the Government charged

¹ Unless otherwise noted, all references to the Rules for Courts-Martial, the Military Rules of Evidence, and the Uniform Code of Military Justice are to the Manual for Courts-Martial, United States (2019 ed.).

A1C Velazquez specifically with digital penetration of S.L.’s vulva without her consent. (Charge Sheet.)

The prosecution bears the burden of proving every element beyond a reasonable doubt—the same quantum of proof required for factual sufficiency review under *Harvey*. *Harvey*, 85 M.J. at 131. Where the evidence fails to establish any essential element, the conviction cannot stand. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

2. Government’s Burden and Chosen Legal Theory

Critical to this case is the Government’s deliberate choice of legal theory. In opening statement, the prosecution explicitly framed this as a “lack of consent” case, arguing that “he touched a woman without her consent” and “no consent was given on the night of the incident.” R. at 188-89. This choice is legally significant because military law recognizes distinct theories of non-consent under Article 120. *Compare* UCMJ art. 120(b)(2)(A) (sexual act “without the consent of the other person”), *with* UCMJ art. 120(b)(2)(B) (sexual act “when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware”) and UCMJ art. 120(b)(3)(A) (sexual act when other person “incapable of consenting” due to “impairment by any drug, intoxicant, or other similar substance”).

The Court of Appeals for the Armed Forces has held that these represent distinct legal theories requiring different proof. *United States v. Robinson*, 77 M.J. 294, 298-99 (C.A.A.F. 2018). Under the “lack of consent” theory chosen by the Government, the prosecution must prove that the alleged victim had the capacity to consent but actively refused or that her refusal was communicated to the accused. *Id.* The Government cannot simply prove incapacity and claim that satisfies a lack of consent theory—the prosecution is bound by the legal theory it presents to the fact finder. *Id.*

This distinction proves fatal to the Government’s case, as the evidence presented supports at most an “inability to consent” theory based on S.L.’s unconscious state, but wholly fails to establish the “lack of consent” theory the prosecution chose to pursue.

B. The Evidence Is Insufficient to Prove Digital Penetration

The first element the Government must prove beyond a reasonable doubt is that A1C Velazquez committed a “sexual act” upon S.L., specifically digital penetration of her vulva. The evidence presented at trial utterly fails to meet this burden, leaving reasonable doubt not only possible, but compelled.

1. S.L.’s Testimony Fails to Clearly Establish Penetration

S.L.’s own testimony provides the prosecution’s sole alleged evidence of penetration, yet her account is so vague and contradictory that it cannot support a conviction beyond a reasonable doubt. Her direct testimony described only “waking up” to an ambiguous sensation—“I felt his hand touching my vagina”—without any direct observation of actual penetration. R. at 581. When pressed during cross-examination about what specifically she felt, S.L. testified: “I felt his hand, um it was over my clothes, but I felt it” and later “I was asleep on my back” when “I felt his hand touching my vagina.” R. at 320, 581.

This evidence reveals a fundamental ambiguity: S.L. admits she was asleep when the alleged touching began and describes only feeling “his hand” in the general vaginal area. More critically, when questioned specifically about penetration versus external touching, her testimony became internally inconsistent. During her OSI interview, captured on Defense Exhibit I, S.L. initially described waking to touching “over” her clothes, then later claimed fingers were inserted “eventually.” R. at 581. However, her trial testimony failed to establish with any precision when, how, or even if actual penetration occurred rather than merely external touching.

S.L.'s severe alcohol impairment on the night in question further undermines the reliability of her testimony. She admitted to consuming "three or four" drinks despite weighing only 128 pounds, and had previously experienced blackouts from alcohol consumption. R. at 418-419. Her own testimony reveals she could not recall many details of that night, including basic facts about her activities immediately before sleeping. This impairment, combined with her acknowledgment that she was asleep when the alleged conduct began, renders her testimony wholly insufficient to prove the precise physical act required for conviction.

2. A1C Velazquez's Explicit and Credible Denials

In stark contrast to S.L.'s vague and inconsistent testimony, A1C Velazquez provided clear, consistent, and specific denials of any vaginal penetration throughout his OSI interview. When directly asked by investigators: "Was there any touching of her vagina, any touching of her breasts, any touching of her private areas?" A1C Velazquez responded: "No, not from, like, what I can remember, no." R. at 226. When pressed further with explicit questions about penetration, he maintained: "no touching, no putting your hand over her pants" and specifically denied any conduct "underneath the clothes" or "between her legs." R. at 226-227.

Throughout the lengthy OSI interview, A1C Velazquez demonstrated remarkable cooperation and transparency, admitting to behavior that could be viewed unfavorably (such as touching S.L.'s "upper thigh groin area") while consistently and specifically denying any vaginal contact or penetration. R. at 227-228. This pattern of selective admissions and specific denials strongly supports his credibility on the central issue of penetration. If A1C Velazquez were fabricating his account, it would make little sense for him to admit to other inappropriate touching while falsely denying vaginal penetration.

OSI agents confirmed that A1C Velazquez never wavered in these denials throughout multiple interviews and follow-up contacts. Special Agent E.R. testified that there was nothing in the investigation where he admitted to “digitally penetrating Airman Lippert” beyond the “over the clothes on the thigh groin” contact he acknowledged. R. at 241-242. This consistent position, maintained under the pressure of a criminal investigation while cooperating fully with law enforcement, carries significant probative weight in favor of his denial.

3. Complete Absence of Corroborating Evidence

The prosecution’s case suffers from a complete absence of any physical or forensic evidence supporting the allegation of digital penetration. Agent E.R. confirmed that OSI collected “no physical evidence” in this case. R. at 243. No Sexual Assault Nurse Examination was conducted, no DNA evidence was collected from S.L.’s clothing or person, and no forensic analysis was performed despite investigators specifically questioning A1C Velazquez about the possibility of finding his DNA “inside of her underwear.” R. at 232-233, 245-246.

This evidentiary vacuum is particularly significant given that digital penetration, even brief, would likely leave some trace evidence that could be forensically analyzed. The Government’s failure to collect time-sensitive physical evidence when S.L. remained in the same clothing for hours after the alleged incident represents a critical gap that reasonable doubt easily fills. Moreover, OSI failed to secure potentially corroborating evidence such as dormitory security camera footage, despite Agent E.R. acknowledging that cameras existed “directly above” A1C Velazquez’s room. R. at 247.

4. Multiple Innocent Explanations Remain

Given the significant alcohol consumption by both parties and the ambiguous circumstances, multiple innocent explanations for S.L.’s sensations remain wholly consistent with the evidence. S.L.’s severe intoxication, combined with her unconscious state, creates substantial reasonable doubt about her ability to accurately perceive and later recall the precise nature of any physical contact.

A1C Velazquez’s acknowledged touching of S.L.’s “upper thigh groin area” over clothing, occurring while both parties were heavily intoxicated and lying in close proximity on the same bed, could easily account for S.L.’s confused recollection of vaginal contact. Movement during sleep, the sensation of hands moving over clothing in the groin region, or simple misperception due to alcohol impairment all provide reasonable alternative explanations for her testimony.

The evidence establishes that both parties were extremely intoxicated—A1C Velazquez described himself as “super ridiculously twisted” and unable to “remember parts of, like, the night”—creating an environment where misperception and faulty memory formation were highly probable. R. at 221, 228. Under these circumstances, the prosecution’s burden to prove the specific physical act of digital penetration beyond a reasonable doubt simply cannot be met.

Even applying the highly deferential legal sufficiency standard and drawing every reasonable inference in favor of the prosecution, no rational fact finder could have found digital penetration occurred beyond a reasonable doubt. The evidence establishes at most ambiguous touching over clothing by an intoxicated individual who consistently denied vaginal contact. Under either legal or factual sufficiency review, the penetration element fails.

C. The Evidence Is Insufficient to Prove Lack of Consent

Even if this Court were to find sufficient evidence of digital penetration—which it should not—the Government’s proof on the consent element fails catastrophically under the *Robinson* framework and basic principles of burden allocation.

1. Government’s Legal Theory Creates Insurmountable Burden

The Government’s strategic choice to prosecute this case under Article 120(b)(2)(A)’s “lack of consent” theory, rather than theories based on S.L.’s unconsciousness or incapacity, creates an insurmountable evidentiary burden under the *Mendoza* framework that dooms their case. *Mendoza* establishes that different subsections of Article 120(b) represent distinct legal theories requiring fundamentally different proof. *United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024). The Court essentially held that a charge of sexual assault without consent is a separate theory of liability from a charge of sexual assault upon a person incapable of consenting. *Id.* The prosecution chose Article 120(b)(2)(A)—sexual act “without the consent of the other person”—when they could have charged under Article 120(b)(2)(B) (victim “asleep, unconscious, or otherwise unaware”) or Article 120(b)(3)(A) (victim “incapable of consenting” due to intoxication).

A “lack of consent” charge under 120(b)(2)(A) requires the Government to prove the alleged victim “was ‘capable of consenting,’ yet did not consent.” *United States v. Evangelista*, No. ACM 40531, slip op. at 11, 2025 CCA LEXIS 501, at *20 (A.F. Ct. Crim. App. Nov. 5, 2025). This is fundamentally different from proving incapacity due to unconsciousness or intoxication. *Mendoza* expressly holds that what the Government cannot do is prove the absence of consent by merely establishing that the victim was incapable of consenting. *Mendoza*, 85 M.J. at 222.

This legal framework proves fatal here because the Government's own evidence establishes that S.L. was unconscious when the alleged conduct began. S.L. testified: "I was asleep on my back" when she felt the touching. An unconscious person cannot engage in the active refusal or consent communication that the Government's chosen theory requires. The prosecution has essentially argued that S.L. actively refused consent while simultaneously establishing that she was asleep and therefore incapable of any active response.

The Government cannot escape this bind by arguing that S.L.'s physical response after waking constituted sufficient evidence of refusal. *Robinson* requires that the prosecution prove their chosen theory, not pivot to alternative theories when their evidence fails to fit. The Government made a strategic charging decision and must live with its consequences—they cannot prove "lack of consent" when their own evidence shows the alleged victim was incapable of consent communication due to unconsciousness.

2. Government's Chosen Legal Theory Under *Mendoza*

The Court of Appeals for the Armed Forces' recent decision in *Mendoza* reinforces and clarifies a critical distinction that independently requires reversal of A1C Velazquez's conviction. A charge of sexual assault without consent is a separate theory of liability from a charge of sexual assault upon a person incapable of consenting. This distinction is not merely semantic—it fundamentally changes what the Government must prove.

Under *Mendoza*, in without consent cases, evidence of a victim's level of intoxication may be relevant and admissible; however, it would be improper to use this evidence as proof of a victim's inability to consent and therefore proof of absence of consent in these cases. Put differently, "what the Government cannot do is prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent." *Id.*

The Government charged A1C Velazquez under Article 120(b)(2)(A)—sexual act “without consent.” Yet their entire proof consisted of establishing that S.L. was unconscious and intoxicated, rendering her incapable of consenting. *Mendoza* makes clear this is impermissible theory mismatch. To prove “without consent” under 120(b)(2)(A), the Government must establish that S.L. was “capable of consenting, yet did not consent.” *Evangelista*, No. ACM 40531, slip op. at 15, 2025 CCA LEXIS 501, at *20 (internal quotation deleted) (citing *Mendoza*).

3. S.L.’s Physical State Negates the Possibility of Consent Communication

The Government’s own evidence establishes that S.L. was in no condition to communicate consent or non-consent when the alleged conduct occurred. S.L.’s direct testimony confirms she was “asleep” when she first became aware of touching: “I was asleep on my back. I never sleep on my back” and “I woke up and I was like sleeping on my back and I felt his hand touching my vagina.” R. at 320, 581. This testimony alone destroys the Government’s “lack of consent” theory, as unconscious individuals cannot actively refuse or communicate refusal.

S.L.’s severe alcohol impairment further undermines any possibility of meaningful consent communication. As described, S.L. admitted to consuming significant amounts of alcohol, significantly impairing cognitive function and decision-making capacity in someone of her size. R. at 418-419. More significantly, S.L. had previously experienced alcohol-induced blackouts, demonstrating her particular vulnerability to alcohol’s effects on memory and consciousness. R. at 419. Her testimony reveals she “can’t remember completely” numerous details from that evening, indicating substantial impairment of her cognitive abilities.

The combination of alcohol with prescription medications that S.L. acknowledged taking but “couldn’t recall” during her testimony creates an additional layer of impairment that further negates her capacity for consent communication. R. at 419-420. This pharmaceutical cocktail,

combined with severe intoxication, would render any person incapable of the clear-headed refusal that the Government’s “lack of consent” theory requires. S.L.’s admission that she was sleeping in an unusual position (“I never sleep on my back”) suggests disorientation and loss of normal bodily control consistent with severe impairment.

Perhaps most tellingly, S.L.’s own account of her response to the alleged assault contradicts the Government’s theory that she actively refused consent. She testified that after allegedly pushing A1C Velazquez’s hand away “violently,” she immediately “fell back asleep” and remained in his bed until morning. R. at 431, 434-435. This immediate return to sleep after an allegedly violent physical response is wholly inconsistent with the conscious, active refusal that “lack of consent” requires—it suggests instead someone whose impairment prevented sustained awareness or meaningful decision-making.

The Government cannot have it both ways: either S.L. was conscious and capable of communicating refusal (contradicting their own evidence), or she was unconscious/incapacitated (supporting a theory they chose not to pursue). The evidence overwhelmingly supports the latter, rendering the Government’s chosen “lack of consent” theory legally and factually untenable.

4. No Evidence of Communicated Non-Consent

Beyond S.L.’s unconscious state, the record entirely lacks evidence of any verbal or clear physical communication of non-consent. S.L. admitted under cross-examination that she never told A1C Velazquez to “stop” or said “no” at any point during the alleged incident. R. at 433. This absence of verbal refusal is particularly significant under the Government’s chosen legal theory, which requires proof of active refusal or communicated non-consent.

Moreover, the physical response that S.L. described—turning over and pushing A1C Velazquez’s hand away—occurred in the context of her severe impairment and sleepiness,

making it ambiguous at best. More importantly, her response was followed immediately by continued presence in his bed and a return to sleep until morning. R. at 434-435. A reasonable person in A1C Velazquez's position, observing someone push his hand away but then remain in bed and return to sleep, would not necessarily interpret this as definitive communication of non-consent, particularly given their established friendship and S.L.'s voluntary decision to sleep in his bed.

The relationship context further undermines any claim of clear non-consent communication. S.L. had voluntarily slept in A1C Velazquez's bed on multiple prior occasions, including the night immediately before the charged incident when she slept there alongside another airman. R. at 214-216. She regularly visited his room to discuss personal problems and seek emotional support. This pattern of intimate friendship and physical comfort in his space would reasonably lead A1C Velazquez to interpret ambiguous signals differently than if the parties were strangers.

S.L.'s continued presence in A1C Velazquez's room until "the sun was out" the following morning further contradicts any claim of communicated non-consent. R. at 434-435. If S.L. had clearly communicated refusal and A1C Velazquez had ignored that communication, her decision to remain sleeping in his bed for hours afterward defies logical explanation. Her behavior is more consistent with someone who was too impaired to make clear decisions or someone who did not view the conduct as non-consensual.

5. Evidence Actually Supports Consent or Mistake of Fact

Even if this Court were to find that S.L. awoke at some point during the alleged conduct, CAAF's recent decision in *United States v. Casillas*, No. 24-0089, 2025 CAAF LEXIS 692 (C.A.A.F. Aug. 20, 2025), requires analyzing consent under a "continuum" framework that

considers “the totality of Appellant’s relationship with [the victim] and events leading up to sexual penetration.” *Evangelista*, slip op. at 15, 2025 CCA LEXIS 501, at *30. Under *Casillas*, courts must examine the entire course of conduct and relationship context, not merely a snapshot moment. *Id.*

Applying this framework, the evidence overwhelmingly supports either actual consent or A1C Velazquez’s reasonable mistake of fact. The pattern of escalating intimacy between the parties—[REDACTED] repeated bed-sharing, physical touching of intimate areas—must be considered in totality when assessing whether A1C Velazquez reasonably believed S.L. consented.

Rather than establishing lack of consent, the evidence affirmatively supports either consent or A1C Velazquez’s reasonable mistake of fact regarding consent. The relationship between A1C Velazquez and S.L. was characterized by unusual intimacy and physical comfort that would reasonably suggest romantic or sexual interest to a person in A1C Velazquez’s position.

S.L. testified that she had shown A1C Velazquez a bruise on her inner thigh by physically guiding his hand to touch the area. R. at 214. This intimate physical contact, initiated by S.L., would reasonably suggest to A1C Velazquez that she was comfortable with physical contact in private areas of her body. Combined with her regular borrowing of his clothing and increasingly “comfortable” behavior around him, these interactions paint a picture of escalating intimacy that would support a reasonable belief in consent.

S.L.’s voluntary decision to sleep in A1C Velazquez’s bed on the night in question, rather than returning to her own room just steps away, carries particular significance under the *Casillas* continuum framework. She made this choice after consuming alcohol with him in his room while wearing “short shorts” and practicing handstands. R. at 188, 219-220, 422. Her decision to share

his bed, particularly given their recent intimate interactions, would reasonably signal receptivity to physical contact to an ordinary, prudent, sober adult assessing the totality of their relationship.

The totality of S.L.’s behavior—the intimate physical contact she initiated, her choice to change into revealing clothing in his presence, her decision to consume alcohol alone with him, and her voluntary decision to share his bed—creates a compelling case for A1C Velazquez’s reasonable mistake of fact regarding consent. Even if actual consent cannot be established, the evidence overwhelmingly supports that a reasonable person in A1C Velazquez’s position would believe S.L. was receptive to intimate contact.

The Government’s “lack of consent” theory fails not only because S.L. was unconscious and therefore incapable of active refusal, but because the evidence affirmatively suggests the opposite of their theory. A1C Velazquez’s reasonable interpretation of S.L.’s conduct, combined with both parties’ severe intoxication, creates reasonable doubt that precludes conviction under any theory of non-consent.

Under both legal and factual sufficiency standards, the Government failed to prove lack of consent under their chosen Article 120(b)(2)(A) theory. The *Mendoza* framework makes clear that proving incapacity is not the same as proving lack of consent—the Government must establish the alleged victim communicated non-consent, which is impossible when she was unconscious. No reasonable inference favorable to the prosecution can salvage this fundamental theory mismatch.

6. Prosecution Exhibits 3-7 Do Not Establish Non-Consent

The Government introduced, and is likely to heavily rely upon, A1C Velazquez’s apology letter and text messages (Prosecution Exhibits 3-7) as evidence of guilt. However, these expressions of remorse do not establish that penetration occurred or that A1C Velazquez understood S.L. had not consented at the time of the conduct. Under the *Casillas* continuum

framework, consent must be analyzed at the moment of the alleged conduct, not based on subsequent reflection or confusion.

A1C Velazquez's apologies reflect his recognition that S.L. felt violated and his genuine remorse for causing her distress—not an admission that he knowingly engaged in non-consensual penetration. His consistent denials to OSI of vaginal penetration, combined with his admissions to other touching, demonstrate he was apologizing for behavior he believed crossed boundaries while maintaining he did not commit the charged offense.

Moreover, under *Mendoza*, evidence of S.L.'s post-incident emotional state does not prove she was capable of communicating non-consent at the moment of the alleged offense. The apologies show A1C Velazquez's character and concern for S.L., not proof beyond reasonable doubt of the charged elements.

D. Cumulative Analysis Under *Harvey* Standard

The systematic failures in the Government's proof on both essential elements compel this Court's clear conviction that A1C Velazquez's guilt was not established beyond a reasonable doubt.

1. Government Failed First *Harvey* Prong

The evidence in this case fails to establish guilt under both legal and factual sufficiency standards. Under legal sufficiency, even viewing all evidence in the light most favorable to the Government and drawing every reasonable inference in their favor, no rational fact finder could find the essential elements proven beyond a reasonable doubt. Under factual sufficiency's first *Harvey* prong, this Court must determine whether "the evidence, as it weighs it, does not prove that appellant is guilty beyond a reasonable doubt." *Harvey*, 85 M.J. at 132. The Government's case fails this standard on both essential elements of the charged offense. Regarding penetration,

the evidence presents only S.L.’s impaired and internally inconsistent recollection of waking to ambiguous sensations, directly contradicted by A1C Velazquez’s specific and consistent denials throughout his cooperative OSI interview. No physical evidence, forensic analysis, or corroboration supports the prosecution’s penetration theory, leaving multiple reasonable inferences consistent with innocence—including alcohol-induced misperception, external touching over clothing, or simple movement during sleep.

The consent element fails even more dramatically under the Government’s chosen “lack of consent” theory. The prosecution’s own evidence establishes that S.L. was unconscious when the alleged conduct began, rendering impossible the active refusal or consent communication that their theory requires under *Robinson*. S.L.’s severe alcohol impairment, combined with possible prescription medications, further negates any possibility of meaningful consent communication. The evidence of S.L.’s prior intimate behavior with A1C Velazquez—including physically guiding his hand to her inner thigh and repeatedly sleeping in his bed—affirmatively supports consent or reasonable mistake of fact, directly contradicting the Government’s theory.

Credibility determinations strongly favor A1C Velazquez’s version of events. His cooperative attitude throughout the investigation, his pattern of admitting to unfavorable conduct while specifically denying penetration, and his immediate expressions of remorse for behavior he genuinely believed was inappropriate all support his credibility. In contrast, S.L.’s testimony suffers from internal inconsistencies, memory gaps due to severe intoxication, and behavior inconsistent with her claimed lack of consent (remaining in his bed until morning after allegedly violent resistance).

2. Court Must Be Clearly Convinced of Acquittal

The second prong of *Harvey* requires this Court to be “clearly convinced of the correctness of this decision” that the evidence fails to prove guilt beyond reasonable doubt. *Harvey*, 85 M.J. at 132. Viewed objectively, the evidence in this case compels reasonable doubt rather than conviction. The prosecution presented what is essentially a “he said, she said” case where the “she said” portion comes from someone who admits to being unconscious during portions of the alleged conduct and severely impaired by alcohol and medication. Against this, A1C Velazquez provided consistent, specific denials while acknowledging other conduct that could be viewed unfavorably—a pattern that strongly supports his credibility on the central disputed facts. His admissions, in fact, stand in stark contrast to what the Government will inevitably argue were self-serving statements motivated by a desire to lessen his own guilt.

The weakness of the prosecution’s case is further underscored by their reliance on testimony from an admittedly impaired witness. OSI’s investigation failed to collect any physical evidence, failed to conduct a timely medical examination, and failed to preserve potentially corroborative evidence such as dormitory security footage. This investigative failure, combined with the inherent unreliability of testimony from someone who was unconscious and severely intoxicated during the alleged conduct, renders the Government’s case insufficient as a matter of law.

A1C Velazquez—a mature airman with seven years of professional experience helping vulnerable individuals, no prior disciplinary history, and demonstrated integrity throughout the investigation—is entitled to the benefit of reasonable doubt when the evidence permits multiple innocent explanations for the alleged conduct. A legal and supportable conviction demands proof beyond a reasonable doubt of guilt. However, the *Harvey* standard compels this Court to reverse

convictions when it is clearly convinced that such proof does not exist – a result which should prevail in this case.

E. Conclusion

A1C Velazquez’s conviction cannot stand under either the legal or factual sufficiency standards applicable to this Court’s review. Under the legal sufficiency test, even when viewing the evidence in the light most favorable to the prosecution and drawing every reasonable inference in their favor, no rational trier of fact could have found the essential elements of Article 120(b)(2)(A) beyond a reasonable doubt. The Government’s proof on the penetration element consists solely of ambiguous testimony from a witness who was unconscious or severely intoxicated throughout the time period at issue, directly contradicted by the accused’s consistent and credible denials. More fundamentally, the Government failed to prove their charge under *Mendoza*’s controlling framework: they did not establish that S.L. was capable of consenting, yet did not consent. Instead, their evidence merely proved she was incapacitated—a separate theory of liability they declined to charge.

Under the *Harvey* factual sufficiency analysis, this Court must reverse a conviction when it is clearly convinced that the evidence, as weighed by this Court, fails to prove guilt beyond a reasonable doubt. The Government has met neither threshold. Their proof on consent fails catastrophically under the *Robinson* framework, as their chosen “lack of consent” theory requires evidence of active refusal or consent communication that is impossible when the alleged victim was unconscious or otherwise incapable of communicating non-consent. Both elements of the charged offense fail the beyond-reasonable-doubt standard under both legal and factual sufficiency review, with multiple reasonable inferences supporting innocence rather than guilt.

Justice requires that this Court reverse A1C Velazquez's conviction and dismiss the charges with prejudice, vindicating both the legal and factual sufficiency standards, the principles established in *Mendoza* and *Casillas*, and the rights of service members to fair adjudication based on competent evidence rather than speculation and inference.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings and sentence and dismiss Specification 1 of the Charge with prejudice.

II.

THE MILITARY JUDGE ERRED BY IMPROPERLY EXCLUDING HIGHLY PROBATIVE EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412 THAT WAS ESSENTIAL TO APPELLANT'S DEFENSE OF REASONABLE MISTAKE OF FACT AS TO CONSENT, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION, AND TO PRESENT A COMPLETE DEFENSE, AND COMPOUNDING THE LEGAL AND FACTUAL INSUFFICIENCY OF THE GOVERNMENT'S CASE.

Standard of Review

This Court reviews the military judge's ruling on whether to exclude evidence pursuant to Military Rule of Evidence (M.R.E.) 412 for an abuse of discretion. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011); *United States v. St. Jean*, 83 M.J. 109, 113 (C.A.A.F. 2023). This is a strict standard, calling for "more than a mere difference of opinion" between the appellate court and the trial judge. *Evangelista*, No. ACM 40531, slip op. at 20, 2025 CCA LEXIS 501, at *40. A military judge abuses his discretion when he: (1) predicates a ruling on findings of fact that are not supported by the evidence of record, (2) uses incorrect legal principles, (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

M.R.E. 412 is a rule of exclusion which provides that, in any proceeding involving an alleged sexual offense, evidence of a victim's sexual behavior or predisposition is not admissible,

subject to three limited exceptions. *St. Jean*, 83 M.J. at 113. However, the rule’s exclusionary reach is not absolute—the rule contains limited exceptions which allow an accused the ability to present a defense as to consent, and the rule’s exceptions acknowledge an accused’s constitutional right to confront and cross-examine witnesses. *Ellerbrock*, 70 M.J. at 318.

Additional Facts

At trial, the defense sought admission of three categories of evidence under M.R.E. 412:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The military judge excluded the [REDACTED] evidence, finding it “not relevant” due to the “extended duration of time” and “dissimilarity” between [REDACTED] and the alleged offenses, and concluded its probative value was “exceedingly low.” App. Ex. XXVI ¶¶ 18-19. The judge admitted evidence regarding S.L. sleeping in A1C Velazquez’s bed and the thigh bruise incident, App. Ex. XXVI ¶¶ 7-8, but excluded evidence about [REDACTED], App. Ex. XXVI ¶ 6.

A. M.R.E. 412 Framework and Constitutional Overlay

The military judge’s exclusion of critical evidence regarding the relationship between A1C Velazquez and S.L. violated both the literal requirements of M.R.E. 412 and A1C Velazquez’s constitutional rights to confrontation and due process.

1. Basic M.R.E. 412 Structure

M.R.E. 412 establishes a general rule of exclusion for evidence of a victim’s sexual behavior or predisposition in cases involving alleged sexual offenses. M.R.E. 412(a). However, this exclusionary rule is subject to three narrow but critical exceptions that ensure the rule does not violate an accused’s constitutional rights. Under M.R.E. 412(b), such evidence is admissible if: (1) “offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence”; (2) it is evidence of specific instances of an alleged victim’s sexual behavior with the accused “if offered by the accused to prove consent or if offered by the prosecution”; or (3) its exclusion “would violate the accused’s constitutional rights.” M.R.E. 412(b).

2. Constitutional Exception Under M.R.E. 412(b)(3)

The third exception to M.R.E. 412’s exclusionary rule—evidence “the exclusion of which would violate the accused’s constitutional rights”—provides the most robust protection for an accused’s rights and directly controls this case. *Ellerbrock*, 70 M.J. at 318. Under *Ellerbrock*, evidence falls within this constitutional exception when three criteria are met: the evidence must be relevant, material, and its probative value must substantially outweigh the dangers of unfair prejudice. *Id.* at 319.

“In applying M.R.E. 412, the judge is not asked to determine if the proffered evidence is true . . . Rather, the judge serves as gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.” *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (quoting *United States v. Banker*, 60 M.J. 216, 224 (C.A.A.F. 2004)).

Critically, the *Ellerbrock* analysis focuses on materiality, which addresses “the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue.” *Ellerbrock*, 70 M.J. at 318-19 (citation modified) (quoting *Banker*, 60 M.J. at 222 (quoting *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983))). When consent is one of two centrally disputed issues in a case—as it was here—evidence bearing on the relationship dynamic between the accused and alleged victim becomes highly material, even if it might be considered marginally relevant in cases involving stranger assaults. *Ellerbrock*, 70 M.J. at 320. The constitutional exception exists precisely to prevent M.R.E. 412 from being used as a sword to prevent accused persons from mounting legitimate defenses to sexual assault charges.

The Sixth Amendment’s confrontation guarantee requires that an accused be permitted to expose bias, interest, or motive on the part of prosecution witnesses through cross-examination. *United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011). When the prosecution presents a sexual assault case that turns entirely on the credibility of the alleged victim, the accused’s right to present evidence showing the true nature of their relationship becomes constitutionally indispensable. M.R.E. 412 cannot be wielded to prevent this core constitutional protection, particularly where the evidence directly contradicts the prosecution’s theory of the case.

B. The Military Judge Applied Incorrect Legal Standards

The military judge's ruling in this case reflects a fundamental misunderstanding of both recent Court of Appeals for the Armed Forces precedent and the constitutional requirements governing M.R.E. 412 analysis. His decision to exclude evidence critical to A1C Velazquez's defense constitutes an abuse of discretion under multiple prongs of the *Rudometkin* framework.

1. Misapplication of *St. Jean* Similarity Requirement

The military judge erroneously treated similarity between past sexual behavior and the charged conduct as a mandatory prerequisite for admission under M.R.E. 412, directly contradicting the Court of Appeals for the Armed Forces' recent guidance in *St. Jean*. In his written ruling, the judge stated: [REDACTED]

[REDACTED] Appellate Exhibit XXVI, ¶ 18. This analysis reflects a critical legal error.

St. Jean explicitly holds that “similarity and distinctiveness are not indispensable qualities of relevant Mil. R. Evid. 412(b)(1)(B) evidence but simply enhance the relevance.” *St. Jean*, 83 M.J. at 118. The Court emphasized that while similarity may strengthen the probative value of sexual behavior evidence, its absence does not render such evidence inadmissible or irrelevant. *Id.* By treating dissimilarity as grounds for exclusion in this case, the military judge “applie[d] correct legal principles to the facts in a way that is clearly unreasonable.” *Rudometkin*, 82 M.J. at 401.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Failure to Conduct Proper Constitutional Analysis

Perhaps most critically, the military judge’s ruling contains no meaningful analysis under the constitutional exception of M.R.E. 412(b)(3), despite A1C Velazquez’s explicit request for admission under this provision. The *Ellerbrock* framework requires military judges to conduct a three-pronged analysis examining relevance, materiality, and the probative value versus prejudicial effect balance. *Ellerbrock*, 70 M.J. at 319. The judge’s perfunctory treatment of these constitutional requirements represents a clear abuse of discretion.

The ruling fails entirely to address the materiality prong of *Ellerbrock*, which requires analysis of “the importance of the issue for which the evidence was offered in relation to the other issues in the case.” *Id.* Here, consent was not merely one issue among many—it was a central disputed factual question in the case. The prosecution’s entire theory rested on portraying the relationship between A1C Velazquez and S.L. as purely platonic, making evidence of [REDACTED] [REDACTED] highly material to the defense. The judge’s failure to recognize this materiality constitutes a failure to “consider important facts.” *Rudometkin*, 82 M.J. at 401.

Similarly, the ruling contains no proper balancing analysis weighing the probative value of the excluded evidence against potential prejudicial effects. [REDACTED]

[REDACTED]

[REDACTED] This cursory analysis falls far short of the careful constitutional balancing that *Ellerbrock* requires and represents an abuse of the judge’s discretion.

3. Erroneous Application of Time-Gap Analysis

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Military courts regularly admit M.R.E. 412 evidence involving significant temporal gaps when the evidence bears on the relationship between the accused and alleged victim. Relevance under M.R.E. 412(b)(1)(B) does not require that the sexual behavior evidence occur immediately proximate to the charged offense—it requires that the evidence tend to make the existence of consent more or less probable. [REDACTED]

[REDACTED]

[REDACTED]

Furthermore, the judge failed to consider that the relevant time period should be measured not just from [REDACTED] to the charged conduct, but encompassed the entire evolution of the relationship between the parties. The evidence showed a pattern of escalating intimacy—from [REDACTED], to S.L. showing A1C Velazquez her inner thigh bruise, to her repeatedly sleeping in his bed—that culminated in the events of April 16, 2023. Viewed in this proper context, the [REDACTED] was not an isolated incident separated by months, but rather an early indicator of the sexual dynamic that characterized their relationship throughout the relevant period.

C. The Excluded Evidence Was Highly Relevant and Material

The military judge's conclusion that the excluded evidence was [REDACTED] or had only [REDACTED] probative value reflects a fundamental misunderstanding of both the evidence and the legal standards governing M.R.E. 412 admissibility. Each category of excluded evidence was not only relevant but highly material to A1C Velazquez's defense theory of consent or reasonable mistake of fact.

1. [REDACTED] Evidence

The military judge's exclusion of evidence regarding S.L.'s [REDACTED] [REDACTED] represents the most egregious error in his ruling. According to A1C Velazquez's testimony, S.L. [REDACTED] [REDACTED]. Appellate Exhibit XXVI, ¶ 5. This evidence was directly relevant to A1C Velazquez's reasonable mistake of fact defense because it demonstrated [REDACTED] [REDACTED]—precisely the type of behavior that would reasonably suggest openness to sexual intimacy.

[REDACTED] Appellate Exhibit XXVI, ¶ 18. This analysis ignores the fundamental purpose of mistake of fact evidence under M.R.E. 412(b)(1)(B). The relevance of the [REDACTED] lies not in its similarity to digital penetration, but in its demonstration of the sexual comfort level and intimate communication pattern between the parties. When S.L. [REDACTED] [REDACTED], this created a reasonable basis for him to believe she was sexually interested in him and comfortable with [REDACTED] in their relationship.

The prosecution's entire case theory rested on portraying the relationship as "purely platonic" with "zero prior relationship" suggesting sexual interest. Evidence that S.L. [REDACTED] directly contradicted this prosecution narrative and provided crucial context for understanding A1C Velazquez's reasonable interpretation of her subsequent behavior. Under the proper M.R.E. 412(b)(1)(B) analysis, evidence need only have "some tendency to lead [the fact finder] to find [the victim] may . . . have consented to [the charged conduct], or that Appellant may have believed she would consent." *United States v. Harrington*, No. ACM 39223, 2018 CCA LEXIS 456, at *14-15 (A.F. Ct. Crim. App. Sep. 25, 2018). S.L.'s willing participation in [REDACTED] easily meets this standard.

Moreover, the constitutional significance of this evidence cannot be overstated. The prosecution presented S.L. as someone who would never engage in sexual discussions or behavior with A1C Velazquez, making her testimony about their sexually innocent relationship central to the Government's case. A1C Velazquez's Sixth Amendment rights demanded that he be permitted to present evidence contradicting this characterization, particularly when that evidence came from his own firsthand observations of her behavior.

2. [REDACTED] Evidence

The military judge's partial admission of evidence regarding [REDACTED] with A1C Velazquez, while excluding [REDACTED], artificially sanitized evidence that was crucial to A1C Velazquez's defense. A1C Velazquez testified that S.L. [REDACTED]

[REDACTED] Appellate Exhibit XXVI, ¶ 6.

This evidence was highly material because it demonstrated A1C Velazquez's reasonable belief that S.L. was becoming romantically available and potentially interested in him. [REDACTED]

[REDACTED]

[REDACTED] When someone seeks advice about ending a romantic relationship, this naturally suggests potential openness to new romantic connections, particularly when that advice is sought from someone like A1C Velazquez who was already serving as S.L.’s primary emotional confidant.

The judge’s decision to exclude evidence [REDACTED] of S.L.’s prior relationship was particularly problematic because it prevented A1C Velazquez from demonstrating the full context of their discussions. If S.L. was comfortable discussing [REDACTED], this would further support A1C Velazquez’s reasonable belief that she viewed him as someone appropriate for such [REDACTED]—again contradicting the prosecution’s “purely platonic” theory.

3. Pattern of Physical Intimacy

The admitted evidence of S.L. repeatedly sleeping in A1C Velazquez’s bed gained critical significance when viewed alongside the excluded evidence of [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED] Appellate Exhibit XXVI, ¶ 7.

However, the full probative value of this evidence could only be appreciated when considered alongside the excluded evidence of [REDACTED]. The pattern that emerges from the totality of their interactions—[REDACTED]s, relationship advice-seeking, repeated bed-sharing, and S.L.’s physical guidance of A1C Velazquez’s hand to touch her inner thigh bruise (Appellate Exhibit XXVI, ¶ 8)—paints a picture of escalating intimacy that strongly supported A1C Velazquez’s reasonable mistake of fact defense. Without the [REDACTED] evidence,

the bed-sharing loses much of its probative force and appears merely as friendly behavior rather than part of a pattern of increasing sexual comfort.

The prosecution's case relied heavily on convincing the fact finder that A1C Velazquez should have recognized clear boundaries in his relationship with S.L. The excluded evidence was essential to demonstrating that no such clear boundaries existed—indeed, that S.L.'s behavior consistently suggested the opposite.

4. Materiality to Defense Theory

Under the *Ellerbrock* materiality analysis, the excluded evidence addressed “the importance of the issue for which the evidence was offered in relation to the other issues in the case.” *Ellerbrock*, 70 M.J. at 318. Here, consent was not merely an important issue—it was a centrally disputed issue in the case. The prosecution presented no physical evidence, no DNA evidence, and no corroborating witnesses. Much of the case turned on S.L.'s credibility and the fact finder's assessment of whether A1C Velazquez should have known she did not consent to the alleged conduct.

In this context, evidence demonstrating the true nature of their relationship dynamic was not merely material—it was essential to a fair trial. The military judge's exclusion of [REDACTED] evidence prevented A1C Velazquez from presenting the complete picture of their relationship and forced him to defend against a prosecution theory that mischaracterized the fundamental nature of his interactions with S.L. This exclusion violated both the letter and spirit of M.R.E. 412's exceptions for constitutionally required evidence.

D. Probative Value Far Outweighs Any Prejudicial Effect

The military judge's conclusion that the excluded evidence had only “exceedingly low” probative value reflects a fundamental misunderstanding of the *Ellerbrock* balancing test and the

constitutional requirements governing M.R.E. 412 analysis. When properly analyzed, the probative value of the excluded evidence substantially outweighs any potential prejudicial effect, mandating admission under both M.R.E. 412(b)(1)(B) and the constitutional exception of 412(b)(3).

1. High Probative Value

The excluded evidence possessed exceptionally high probative value because it directly addressed the central issue in the case—whether A1C Velazquez reasonably believed S.L. consented to intimate physical contact. Under *Ellerbrock*, probative value must be assessed in light of “the importance of the issue for which the evidence was offered in relation to the other issues in the case.” *Ellerbrock*, 70 M.J. at 318. Here, the relationship dynamic between A1C Velazquez and S.L. was not a peripheral concern—it was a dispositive factual question upon which the entire case turned.

The [REDACTED] evidence possessed particularly high probative value because it directly contradicted the prosecution’s core narrative. The Government’s case relied entirely on convincing the fact finder that A1C Velazquez should have recognized clear sexual boundaries with S.L. based on their allegedly “purely platonic” relationship. Evidence that S.L. [REDACTED] [REDACTED] with A1C Velazquez in his private dormitory room fundamentally undermined this prosecution theory by demonstrating [REDACTED] in their relationship. This evidence was not merely probative—it was devastating to the Government’s characterization of their relationship dynamic.

Similarly, the relationship advice evidence, and especially [REDACTED] [REDACTED], possessed high probative value because it established A1C Velazquez’s reasonable belief that S.L. was becoming romantically available and potentially

interested in him. When someone seeks intimate relationship advice from a member of the opposite sex, this behavior naturally suggests potential romantic interest, particularly when combined with the other evidence of escalating physical and emotional intimacy between the parties. The judge's failure to recognize this probative value reflects a clearly unreasonable application of legal principles under *Rudometkin*.

The cumulative probative value of all the excluded evidence was even higher than the sum of its individual parts. Together, [REDACTED], relationship discussions, and pattern of physical intimacy created a compelling narrative of escalating intimacy that directly supported A1C Velazquez's reasonable mistake of fact defense. This evidence was not cumulative or tangential—it was essential to understanding the true nature of the relationship and A1C Velazquez's reasonable interpretation of S.L.'s behavior on the night in question.

2. Minimal Prejudicial Effect

In stark contrast to its high probative value, the excluded evidence presented minimal risk of unfair prejudice when analyzed under the proper M.R.E. 412 framework. The [REDACTED]

[REDACTED] Appellate Exhibit XXVI, ¶ 18. Additionally, since the military judge was himself the fact finder, the prospects of any such confusion were vanishingly small.

The [REDACTED] evidence presented no risk of impermissible character assassination or personal shaming because it involved only S.L.'s interactions with A1C Velazquez himself, not her sexual behavior with other persons. M.R.E. 412 specifically contemplates admission of evidence regarding “the victim's past sexual behavior with the

accused” under subsection (b)(1)(B). The conversation evidence fits squarely within this category and presents none of the prejudicial risks that M.R.E. 412 was designed to prevent.

Moreover, the conversation evidence was not offered to prove S.L.’s sexual character or propensity, but rather to demonstrate A1C Velazquez’s reasonable interpretation of her behavior toward him specifically. This distinction is critical under M.R.E. 412 analysis—evidence offered to prove an accused’s reasonable mistake of fact presents far less prejudicial risk than evidence offered to suggest a victim’s general sexual availability. The military judge’s failure to recognize this distinction represents an incorrect understanding of the rule’s purpose and scope.

The relationship advice evidence presented even less prejudicial risk because it involved no sexual behavior whatsoever—merely S.L.’s discussions with A1C Velazquez about ending a [REDACTED] relationship with another person. This evidence was directly relevant to A1C Velazquez’s reasonable belief about her potential interest in him, while presenting no risk of unfair prejudice regarding S.L.’s sexual character or behavior.

3. *Ellerbrock* Balancing Favors Admission

When the high probative value of the excluded evidence is properly weighed against its minimal prejudicial effect, the *Ellerbrock* balance overwhelmingly favors admission. The Court of Appeals for the Armed Forces has emphasized that the constitutional exception to M.R.E. 412 must be applied with particular care when consent is the central issue in the case. *Ellerbrock*, 70 M.J. at 320. The exclusion of evidence that directly bears on the accused’s reasonable interpretation of the alleged victim’s behavior violates the fundamental principle that the accused has the right to an opportunity to be heard in his defense.

The military judge’s balancing analysis was fundamentally flawed because it failed to account for the constitutional dimensions of the evidence. Under the Sixth Amendment,

A1C Velazquez had a right to present evidence that contradicted the prosecution’s characterization of his relationship with S.L., particularly when that characterization was central to the Government’s case. *See, e.g., Chambers v. Miss.*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.”). The judge’s conclusion that such evidence would “mislead the fact finder” essentially holds that fact finders cannot be trusted to properly weigh evidence about relationship dynamics—a conclusion that undermines the entire adversarial system.

Furthermore, the judge’s concern about “confusing the issues” ignores the reality that the true nature of the relationship between A1C Velazquez and S.L. was the central issue in the case. Evidence that clarifies this relationship dynamic does not confuse the issues—it illuminates the very question the fact finder must resolve. The military judge’s reasoning would effectively prevent accused persons from presenting evidence about their relationships with alleged victims in any case where the prosecution chooses to characterize those relationships as “purely platonic.”

The constitutional requirements of due process and confrontation demand that accused persons be permitted to present their version of intimate and evolving relationships, particularly when those relationships are central to the charges against them. The military judge’s exclusion of evidence essential to A1C Velazquez’s defense violated these fundamental principles and cannot be sustained under any reasonable interpretation of M.R.E. 412 or constitutional law.

E. The Exclusion Violated A1C Velazquez’s Constitutional Rights and Was Not Harmless

The military judge’s exclusion of critical relationship evidence violated A1C Velazquez’s fundamental constitutional rights under the Fifth and Sixth Amendments and cannot be dismissed

as harmless error. The Sixth Amendment guarantees an accused the right to confront witnesses against him and to present a complete defense, while the Due Process Clause ensures fundamental fairness in criminal proceedings. *Ellerbrock*, 70 M.J. at 318. Here, the exclusion of evidence that was essential to A1C Velazquez's reasonable mistake of fact defense violated all of these constitutional protections. The [REDACTED] evidence was particularly crucial because it directly contradicted S.L.'s testimony about the nature of their relationship and provided the only means for A1C Velazquez to challenge the prosecution's characterization. Without this evidence, A1C Velazquez was denied his right to effective cross-examination on the central credibility issue in the case.

The constitutional violation was compounded by the weakness of the prosecution's case, which relied on S.L.'s uncorroborated testimony about her relationship with A1C Velazquez and her claimed lack of consent. The Government presented no physical evidence, no DNA analysis, no medical examination, and no corroborating witnesses—making the credibility determination and relationship characterization a critical basis for conviction. Where, as here, a military judge erroneously excludes evidence that should have been admitted under M.R.E. 412(b)(3), the Government bears the burden of showing harmlessness beyond a reasonable doubt. *Ellerbrock*, 70 M.J. at 320. The exclusion of evidence that directly contradicts the prosecution's theory cannot be considered harmless, much less harmless beyond a reasonable doubt. The excluded evidence would have provided critical context for understanding A1C Velazquez's reasonable interpretation of S.L.'s behavior, potentially creating reasonable doubt where none existed without it.

The harmlessness analysis must also account for the cumulative effect of excluding multiple categories of relevant evidence. The military judge's decision to exclude evidence of [REDACTED], relationship discussions, and the full context of their physical intimacy

prevented A1C Velazquez from presenting a coherent narrative of their escalating relationship that would have supported his mistake of fact defense. This exclusion directly connects to the factual sufficiency arguments raised in Assignment of Error I—by limiting the evidence available to demonstrate the true nature of their relationship, the court artificially strengthened a prosecution case that was already insufficient as a matter of law. The constitutional error in excluding this evidence was not harmless but rather contributed directly to a conviction that cannot be sustained on the insufficient evidence presented.

The military judge’s M.R.E. 412 ruling represents a clear abuse of discretion under the *Rudometkin* framework, violating multiple prongs by using incorrect legal principles (*St. Jean* misapplication), applying correct principles in a clearly unreasonable manner (treating similarity as mandatory), and failing to consider important constitutional facts (materiality of consent issue). *Rudometkin*, 82 M.J. at 401. When evidentiary errors rise to the level of constitutional violations and contribute to convictions based on insufficient evidence, reversal is not merely appropriate—it is constitutionally mandated.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings and sentence.

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Founding Attorney

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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 Appellate Government Division on 12 November 2025.

Respectfully submitted,

[REDACTED]

JOSHUA TRAEGER, Esq.
Founding Attorney

[REDACTED]

[REDACTED]

Dwight H. Sullivan
Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT'S MOTION TO FILE
<i>Appellee,</i>	)	UNDER SEAL
	)	
v.	)	
	)	Before Panel 3
Airman First Class (E-3)	)	
Greg A. Velazquez,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	12 November 2025

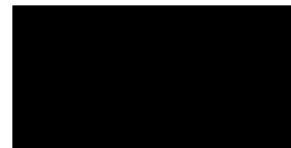
TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant, Airman First Class Greg A. Velazquez, by and through his undersigned counsel, and moves pursuant to Rule 23.3(o) of this Honorable Court's Rules of Practice and Procedure to file his brief under seal.

Portions of Assignment of Error II in Appellant's brief quote from and analyze Appellate Exhibit XXVI, which is sealed. This Court's Rules provide that information derived from materials under seal "shall be separately filed in accordance with Rule 13.2(b)." A.F. Ct. Crim. App. R. 17.2(b). Accordingly, it is necessary to file Appellant's brief under seal. Appellant has filed a redacted version of the brief that obscures portions derived from sealed materials.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,



JOSHUA R. TRAEGER, Esq.
Founding Attorney



DWIGHT H. SULLIVAN
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 12 November 2025.

Respectfully submitted,

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Dwight H. Sullivan
Air Force Appellate Defense Division

A solid black rectangular box redacting the contact information of Dwight H. Sullivan.

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Greg E. VELAZQUEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 3

On 12 November 2025, Appellant’s counsel filed a hard copy of his brief on behalf of Appellant accompanied by a Motion to File under Seal. Appellant’s counsel electronically filed a redacted copy of his brief the same day.

On 24 November 2025, this court held a status conference with Mr. Joshua Traeger and Mr. Dwight Sullivan appearing on behalf of Appellant and Captain Heather R. Bezold appearing on behalf of the government. During the status conference, the court discussed the position of the parties regarding recommendations for additional redactions to the redacted version of the brief filed on 12 November 2025.

On 24 November 2025, Appellant’s counsel filed a Motion to Amend Pleading seeking to amend the redacted version of the brief filed on 12 November 2025 to incorporate certain additional redactions appropriate to protect information from sealed material in the case. Appellant’s counsel filed the amended version of the redacted brief on 24 November 2025.

The amended redacted version of the brief filed on 24 November 2025 is redacted appropriately. Therefore, we grant the motion to Amend the Pleading and accept the amended redacted version of the brief filed on 24 November 2025.

Accordingly, it is by the court on this 26th day of November 2025,

ORDERED:

Appellant’s Motion to File under Seal is **GRANTED** and the unredacted version of the Brief on Appellant, dated 12 November 2025, is accepted.

The 12 November 2025 Brief on Behalf of Appellant (redacted) is rejected.

Appellant’s Motion to Amend the Pleading is **GRANTED**.

The 12 November 2025 Brief on Behalf of Appellant (redacted), as amended on 24 November 2025, is accepted.



JACOB B. HOEFERKAMP, Capt, USAF
Acting Clerk of the Court

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

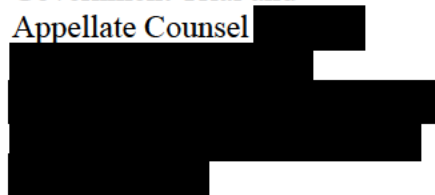
UNITED STATES, <i>Appellee,</i>	)	ANSWER TO ASSIGNMENTS OF ERROR
	)	
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 40815
GREG A. VELAZQUEZ	)	
United States Air Force	)	12 December 2025
<i>Appellant.</i>	)	

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

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel



MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ANSWER TO ASSIGNMENTS OF
<i>Appellee,</i>	)	ERROR
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 40815
GREG A. VELAZQUEZ	)	
United States Air Force	)	12 December 2025
<i>Appellant.</i>	)	

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY TO SPECIFICATION 1 OF THE CHARGE ALLEGING A VIOLATION OF ARTICLE 120(b)(2)(A), UNIFORM CODE OF MILITARY JUSTICE, ARE LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO PRESENT ANY CREDIBLE EVIDENCE THAT APPELLANT DIGITALLY PENETRATED THE ALLEGED VICTIM'S VULVA AND FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ANY TOUCHING OCCURRED WITHOUT HER CONSENT, PARTICULARLY GIVEN HER UNCONSCIOUS STATE WHICH RENDERED HER INCAPABLE OF COMMUNICATING NON-CONSENT UNDER THE GOVERNMENT'S CHOSEN LEGAL THEORY.

II.

WHETHER THE MILITARY JUDGE ERRED BY IMPROPERLY EXCLUDING HIGHLY PROBATIVE EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412 THAT WAS ESSENTIAL TO APPELLANT'S DEFENSE OF REASONABLE MISTAKE OF FACT AS TO CONSENT, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION, AND TO PRESENT A COMPLETE

**DEFENSE, AND COMPOUNDING THE LEGAL AND
FACTUAL INSUFFICIENCY OF THE GOVERNMENT’S
CASE.**

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant and S.L., the named victim, met and became friends shortly after Appellant arrived at Joint Base Elmendorf-Richardson around December 2022. (R. at 292-293, 301).

Appellant was around 31-years old, had earned a degree in psychology, and worked in social work for seven years before joining the Air Force. (R. at 208).

S.L. and Appellant lived in the same dormitory hallway along with two of their friends, one female – K.K. – and one male – H.G.¹ (R. at 289). S.L. was good friends with K.K. and H.G. and sometimes would spend time with K.K. and H.G. in their rooms. (R. at 290-292, 296, 296-297). Eventually, S.L. started going to Appellant’s room to socialize as well. (R. at 297, 300).

S.L. and Appellant did not have a sexual or romantic relationship.

Appellant and S.L. were not attracted to each other. Appellant told OSI he “never had any sort of [. . .] attraction towards” S.L. (R. at 212). S.L. testified that she was not attracted to Appellant. (R. at 319).

S.L. and Appellant did not have a romantic or sexual relationship. (R. at 304). Appellant told OSI that there was never anything “intimate” between him and S.L., and that they had never kissed, dated, or texted “in a romantic way.” (R. at 214). Appellant told OSI he and S.L. had not

¹ H.G.’s initials are J.H.G. but his friends, including Appellant and S.L., called him H.G. For clarity, he is referred to as H.G. throughout this brief.

cuddled. He added that even if S.L.'s leg came close to his while lying in bed the night of the sexual assault, he did not believe it was anything "romantic." (R. at 219). Although Appellant told OSI that he felt S.L. was becoming more "jokey" with him, he admitted that he did not "take it as flirtatious" and could not discern if she was merely getting more comfortable with him or flirting. (R. at 213-214). The examples Appellant provided OSI of S.L. becoming "more jokey" were seemingly innocuous and included that S.L. told him she collected shot glasses and asked for him to get one from Japan while he was TDY, asked to borrow his weight set, and borrowed one of his shirts. (R. at 213).

S.L. and Appellant maintained their non-sexual or unromantic relationship the day before the sexual assault and the night of the sexual assault. S.L. testified that she and Appellant had never held hands, cuddled, kissed, or had any sexual contact. (R. at 303-304). S.L. testified that the night before the sexual assault she and Appellant did not flirt, kiss, or have any sexual contact. (R. at 310-311). The night of the sexual assault, S.L. did not show Appellant any romantic interest. (R. at 318). She testified that she did not cuddle with Appellant or even touch him. (R. at 320).

S.L. and Appellant's friends and supervisor did not observe any sexual or romantic interactions between Appellant and S.L. K.K. testified that she never observed S.L. have any romantic or physical attraction towards Appellant. (R. at 269). K.K. confirmed that she never saw S.L. and Appellant hold hands, cuddle, kiss, or engage in any other behavior that would lead K.K. to believe S.L. and Appellant were sexually intimate. (R. at 271).

H.G. testified that he never saw any signs of physical connection between S.L. and Appellant. (R. at 509). He confirmed that Appellant never expressed an attraction towards S.L.

and that he never saw S.L. and Appellant engage in any physical sexual interaction. (R. at 509-510).

S.L. and Appellant's supervisor, J.C., testified that S.L. and Appellant did not interact at work "whatsoever if they didn't have to." (R. at 487). He explained that he never observed S.L. and Appellant flirting, sitting together, or talking unless they needed to for work. (R. at 488).

The night before the sexual assault.

The night before the sexual assault, S.L. and K.K. went to Appellant's room to "pregame" (drink alcohol) before going out to a bar called Gaslight. (R. at 215, 272, 305, 306, 510-511). H.G. was already in Appellant's room. (R. at 510). When S.L. and K.K. left for the bar, Appellant and H.G. did not go with them. (R. at 306, 510-511). At the bar, S.L. rode a mechanical bull and squeezed her legs so hard while trying to stay on that she had bruises on her thighs – three to four inches below where her inner thigh creates a "v". (R. at 215, 216, 307, 424).

S.L. had borrowed a shirt and pants from K.K. to wear to the bar. (R. at 308). When she and K.K. returned to the dormitories, S.L. changed out of K.K.'s clothes and into a black hoodie and pink shorts. (R. at 308, 309). S.L. wore the pink shorts often and felt comfortable wearing them in front of other people. (R. at 309).

Appellant invited S.L. and K.K. back to his room when they left the bar. (R. at 308, 511, 516). H.G. was already in Appellant's room when they arrived. (R. at 310). S.L., Appellant, and H.G. talked about S.L.'s time out at the bar. (R. at 216, 310). Appellant noticed the bruise on S.L.'s leg. (R. at 214). He touched the bruise and made a comment about how crazy it looked. (R. at 214).

Although Appellant told OSI that S.L. “took [his] hand and wanted” him to touch her bruise, S.L. denied putting Appellant’s hand on her bruise. (R. at 427). S.L. explained that after Appellant touched the bruise on her leg, she walked away because she found it “awkward” and did not want him to touch her. (R. at 425, 456-457).

Eventually, K.K. left Appellant’s room and S.L., H.G. and Appellant fell asleep on his bed. (R. at 216, 310, 311, 511). S.L. slept on one side of the bed, H.G. slept in the middle, and Appellant slept on the other side of the bed. (R. at 311-312, 512). That evening, no sexual conduct, flirting, kissing, or cuddling occurred between Appellant and S.L. (R. at 217-218, 310-311, 314). Appellant explained that S.L.’s leg might have unintentionally come close to his but denied that there was anything like “what people in a relationship do or whatever like that.” (R. at 218).

The night of the sexual assault.

The night Appellant sexually assaulted S.L., she brought alcoholic shots to each of her friend’s rooms, including Appellant. (R. at 315). After giving Appellant the shot, S.L. remained in Appellant’s room. (Id). S.L. consumed around two to four alcoholic drinks that evening with Appellant but did not take any medications. (R. at 418-419). S.L. denied losing consciousness or having memory lapses that evening because of intoxication. (R. at 464-465).

S.L. explained that she felt comfortable in Appellant’s room because Appellant “didn’t seem like a threat to her” because of his military status. (R. at 318, 319). While in Appellant’s room, Appellant did not express any romantic interest in S.L. (R. at 318). Similarly, S.L. did not show Appellant any romantic interest. (R. at 318, 319). S.L.

Eventually, S.L. fell asleep in Appellant’s bed on top of the covers. (R. at 319). S.L. did not cuddle with or touch Appellant. (R. at 320). When S.L. awoke, she realized she had been

asleep on her back. (R. at 320). She felt Appellant's hand on her vagina over her clothes. (R. at 320-321). S.L. was scared and did not know what to do. (R. at 321). She turned to her side to get Appellant to stop touching her and Appellant's hand moved away. (R. at 321, 322). S.L. stayed awake and wanted to leave. (R. at 322, 428). Then, as S.L. lay there thinking about how she could leave, Appellant put his hand under her shorts and inserted his finger into her vagina for seconds. (R. at 323-326). S.L. confirmed that Appellant could have penetrated her with one or two fingers and denied that it was three or four. (R. at 430-431). S.L. pushed Appellant's hand far enough away from her that it was no longer touching her. (R. at 326, 432). She gathered all her belongings and left Appellant's room. (R. at 326-328). After leaving Appellant's room, S.L. returned to her room and took a shower because she felt "disgusting." (R. at 328). She then went to K.K.'s room and told K.K. what happened. (R. at 328).

S.L. testified that she did not want Appellant touching her like that. (R. at 326). S.L. testified that she did not previously consent to Appellant penetrating her vagina with his fingers and that there was never any discussion between her and Appellant about that kind of sexual activity. (R. at 326).

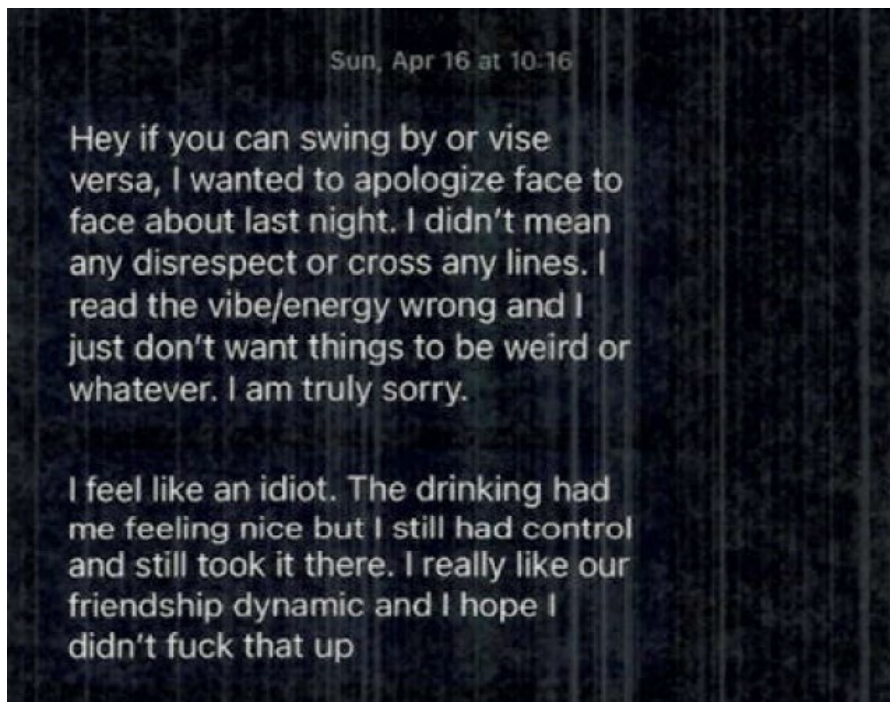
S.L. felt shame or guilt that she could have done more to leave but did not. (R. at 327). She explained, "I was just scared, I didn't – I don't know how to explain it, like, I just couldn't move." (R. at 327). She explained that she did not call the Air Force Office of Special Investigation (OSI) or her supervisor because she "didn't know what to do" and "didn't even know if it was worth sharing." (R. at 328-329). S.L. explained that when she told K.K. what happened, K.K. told her that if she did not report Appellant that K.K. would. (R. at 330). Around three days later, S.L. made a restricted report. (R. at 330-331). S.L. changed her report to unrestricted after she could not handle seeing Appellant at work every day. (R. at 348).

S.L.'s outcry to K.K. aligned with S.L.'s trial testimony.

K.K. testified that S.L. came to her room the morning after she was sexually assaulted. (R. at 273-274). She testified that S.L. told her that she felt Appellant touch her but brushed it off. (R. at 274). But then, S.L. felt Appellant pull down her pants and insert a finger in her vagina. (R. at 274-275).

Appellant apologized to S.L. twice.

The morning after the sexual assault, Appellant texted S.L. and apologized. He said,



(Pros. Ex. 4.). S.L. replied that she would come by his room, but when she did not, Appellant slipped a letter under her door. (R. at 222, 235); *See* Pros. Ex. 4 (Appellant texted S.L. and asked, "Did you get my letter?").

Appellant's letter said,

S.L.

It hit me that seeing me is prally the last thing you want so I'm just going to write this out. I'm embarrassed and ashamed of what I did. That isn't in my nature to do that to someone with the friendship we have. That is something I would've done with someone who I know we had mutal feelings on the matter. I feel the trust we had is ruined and rightfully so. It's in my nature and intention to make everyone in my life feel safe and comfortable. You're an innocent soul and along with everyone in my life, I want to protect ya'll from outside, wrongful acts. I was raised to never disrespect/degrade a woman. Please know this is something I don't do and still confused why, in that moment, felt it was okay to do or was wanted by you. I feel I was a poor example of what a man is and failed you. I would do anything to take it back and have the honest, open friendship we were building. I'm still open to apologize in person, and hear what you have to say. I can't imagine ~~how~~ how this made you feel / affected you. I know there's no words to make up for this. I'm genuinely sorry S.L.

Greg V

(Pros. Ex. 3).

When S.L. did not respond to Appellant, he texted her again and told her that he reached out to family and friends to discuss what he did and was "looking for the best way to make this right." (Pros. Ex. 4).

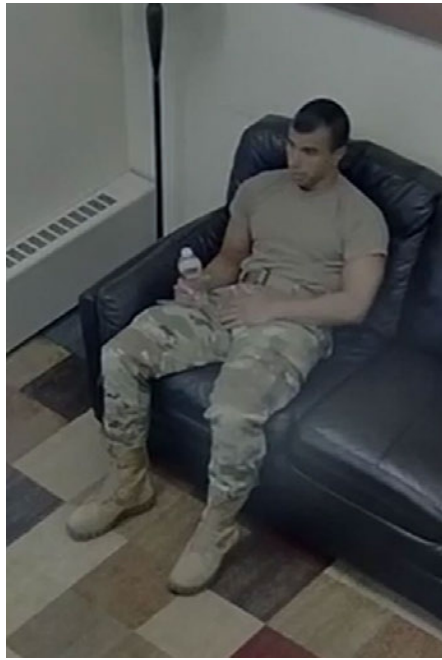
Appellant told his friend that he was ashamed of what he did.

Appellant admitted to his friend, H.G., that he “did something he was ashamed of.” (R. at 531). When testifying at trial, H.G. admitted that at times he was making assumptions about what happened based on what Appellant told him. (R. at 515, 526, 527). Therefore, the judge, as the fact-finder, asked H.G. to describe what Appellant said without making any assumptions or interpretations. (R. at 531). H.G. then explained Appellant’s confessional. (Id.)

H.G. testified that Appellant explained that he “did something he was ashamed of.” (Id.) Appellant said that he was hanging out with a girl and at one point they had been drinking. (Id.) They lay down in the bed. (Id.) Appellant touched her thigh, and she didn’t reject him so he “proceeded to put his hand on her genital region.” (Id.) The girl pushed Appellant’s hand away, and he felt embarrassed and ashamed and turned away from the girl on the bed. (Id.)

Appellant admitted to touching S.L.

Appellant’s statements and gestures to OSI conceded that he touched S.L.’s vagina over her clothes. Appellant waived his right to remain silent and spoke to OSI. (Pros. Ex. 1; R. at 207-237). Appellant admitted that he touched the front of S.L.’s “groin area” and demonstrated where he touched her by placing his hand on his genitals and saying that his hand was “right here.” (Pros. Ex. 1 at 55:19).



(Id).

To explain how he moved his hand from her hip to her vagina, Appellant drug his hand across his body from his hip to his genitals as an example. (Id. at 56:55-57:02). Appellant claimed to OSI that when his hand got to S.L.’s genitals, she moved his hand off her. (Id.) Appellant explained that he apologized in the text and letter because he believed he might have done something after S.L. moved his hand away. (Pros. Ex. 1, at 54:28).

Appellant admitted that he did not know what S.L. wanted.

Appellant confessed to OSI that he did not know what S.L. wanted. (R. at 236-267). He justified it by saying that he was “really drunk” and “assum[ed]” that when he was drunk “it seemed, like, she just wanted more.” (Id.) Appellant conceded that his perception when he is intoxicated may not align with reality. He told OSI, “When you’re drunk, things seem a certain way and then it’s, like, you know, you break out of it. And you’re like, it really wasn’t.” (R. at 228).

In addition to misperceiving reality, Appellant’s memory suffered due to alcohol intoxication. During that interview, Appellant repeatedly explained that the night of the sexual

assault he was heavily intoxicated and did not remember many parts of the night. (R. at 226, 227, 228, 236).

ARGUMENT

I.

APPELLANT’S CONVICTION FOR VIOLATING ARTICLE 120(b)(2)(A), UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews whether a conviction was legally sufficient de novo. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

This Court reviews questions of factual sufficiency when an appellant asserts an assignment of error and makes a specific showing of a deficiency in proof. United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ).

This Court’s assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law

1. Legal Sufficiency

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” King, 78 M.J. at 221 (internal quotation marks omitted) (quoting United States v. Gutierrez, 73 M.J. 172, 175 (C.A.A.F. 2014)). “[T]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” Id. (citation omitted).

“The term reasonable doubt, however, does not mean that the evidence must be free from conflict.” United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citation omitted). This Court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The test for legal sufficiency “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.” United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)).

2. Factual Sufficiency

Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, states:

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.

(ii) After an accused has made 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.

This factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (2021).

A specific deficiency in proof is “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. United States v. Csiti, 2024 CCA LEXIS 160, *17-18 (A.F. Ct. Crim. App. 29 April 2024) (citing Harvey, 85 M.J. at 132).

“Appropriate deference” under Article 66(d)(1)(B)(ii)(I) depends on the nature of the evidence at issue. Harvey, 85 M.J. at 130. It is within this Court’s discretion to determine what level of deference is appropriate, but CAAF provided helpful examples in Harvey. The Court explained that deference may be high when assessing the testimony of a fact witness because “the CCA judges could not see the witness testify.” Id. at 131. On the other hand, “when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial” the appropriate deference might be low. Id.

The quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is the same as the quantum of proof necessary to find an accused guilty at trial – proof beyond a reasonable doubt. Id.

There are two requirements to overturn a conviction based on factual insufficiency. First, this Court “must decide that the evidence, as [this Court] has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt.” Id. Second, this Court must be clearly convinced of this decision. Id.

This Court has given “little weight” to an appellant’s contention that a victim “lacked credibility because she experienced fragmentary alcohol-induced blackouts throughout the night” when the victim’s testimony described the sexual assault. United States v. Evangelista, 2025 CCA LEXIS 501, *24 (A.F. Ct. Crim. App. 5 Nov 2025) (unpub. op.) In Evangelista, the victim testified that she was very drunk and had fragmentary blackouts throughout the night resulting in

her remembering some events of the evening but not others. Id. at *21. The victim did remember changing clothes, eating food, watching videos, and falling asleep without the appellant in the bed. Id. at *22. After she fell asleep, the victim woke up because she felt a hand in her underwear. Id. She was very tired and intoxicated but recalled that she felt the hand coming from the right. She described the appellant's hand as "crawling" from her stomach into her underwear and explained that she felt fingers on her clitoris and going inside her vagina. Id.

"Proof beyond a reasonable doubt does not require corroboration from scientific evidence or eyewitness testimony; the law is settled that '[t]he testimony of only one witness may be enough.'" Evangelista, 2025 CCA LEXIS at *24-25 (quoting United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006)).

This Court has also found "little merit" in an appellant's argument that the conviction was factually insufficient because the victim's "post-assault conduct was not consistent with someone who had been assaulted[.]" Id. at *27.

3. Article 120(b)(2)(A), Sexual Assault Without Consent

To establish that Appellant violated Article 120(b)(2)(A), UCMJ, the Government was required to prove: (1) that the accused committed a sexual act upon the victim, and (2) that the victim did not consent to that sexual act. Article 120(b)(2)(A), UCMJ. ²

Our superior Court has held that Article 120(b)(2)(A), sexual assault without consent, is a distinct offense from Article 120(b)(2)(B), sexual assault while the victim is asleep. United States v. Casillas, ___ M.J. ___, 2025 CAAF LEXIS 692, *13 (C.A.A.F. 2025).³ For that

² Unless otherwise specified, all references to the UCMJ refer to the 2019 edition.

³ Casillas is a published opinion but has not yet been reported on Lexis.

reason, the Government cannot “prove lack of consent by establishing that the victim was asleep at the time of the act.” Id. But if the victim woke up during the sexual assault, a conviction for sexual assault without consent in violation of Article 120(b)(2)(A) can be legally and factually sufficient.

Analysis

Appellant’s conviction for sexually assaulting S.L. by penetrating her vulva without her consent is legally and factually sufficient. The Government charged, argued, and proved that Appellant sexually assaulted S.L. without her consent. At no point did the Government rely on S.L.’s intoxication or other incapacity, such as sleep, to prove that Appellant sexually assaulted S.L. without her consent. Instead, the evidence showed that S.L. was awake, had not consented and did not consent to Appellant penetrating her vulva with his finger, and that Appellant did not have a reasonable mistake of fact as to consent.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all the essential elements of Article 120(b)(2)(A) beyond a reasonable doubt. King, 78 M.J. at 221; Barner, 56 M.J. at 134. So Appellant’s conviction is legally sufficient.

This Court, after giving appropriate deference to the fact that the trial court heard and saw the witnesses, should not be clearly convinced that the evidence does not prove that Appellant is guilty beyond a reasonable doubt. Harvey, 85 M.J. at 130. As a result, Appellant’s conviction is factually sufficient.

1. Legal and factual errors critically undermine Appellant’s argument.

Appellant’s argument that his conviction is not legally or factually sufficient depends on incorrect legal and factual premises. With these errors removed, Appellant’s argument must fail.

A. The law does not require a victim to actively refuse or communicate her refusal to her assailant.

Appellant's legal error arises from his claim that the prosecution must prove that the alleged victim had the capacity to consent but "*actively refused or that her refusal was communicated to the accused*" to prove sexual assault without consent. (App. Br. at 7) (emphasis added). This is incorrect. Appellant cites to United States v. Robinson, 77 M.J. 294, 298-299 (C.A.A.F. 2018) for this proposition. Not only did Robinson involve an older version of Article 120 not at issue here, but also that case did not involve a charge of sexual assault without consent and the Court did not hold what appellant argues.

All people constantly exist in a state of non-consent until they freely agree to the sexual conduct at issue. Although, according to CAAF, the Government cannot prove a lack of consent merely by proving that the victim was incapacitated or asleep, that does not mean the Government must prove that the victim "actively refused or that her refusal was communicated to the accused." (App. Br. at 7). In fact, the statutory definition of consent directly refutes Appellant's argument by explaining, consent is a "freely given agreement" and that "lack of verbal or physical resistance does not constitute consent." 10 U.S.C. § 920(g)(7)(A).

As a result, this Court should disregard Appellant's claim that his conviction is not legally or factually sufficient because S.L. did not "actively refuse" or communicate her active refusal to Appellant. It is enough that the evidence showed that there was not a "freely given agreement" between Appellant and S.L. for him to penetrate her vulva with his finger. 10 U.S.C. § 920(g)(7)(A).

B. The facts do not support that S.L. was asleep or incapacitated when Appellant sexually assaulted her, or that she could not communicate her lack of consent.

One incorrect factual premise in Appellant's argument is that S.L. was asleep or incapacitated when the sexual assault occurred. (App. Br. at 6, 13). This claim is not supported

by the evidence. S.L.'s testimony established that S.L. was awake when Appellant penetrated her vulva with his finger. (*See* R. at 321-326, 430-431)(S.L. explained how she awoke to Appellant's hand on her vagina over her clothes and she rolled over. She stayed awake and felt Appellant penetrate her vulva with one or two fingers and pushed his hand away.). And there is no evidence that S.L. was incapacitated because of intoxication. In fact, S.L. testified that she was not so intoxicated that she was rendered unconscious or had gaps in her memory. (R. at 464-465).

While Appellant claims that S.L. was incapacitated because of alcohol intoxication based on her weight and the amount of alcohol she consumed, there is no evidence in the record to support this claim. (App. Br. at 9). An expert in toxicology did not testify, S.L.'s blood-alcohol content was not analyzed, and there was no evidence of the amount of alcohol S.L. must consume to suffer adverse effects like incapacitation. This Court's assessment of legal and factual sufficiency is limited to the evidence produced at trial. Rodella, 82 M.J. at 525. Therefore, without evidence to support Appellant's claim, this Court should disregard all of Appellant's assertions that S.L. was incapacitated because of alcohol consumption.

Next, Appellant's conflates two distinct instances when he claims that S.L. was asleep when Appellant sexually assaulted her. (App. Br. at 8). S.L. testified that she woke up to Appellant's hand on her vagina over her shorts – the first instance of Appellant touching S.L. as captured in Specification 2 of the Charge which Appellant was acquitted of. (R. at 320-321; *Entry of Judgment (EOJ)*). She rolled to her side, away from Appellant, to get him to stop, and his hand moved off her. (R. at 321, 322). As she lay awake and thought about leaving, Appellant ran his hand up her leg and under her shorts and put one or two fingers in her vagina for a few seconds – as captured in Specification 1 of the Charge. (R. at 323-325, 326, 428, 430-

431; *EOJ*). This was the second instance of Appellant touching S.L. and her testimony established that she was awake, and capable of consenting.

Appellant also claims that S.L. was too intoxicated to have “meaningful consent communication.” (App. Br. at 14). Even disregarding the legal error in this argument explained above, there is no evidence that S.L. was so intoxicated that she could not communicate. In fact, S.L.’s testimony that she rolled away from Appellant after he touched her the first time and moved his hand away when he touched her the second time undermines Appellant’s claim that she could not communicate. (R. at 322, 325, 431-432). Moving someone’s hand away is a physical manifestation that one does not consent to the sexual contact.

Finally, Appellant claims that fact that Appellant penetrated S.L.’s vulva was not established. (App. Br. at 8). This is incorrect. Appellant errs by focusing on when S.L. testified about waking up to Appellant touching her over her clothes instead of when S.L. testified about Appellant penetrating her vulva with his finger. (*Id.*) Trial counsel asked S.L., “Did the finger [Appellant’s finger] go inside your vagina?” S.L. responded, “Yes, Sir.” (R. at 325). S.L. testified that Appellant’s finger was in her vagina for seconds. (R. at 325, 430-431). On cross-examination, S.L. confirmed that Appellant used one or two fingers and knew that it was not three or four. (R. at 430-431). As Appellant points out, S.L. even told OSI that after she woke up to Appellant touching her over her clothes, he then eventually inserted his fingers into her vagina. (R. at 581). This testimony is neither “vague” nor “contradictory” as Appellant claims. (App. Br. at 8). Instead, S.L. clearly established that Appellant penetrated her vulva with his finger after putting his hand in her shorts. As explained below, S.L.’s testimony is credible.

With Appellant’s legal and factual errors disregarded, the evidence establishes that Appellant’s conviction is legally and factually sufficient.

2. Appellant's conviction is legally sufficient.

A. S.L.'s testimony established that Appellant penetrated her vulva with his finger.

S.L. testified that she awoke to Appellant's hand on her vagina over her shorts. (R. at 320-321). She rolled away from Appellant to get him to stop touching her and his hand moved off her. (R. at 321, 322). As she lay awake and thought about leaving, Appellant ran his hand up her leg and under her shorts and put one or two fingers in her vagina for a few seconds. (R. at 323-325, 326, 430-431). This testimony established that Appellant penetrated S.L.'s vulva with his finger – the first element of Article 120(b)(2)(A).

B. S.L.'s testimony established that she did not consent to Appellant penetrating her vulva with his finger.

S.L.'s testimony, and her statements to OSI, established that she was awake when Appellant penetrated her vagina with her finger. (R. at 323, 326; Pros. Ex. 8). Because she was awake, and capable of consenting, the only remaining issue is whether S.L. consented to Appellant's sexual contact. S.L.'s testimony and Appellant's statements to OSI established that S.L. did not consent.

S.L., Appellant, K.K., and H.G. all confirmed that S.L. and Appellant did not have a romantic, sexual, or flirtatious relationship. (R. at 212, 213, 214, 218-219, 269, 271, 303-304, 310-311, 318, 319, 509-510). Before the sexual assault, S.L. and Appellant had never discussed having any sexual contact. (R. at 326). The night of the sexual assault, S.L. and Appellant did not flirt, cuddle, or discuss having sexual contact. (R. at 320, 326). Finally, S.L. confirmed that she did not consent to sexual contact with Appellant. (R. at 326). So before Appellant penetrated her vulva with his finger there was not a "freely given agreement" between S.L. and Appellant for him to do so. 10 U.S.C. § 920(g)(7)(A). As a result, Appellant penetrated S.L.'s

vulva with his finger without her consent and the second element of Article 120(b)(2)(A) was established.

3. Appellant's conviction is factually sufficient.

As explained above, S.L.'s testimony established that Appellant sexually assaulted her in violation of Article 120(b)(2)(A). Nothing in the record should lead this Court to be clearly convinced that the evidence did not support Appellant's conviction beyond a reasonable doubt.

Although Appellant does not couch his argument in terms of his burden to make a specific showing of a deficiency in proof, Appellant argues that his conviction is not factually sufficient because of Appellant's statements to OSI, S.L.'s behavior after she was sexually assaulted, and the lack of DNA, a Sexual Assault Nurse Examination (SANE), and security camera footage. (App. Br. at 8-10, 15, 20). These arguments are unpersuasive, and this Court should not be clearly convinced that the evidence does not support Appellant's conviction beyond a reasonable doubt for three reasons: (A) S.L.'s testimony was more credible than Appellant's denials to OSI; (B) S.L.'s behavior after she was sexually assaulted does not create reasonable doubt; and (C) the lack of DNA or other forensic evidence does not undermine the evidence.

A. S.L.'s testimony is more credible than Appellant's statements to OSI.

When conducting factual sufficiency review, this Court must weigh the evidence while giving "appropriate deference" to the fact that the trial court saw and heard the witnesses in a way this Court cannot. Harvey, 85 M.J. at 130. This case turned on the trial court's evaluation of witness credibility – particularly S.L. Based on this, in accordance with CAAF's guiding examples, this Court should approach the trial court's determination that S.L. was credible with greater deference. *See Harvey*, 85 M.J. at 130 (explaining that a CCA may give greater

deference to witness testimony). But even without any deference, this Court should find S.L.'s testimony is more credible than Appellant's statements to OSI for two reasons: (1) S.L.'s testimony about the night of the incident, and the evening before, were corroborated by K.K., H.G. and Appellant; (2) Appellant's self-serving bias and lack of memory because of intoxication undermine his credibility.

(i) S.L.' s testimony was corroborated.

This Court has previously found a victim's testimony about being sexually assaulted credible enough to support a conviction on factual sufficiency review when her testimony about the surrounding circumstances was corroborated. Evangelista, 2025 CCA LEXIS 501. Here, S.L.'s testimony about both the surrounding circumstances and the sexual assault were corroborated. As a result, this Court should not be clearly convinced that the evidence does not support Appellant's conviction beyond a reasonable doubt.

S.L. testified that the day before the sexual assault, she, K.K. and another person went to Appellant's room to "pre-game" (drink alcohol) before going out to a bar called Gaslight – K.K., H.G. and Appellant corroborated this. (R. at 215, 302, 305-306, 510-512). S.L. testified that she rode a mechanical bull at the bar and was squeezing so hard to stay on that she got bruises on her upper thighs – Appellant corroborated this. (R. at 215, 307) (Appellant characterized it as "gashes" or "scars").

S.L. testified that she and K.K., but not the other person, went back to Appellant's dorm – Appellant, K.K. and H.G. corroborated this. (R. at 216, 310, 510-512) (Appellant does not mention the third person but says, "[S.L.] and them come back[.]"). S.L. testified that H.G. was already there – Appellant, K.K. and H.G. corroborated this. (R. at 216, 310, 510-512). S.L. testified that K.K. left – Appellant and K.K. corroborated this. (R. at 216, 311). S.L. testified

that she, H.G. and Appellant fell asleep on Appellant's bed, and that H.G. was in the middle and she and Appellant were on opposite ends – H.G. and Appellant corroborated this. (R. at 216, 217, 311, 312, 510-512). Finally, S.L. testified that she and Appellant did not have a romantic, sexual, or flirtatious relationship. (R. at 303-304, 310-311, 318-319). Appellant, K.K., and H.G. corroborated this. (R. at 212, 214, 509-510). S.L. recalled all these corroborated details despite having consumed alcohol. (R. at 305, 308).

Appellant's deep shame and apologies to S.L. also corroborated that he sexually assaulted her. Appellant felt so much shame and guilt for what he did to S.L. that he apologized twice, consulted friends and family, and even told H.G. that he "did something he was ashamed of." (Pros Exs. 3, 4; R. at 531). Appellant characterized his actions as disrespecting or *degrading* a woman. (Pros. Ex. 3) (emphasis added). He admitted that there were "no words to make up for" his actions. (Id.) It is incongruous with common sense and knowledge of the ways of the world to believe that Appellant was so distraught about merely touching S.L.'s upper thigh or groin area over her clothes.

S.L.'s initial outcry to K.K. corroborated S.L.'s sworn testimony about the sexual assault. K.K. testified that S.L. told her that initially Appellant "brushed" against her in the bed and she ignored it. (R. at 276-277). This corroborated S.L.'s testimony that Appellant first touched her over the clothes and she rolled away. K.K. also testified that S.L. told her that Appellant "inserted a finger into her vagina" and that S.L. "slapped" Appellant's hand away. (R. at 274). This corroborated S.L.'s testimony about Appellant sexually assaulting her by inserting his finger into her vagina.

Additionally, S.L.'s actions after she was sexually assaulted corroborated that she was sexually assaulted. S.L. testified that after Appellant penetrated her vulva with his finger, she

pushed his hand away, gathered her belongings and left his room. (R. at 326-328). She then took a shower because she felt “disgusting.” (Id). After her shower, she told her friend, K.K., what Appellant did to her. (R. at 274, 276). Three days later, S.L. filed a restricted report. (R. at 330-331). She only unrestricted her report after she could not handle seeing Appellant at work every day. (R. at 348). These actions are all consistent with a person who has been sexually assaulted especially because S.L. did not have a motive to fabricate.

That S.L. was repeatedly corroborated by two witnesses and Appellant, despite having consumed alcohol, supports the conclusion that her testimony was credible. Therefore, based on S.L.’s testimony about how Appellant sexually assaulted her, this Court should not be clearly convinced that the evidence does not support Appellant’s conviction beyond a reasonable doubt. Harvey, 85 M.J. at 130.

(ii) Appellant’s self-serving statements to OSI are unpersuasive.

The fact that Appellant and S.L.’s testimonies conflicts about what happened during the sexual assault is not only unsurprising but also expected. Appellant, a 31-year-old man with a degree in psychology, had a motive to fabricate and minimize his criminal culpability when talking to OSI. It is logical that Appellant attempted to minimize his culpability by only admitting to touching S.L. over her clothes rather than admitting to the serious crime of penetrating S.L.’s vulva without her consent. Appellant’s minimization of his culpability was evident in his interview with OSI. Appellant emphasized the amount of alcohol he was drinking and how things “seem a certain way” when you are drunk, and initially Appellant denied that he touched S.L.’s vagina or private areas only to finally admit, by gesturing, that he put his hand on her vagina over her clothes. (R. at 221, 226-228, Pros. Ex. 2).

Further, Appellant's denial that he sexually assaulted S.L. to OSI was unpersuasive because he admitted to what he now accuses S.L. of – that he couldn't remember parts of the night because of how intoxicated he was. (App. Br. at 20; R. at 227, 228) ("From what I can remember, again, it's like, just super fuzzy. . . "; "I couldn't even, like, remember parts of, like, the night, like, that's how drunk I was.").

On the other hand, there was no evidence that S.L. was suffering from "severe alcohol impairment" as Appellant now claims. (App. Br. at 9). S.L. was unequivocal that she did not consume so much alcohol that she was suffering from memory gaps because of alcohol-induced blackout. (R. at 464-465). Additionally, there was no evidence that S.L. was "taking" prescription medication at the same time she was consuming alcohol as Appellant claims. (App. Br. at 14). In fact, at the page cited by Appellant, trial defense counsel asked S.L., "What medications were you on the night of the assault?" and S.L. responded, "None." (R. at 419). It was not that S.L. "couldn't" recall what medications she was taking – instead, she only could not recall what active prescriptions she had at that time. (Id.) Therefore, unlike Appellant, there was no evidence to establish that S.L.'s memory was unreliable because of alcohol, or prescription drugs. As a result, S.L.'s testimony should be afforded more weight than Appellant's statements to OSI.

B. The lack of DNA evidence and security footage does not undermine the evidence.

The testimony of one witness may be enough to support proof beyond a reasonable doubt. Evangelista, 2025 CCA LEXIS at *24-25. Appellant's argument that the absence of DNA evidence, a SANE report, or security camera footage creates reasonable doubt such that his conviction should be overturned on factual insufficiency is unpersuasive. His argument, and the facts in his case, are similar to the facts of Evangelista in which this Court found an absence of similar evidence did not result in factual insufficiency. Id.

In Evangelista, this Court rejected that the conviction was factually insufficient because the Government did not offer evidence “such as deoxyribonucleic acid (DNA), blood alcohol content (BAC) results, video, audio, or eyewitness testimony. . .” Id. at *25. In that case, the Government called witnesses and introduced evidence who corroborated the events before and after the sexual assault.

Similarly, in Appellant’s case, the lack of a SANE report from S.L., DNA collection, or security camera footage does not create reasonable doubt. No evidence supports Appellant’s claim that digital penetration, “even brief, would likely leave some trace evidence that could be forensically analyzed.” (App. Br. at 10). Although there was a camera in the hallway outside Appellant’s room, there is no evidence the camera was functional or that any footage was recorded the night of the sexual assault.

Even if this evidence did exist, nothing suggests that, had it been collected, it would have been favorable to Appellant’s case. In fact, it is more likely this evidence would have been favorable to the Government. Security camera footage would have shown S.L. going to and leaving Appellant’s room – as she testified to. Identity was not at issue, but DNA evidence, if it existed, would have corroborated that Appellant touched S.L. as she testified. A SANE report would have been another early outcry by S.L. that she was sexually assaulted.

Without any indication that this evidence would have been favorable to Appellant, this Court should not be clearly convinced that the absence of such evidence undermines the evidence of Appellant’s conviction beyond a reasonable doubt. Especially when the Government produced sufficient evidence through S.L.’s credible testimony about how she was sexually assaulted as well as witness testimony detailing the events before and after the sexual assault which is sufficient to convict Appellant beyond a reasonable doubt.

C. S.L.’s reaction to Appellant sexually assaulting her does not create reasonable doubt.

Appellant incorrectly states that S.L. “testified” that she immediately fell back asleep after pushing Appellant’s hand away and remained in his bed until morning. (App. Br. at 15). In fact, nowhere within the pages cited by Appellant does S.L. *testify* that she immediately fell asleep and remained in Appellant’s bed until morning.

There was only weak evidence that S.L. fell asleep after Appellant sexually assaulted her in the form of a single sentence S.L. said to OSI. In her interview with OSI, in Defense Exhibit I, S.L. said, “Eventually he put his fingers in. And then I moved his hand. I just froze. I didn’t do anything. I think I fell back asleep and woke back up. I don’t know how much later, like an hour later, two, three hours later, I went back to my room.” (Def. Ex. I, Video 2). Compared to S.L.’s *sworn* testimony at trial, where she unequivocally denied falling back asleep after pushing Appellant’s hand away and explained how she gathered her belongings and left, her OSI interview does not undermine her trial testimony about how she reacted to Appellant sexually assaulting her. (R. at 326-328, 433).

Even if S.L. did fall back asleep after Appellant sexually assaulted her, this does not create reasonable doubt that S.L. was sexually assaulted. This is especially true because S.L.’s other behavior after being sexually assaulted reflected a person who was sexually assaulted. S.L. testified that when Appellant sexually assaulted her by penetrating her vulva with his finger, she pushed his hand away. (R. at 325). She then gathered all her belongings so she would not have to return and left. (R. at 326-328). S.L. explained that she went to her room and took a shower because she felt “disgusting.” (R. at 328). Afterward, she went to K.K.’s room and told her what Appellant did and filed a restricted report. (Id.) S.L. unrestricted her report after she could not handle seeing Appellant at work every day. (R. at 348). All these actions are consistent with

someone who had been sexually assaulted. As a result, even if S.L. fell asleep after removing Appellant's hand from her body, this Court should not be clearly convinced that the evidence does not support Appellant's conviction.

D. Appellant did not have a reasonable mistake of fact as to consent.

For mistake of fact as to consent to be a defense it must be "honest and reasonable." United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019). The evidence in Appellant's case supports neither that Appellant had an honest belief nor that such a belief is reasonable.

Appellant did not honestly believe S.L. consented to him penetrating her vulva with his finger. If he had, he would not have felt so despondent about his actions that he wrote S.L. an apology letter, apologized to her over text, confided in friends and family about his actions, and told his friend H.G. that he did something he regretted. Tellingly, nowhere in Appellant's many expressions of remorse did he say that he believed S.L. wanted or consented to his sexual contact. Instead, he wrote that what he did was "something I would've done with someone who I *know* we had *mutual feelings* on the matter," and told OSI that he "didn't know" what S.L. wanted. (Pros. Ex. 3; R. at 228) (emphasis added). This demonstrated that Appellant did not honestly believe that S.L.'s actions were consenting to his sexual contact and so reasonable mistake of fact was not a defense to Appellant's conduct.

Appellant's argument that the "relationship context" undermined that S.L. did not consent, like the argument in Evangelista, is unpersuasive. (App. Br. at 16). "A current or previous dating or social or sexual relationship by itself . . . does not constitute consent." 10 U.S.C. §920(g)(7). Accordingly, in Evangelista, this Court rejected the appellant's argument that the appellant had a reasonable mistake of fact as to consent based on his friendship with the victim, how he and the victim interacted throughout the evening, that the victim changed into a

t-shirt and underwear to go to sleep, and the victim’s “lack of any adverse communication response” during the assault. Evangelista, 2025 CCA LEXIS at *31. This Court explained “the manner in which [the victim] socialized with [the appellant] and her choice of sleep wear [on the night of the assault] gave no license to [the appellant] to sexually penetrate [the victim]” when the appellant had “no prior sexual relationship” with the victim and no facts indicated the victim had “any desire to have intimate relations” with appellant before he “watched her get into bed very drunk and fall asleep.” Id. at *32. Appellant’s case fails for the same reason.

None of S.L.’s interactions with Appellant – including sleeping in his bed, Appellant touching a bruise on S.L.’s leg, or S.L. wearing short shorts – could reasonably be interpreted by an ordinary, prudent, *sober* adult as consent on the night of the sexual assault. Evangelista, 2025 CCA LEXIS at *17-18 (citations omitted). Appellant seemingly conceded as much when he admitted that things “seem a certain way” when you are drunk but “it really wasn’t” and when he assumed that when he was drunk it seemed like S.L. “wanted more.” (R. at 228, 236-237).

That S.L. slept in Appellant’s bed one time the night before she was sexually assaulted, could not reasonably be interpreted as consent on the night Appellant sexually assaulted her. While Appellant claims that S.L. slept in Appellant’s bed on “multiple” occasions, the evidence supports that she only slept in his bed one time – the night before the sexual assault – aside from the night she was sexually assaulted. (App. Br. at 16; R. at 354-355). Even if Appellant’s version of events is correct, and S.L. slept in his bed two times aside from the night she was sexually assaulted, the fact that a third person was present for both instances – K.K. or H.G. – undermines even the unreasonable belief that S.L. *sleeping* in his bed was somehow romantic or sexual in nature. Additionally, the fact that no sexual contact occurred during either instance but

instead everyone just slept belies any claim that S.L. was indicating she was interested in sexual activity by sleeping in Appellant's bed.

Appellant incorrectly claims S.L. "testified that she had shown [Appellant] a bruise on her inner thigh by physically guiding his hand to touch the area. R. at 214." (App. Br. at 17). The page cited by Appellant contains *Appellant's* interview with OSI where he claimed that is what happened. (R. at 214). S.L. testified Appellant touched the bruise on her thigh, three to four inches below her vagina, but denied that she put his hand on her thigh. (R. at 424). When he touched her bruise, she testified that she "[s]tood up and walked away[.]" (R. at 425). But even if S.L. had moved Appellant's hand to touch a bruise on her thigh, that action could not reasonably be interpreted as consent for him to penetrate her vulva with his finger. (R. at 424-425, 456-457).

Our superior Court has found that even sexual contact such as kissing is not probative of whether the person later consented to sexual contact. United States v. St. Jean, 83 M.J. 109, 114 (C.A.A.F. 2023). S.L. *controlling* when and how Appellant could touch a bruise on her leg, at least three inches below her vagina, could not reasonably be interpreted as consent to unprompted and unguided penetration of her vulva with his finger.

Finally, S.L. wearing "short shorts" certainly could not be reasonably interpreted as consent to Appellant penetrating her vulva with his finger. "[T]he manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." 10 U.S.C. §920(g)(7).

Neither S.L.'s "manner of dress" nor her previous social relationship with Appellant constitutes consent. 10 U.S.C. §920(g)(7). No reasonably prudent person would believe that S.L., who Appellant had no prior romantic, sexual, or flirtatious contact with, was consenting to

him penetrating her vagina with his finger because she drunkenly slept in his bed in short shorts. Appellant even admitted to OSI that he did not know what S.L. wanted. (R. at 236-237). But even if Appellant honestly believed S.L. was consenting, his belief would not have been reasonable and so he did not have a reasonable mistake of fact as to consent.

Appellant did not honestly believe S.L. was consenting to his sexual conduct. Neither S.L.'s social relationship nor her manner of dress could reasonably be interpreted as her consenting to Appellant penetrating her vulva with his finger. Therefore, this Court should not be clearly convinced that the evidence does not support Appellant's guilt beyond a reasonable doubt. Harvey, 85 M.J. at 130.

4. Appellant is wrong that Mendoza “independently requires reversal of [Appellant's] conviction. (App. Br. at 13).

Appellant's case is not like Mendoza, because the Government did not “merely” establish that S.L. was asleep or incapacitated to prove that Appellant sexually assaulted her without her consent. United States v. Mendoza, 85 M.J. 213, 222 (C.A.A.F. 2024). Trial counsel was aware of the limitations on how the Government can prove sexual assault without consent from Mendoza. (See R. at 539-540, 543-544)(Trial counsel recognized that Mendoza prevents proving without consent only by evidence that the victim was asleep and argued that S.L. being asleep only related to Appellant's mistake of fact as to consent). As a result, trial counsel in opening and closing argument *only* relied on evidence that S.L. was awake when Appellant penetrated her vagina, that S.L. did not consent, and that nothing about S.L. and Appellant's relationship would have created a reasonable mistake of fact that she consented. (R. at 186-189, 605-622). Mendoza therefore does not require reversal of Appellant's conviction. Instead, Appellant's case is like, but even stronger than, Casillas and Evangelista. So this Court should find his conviction legally and factually sufficient.

In Casillas, the victim testified that she lay down in her bed after drinking alcohol. Casillas, 2025 CAAF LEXIS at *4-5. She testified that before falling asleep, she never told the appellant that he could penetrate her vagina, she did not consent to the appellant penetrating her vagina, and she did not want the appellant to penetrate her vagina. Id. Yet, she woke up to the appellant's penis penetrating her vagina. Id. at *14. CAAF found it "critical" that the victim's testimony established "that she was awake and aware of what was happening for at least a short time when [the appellant] was penetrating her, as alleged in the specification." Id. This critical fact supported "the rational conclusion that [the victim] had the capacity to consent, but that she did not consent to the sexual act." Id. Based on this, CAAF held "a rational trier of fact could have found the essential elements of the Article 120(b)(2)(A) offense beyond a reasonable doubt." Id.

The same critical fact is present in Appellant's case – S.L.'s testimony established that she was awake and aware of what was happening when Appellant penetrated her vagina with his finger. S.L. explained she was thinking about how she could leave after Appellant touched her the first time. (R. at 326). She described feeling Appellant's finger go up her shorts and penetrate her vagina. (R. at 429). She identified that it was one or two fingers but not three or four. (R. at 430-431). But unlike the victim in Casillas, the evidence of S.L.'s non-consent to Appellant's sexual contact is stronger. On top of not having consented before falling asleep like the victim in Casillas, S.L. *also* manifested non-consent by rolling away from Appellant after he touched her the first time and by removing Appellant's hand from her body when he penetrated her vagina with his finger. (R. at 321, 326-328).

Appellant's case is also like, but stronger than, Evangelista, 2025 CCA LEXIS 501. In Evangelista, this Court explained that it "must consider the totality of [the appellant's]

relationship with [the victim] and the events leading up to sexual penetration when analyzing the issue of consent.” Id. at *30. Like Evangelista, Appellant did not have a prior romantic or sexual relationship with S.L. But more importantly, unlike Evangelista, S.L. had demonstrated non-consent to Appellant touching her when she was awake and capable of consenting by rolling away when Appellant first put his hand on her vagina over her clothes. (R. at 321). Because the evidence here is not like Mendoza, but is stronger than both Casillas and Evangelista, this Court should find Appellant’s conviction legally and factually sufficient.

S.L.’s credible testimony meets the low bar of legal sufficiency because it establishes that a rational fact finder could find the essential elements of the offense beyond a reasonable doubt. King, 78 M.J. at 221; Barner, 56 M.J. at 134. Further, this Court, after giving appropriate deference to trial court, should not be clearly convinced that the evidence does not support Appellant’s guilt beyond a reasonable doubt. Harvey, 85 M.J. at 130. Therefore, this Court should affirm Appellant’s conviction and deny Appellant’s requested relief.

II.

THE JUDGE DID NOT ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE UNDER M.R.E. 412.

Additional Facts

Trial defense counsel moved to admit evidence under M.R.E. 412. (App. Ex. XXI; XXIII). Trial defense counsel sought to admit two proffered facts: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Government counsel and S.L.’s victim’s counsel responded to the defense motion opposing introduction of this evidence. (App. Ex. XIV; XXV).

Motions Hearing Testimony

During the motions hearing, [REDACTED]

[REDACTED] During that conversation, [REDACTED]

Appellant also testified that, [REDACTED]

Appellant said [REDACTED]

Appellant confirmed that [REDACTED]

Appellant confirmed that [REDACTED]

The Judge's Ruling

In his ruling, the judge found the following facts. [REDACTED]

The judge cited the following cases in his ruling. [REDACTED]

[REDACTED]

[REDACTED]

The judge explained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The judge explained, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The judge identified [REDACTED]

[REDACTED]

[REDACTED]

The judge explained

[REDACTED]

The judge also cited

[REDACTED]

Based on this, the judge concluded

[REDACTED]

Finally, the judge explained [REDACTED] He explained, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Next, the judge explained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Based on this, the judge ruled that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Standard of Review

This Court reviews a judge's ruling to exclude evidence under M.R.E. 412 for an abuse of discretion. United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011).

"A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008).

The abuse of discretion standard is strict and requires "more than a mere difference of opinion." United States v. Hendrix, 76 M.J. 283, 288 (C.A.A.F. 2017) (citation omitted). The

challenged action must be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” Id. If the exclusion of evidence is within “the range of choices reasonably arising from the applicable facts and the law” then the judge did not abuse his discretion. United States v. St. Jean, 83 M.J. 109, 112-113 (C.A.A.F. 2023) (quoting Miller, 66 M.J.at 307).

Law and Analysis

“M.R.E. 412 is a rule of exclusion which provides that in any proceeding involving an alleged sexual offense, evidence of a victim’s sexual behavior or predisposition is not admissible, subject to three limited exceptions.” St. Jean, 83 M.J. at 113. Two of those exceptions are: to prove consent under M.R.E. 412(b)(2) and if exclusion would violate the accused’s constitutional rights under M.R.E. 412(b)(3). Id. The appellant bears the burden of establishing that one of the exceptions applies. Id. at 113 (citing United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998)).

Generally, evidence of sexual predisposition of a victim is constitutionally required under M.R.E. 412(b)(3) if the evidence is relevant, material, and the probative value of the evidence outweighs the danger of unfair prejudice. Ellerbrock, 70 M.J. at 318 (citations omitted).

Evidence is relevant if it has any tendency to make the existence of any fact more or less probable than it would be without the evidence. United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010) (quoting M.R.E. 401)). To determine whether evidence is material, the judge looks at “the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue.” Id. (quoting United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004)). Finally, if the judge determines the evidence is relevant and material,

then he balances the probative value against the danger of unfair prejudice to the victim's privacy, to determine "whether the evidence is favorable to the accused's defense." Id.

Evidence falling under an exception to M.R.E. 412's general exclusion "is still subject to M.R.E. 403, which permits a military judge to,

[E]xclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

Id. (citing M.R.E. 403).

The dangers of unfair prejudice to be considered "include concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Ellerbrock, 70 M.J. at 318 (quotation and citations omitted). This is because, although an accused has the right to expose a witness' motivation in testifying pursuant to the Confrontation Clause of the Sixth Amendment, trial judges retain "wide latitude" to impose "reasonable limits on such cross-examination" based on the concerns for unfair prejudice. Del. v. Van Arsdall, 475 U.S. 673, 679 (1986). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (emphasis in original) (quotation and citation omitted).

Although a judge receives "wide discretion" in balancing probative value and danger of unfair prejudice, a judge receives "less deference" if he fails to articulate his analysis on the record. Id. (citing United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009)). When a judge conducts a proper balancing test under M.R.E. 403, an appellate court will not overturn the ruling, unless there has been a clear abuse of discretion. United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (citation omitted).

The judge did not abuse his discretion by excluding evidence under M.R.E. 412.

The judge correctly concluded that evidence that [REDACTED]

[REDACTED] and [REDACTED]
[REDACTED]

1. The [REDACTED] Conversation⁴

A. The judge correctly found [REDACTED]

The judge's conclusion that the evidence that [REDACTED]

[REDACTED] was correct. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. M.R.E. 401. [REDACTED] the sexual assault that did not involve a [REDACTED]

[REDACTED] does not have any tendency to lead the fact finder to conclude that S.L. consented to Appellant penetrating her vulva with his finger. Harrington, 2018 CCA LEXIS at *14-15.

S.L. and Appellant's relationship was never romantic, sexual, or flirtatious. (R. at 214, 269-271, 301-304, 487-488). The fact that there is only *one* instance where [REDACTED] [REDACTED] highlights that she and Appellant did not have a relationship that involved sexual interactions or even conversation. In fact, it demonstrates that S.L. was *uncomfortable* discussing [REDACTED] with Appellant because [REDACTED] she never did it again. And that one conversation did not alter her and Appellant's relationship. They continued to not discuss [REDACTED], engage in flirtatious or romantic behavior, or even socialize at work. (R. at; 487-488; 509-510). [REDACTED]

⁴ [REDACTED]
[REDACTED]

sexual assault, that [REDACTED] does not have any tendency to make it more likely that she consented to him penetrating her vagina with his finger [REDACTED]. Therefore, the judge correctly concluded [REDACTED]

Further, no reasonable person would believe that a [REDACTED] suggests that S.L. was consenting to Appellant, who she had no sexual or romantic relationship with before or after the conversation, penetrating her vulva with his finger unprompted [REDACTED]. Therefore, the judge correctly concluded [REDACTED]

Appellant's argument that this evidence was relevant because it "created a reasonable basis" for Appellant to believe that S.L. was interested in him and comfortable with [REDACTED] is unpersuasive for two reasons. (App. Br. at 30). First, while Appellant may wish to view this evidence as a "intimate communication pattern," a single conversation can hardly be considered a pattern. (App. Br. at 30). Second, and most importantly, a reasonable belief that S.L. was interested in Appellant or comfortable with [REDACTED] is *not the same* as a reasonable belief that S.L. consented to him penetrating her vulva with his finger. Especially when they had no further conversation about [REDACTED] and they both agreed their relationship was platonic.

Appellant's theory that the conversation shows "escalating intimacy" is also unpersuasive because it is not supported by the facts. (App. Br. at 29). There is no evidence that S.L. and Appellant's relationship was escalating in intimacy such that it tended to make consent or a reasonable mistake of fact as to consent more likely. Critically, [REDACTED]

[REDACTED]

[REDACTED] They did not discuss engaging in sexual conduct with each other. S.L. slept in his bed one time before the night of the sexual assault when another friend slept between her and Appellant. (R. at 312). S.L. did not have Appellant touch the bruise on her leg but even if she had that would not be indicative of consent to digital penetration. (R. at 424-425). Appellant's own words, and S.L.'s testimony, establish that their relationship was flatlined as a platonic relationship – not escalating towards unprompted digital penetration of her vulva. [REDACTED]

[REDACTED] and so the judge correctly concluded that it was irrelevant to consent or mistake of fact as to consent.

While Appellant is correct that the judge did not analyze whether the evidence was material, there was no need to because the judge determined [REDACTED]. (App. Br. at 28). Irrelevant evidence is not admissible, either under M.R.E. 412 or M.R.E. 401. Therefore, even if the judge had determined that the issue of consent and mistake of fact as to consent were material then he still would have correctly concluded that the evidence was inadmissible.

Appellant's argument that this evidence was necessary to rebut the prosecution's theory that S.L. and Appellant had a platonic relationship is unpersuasive because the evidence does not support it. [REDACTED]

[REDACTED]

[REDACTED] Therefore, that evidence could not have been material to rebut the fact that Appellant and S.L. had a platonic relationship when he penetrated her vulva with his finger without her consent.

B. The judge did not misapply St. Jean.

“Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.” United States v. Erikson, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted).

There is not clear evidence that the judge misapplied St. Jean to conclude [REDACTED]

[REDACTED] In St. Jean, CAAF considered the dissimilarity of the actions and the extended duration between the actions and concluded that the danger of unfair prejudice outweighed the probative value of the evidence. St. Jean, 83 M.J. at 114-115. Although Appellant’s case also involves dissimilar actions over an extended period, there is no evidence the judge relied on St. Jean in reaching his conclusion that the evidence was irrelevant. The judge did not cite to or reference St. Jean in that part of his analysis. He certainly did not write, “based on St. Jean, because the facts are dissimilar and occur over an extended amount of time, they are irrelevant as to consent and reasonable mistake of fact.” Without any clear evidence he misapplied the standard for relevance, he is entitled to the presumption that he knew and followed the law.

This is especially true because the dissimilarity between two events and the time between them can, as it does here, directly impact whether evidence is relevant to a given issue. St. Jean does not *preclude* a judge from analyzing the dissimilarity between actions and the extended duration between the actions when determining whether the evidence relevant for a given issue. The greater the dissimilarity and the longer the duration between two actions the less likely it is that the evidence has any tendency to make an issue more or less likely. Therefore, the judge properly considered such facts when reaching his [REDACTED].

C. Even if the judge misapplied St. Jean, he correctly concluded the [REDACTED]

The judge explained his M.R.E. 403 balancing analysis in his ruling on the conversation about [REDACTED] and so he is entitled to the greatest deference and should not be overturned on that

evidence absent a “clear abuse of discretion.” Ellerbrock, 70 M.J. at 318; Ediger, 68 M.J.at 248.

The judge’s conclusion [REDACTED]

[REDACTED]

[REDACTED] was not a clear abuse of discretion.

When two interactions are quite dissimilar, the probative value of the evidence is low. *See St. Jean*, 83 M.J. at 114 (finding dissimilar actions “not particularly probative” of whether a person consented). In *St. Jean*, our Superior Court found a trial judge did not abuse his discretion when he excluded evidence that the victim the appellant because “‘making out’ is simply not comparable to sexual intercourse” therefore “the fact that a person consented to kissing on one day is not particularly probative of the issue of whether that person consented to full sexual intercourse a day later.” *St. Jean*, 83 M.J. at 114.

As the judge explained, [REDACTED]

[REDACTED] Meanwhile, the danger of unfair prejudice substantially outweighs such exceedingly low probative value. The judge correctly identified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Even if the evidence were “marginally relevant” that is insufficient to establish its admissibility because allowing interrogation of S.L. based on a marginally relevant conversation is proper consideration for exclusion of evidence. Ellerbrock, 70 M.J. at 318.

If a judge’s decision that making out with an accused before a sexual assault cannot overcome the M.R.E. 403 balancing test is not an abuse of discretion, as our superior Court

found in St. Jean, then the judge's finding here that [REDACTED]

[REDACTED] is not an abuse of discretion.

Therefore, this Court should affirm the judge's finding and deny Appellant's requested relief.

2. Whether S.L.'s relationship with another person [REDACTED]

The judge correctly concluded that whether S.L.'s relationship with another person was [REDACTED] was not probative of whether S.L. consented to Appellant penetrating her vulva with his finger or whether Appellant had a reasonable mistake of fact that S.L. consented to him penetrating her vulva with his finger. The [REDACTED] of S.L.'s relationship with another person does not have *any* tendency to make it more or less likely that she consented to Appellant penetrating her vulva with his finger. Appellant's case is not like United States v. Sanchez, 44 M.J. 174, 179-180 (C.A.A.F. 1996), where sexual activity with another person is so "particularly unusual and distinctive" as to verify Appellant's version of their own sexual interaction that it is constitutionally required. In fact, there appears to be no information about the [REDACTED] of S.L.'s prior relationship in the record⁵ let alone enough to establish that her [REDACTED] with another person was so "unusual and distinctive" as to verify Appellant's version of his sexual interaction with S.L. Thus, the evidence has no probative value. The danger of unfair prejudice of wasting time or confusing the issues substantially outweighs

⁵ [REDACTED]

Although the defense is not required to prove proffered facts for the judge to determine whether one of the exceptions to M.R.E. 412 has been met, the lack of specificity certainly goes to the probative value of the evidence under M.R.E. 403

evidence with no probative value. Therefore, the judge correctly concluded that such evidence was inadmissible under M.R.E. 412.⁶ Based on this, this Court should affirm the judge's ruling and deny Appellant's requested relief.

Even if S.L. had discussed the "[REDACTED]" of her relationship with another person" with Appellant, which undersigned counsel can find no evidence in the record supporting that claim, the evidence would still be irrelevant to show consent or mistake of fact as to consent. (App. Br. at 32). Discussing the "[REDACTED]" of a relationship with another person is not relevant for whether S.L. consented to *Appellant* penetrating her vulva with his finger. Additionally, even if Appellant honestly believed it were, such belief would not be reasonable. So it is similarly not relevant for whether Appellant had a reasonable mistake of fact as to consent. Therefore, the judge's determination that such evidence was inadmissible was correct and should be upheld by this Court.

CONCLUSION

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

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

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

⁶ To the extent that the facts that S.L. ended a relationship, and Appellant knew about it has probative value to show that Appellant may have believed S.L. was open to a relationship with him, the defense introduced that information at trial. (R. at 304-305).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 12 December 2025.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	UNITED STATES' MOTION TO
	)	FILE PORTIONS OF ANSWER
	)	BRIEF UNDER SEAL
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
GREG A. VELAZQUEZ	)	No. ACM 40815
United States Air Force	)	
<i>Appellant.</i>	)	12 December 2025

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

Pursuant to Rules 13.2(b), 17.2(b), and 23.3(o) of this Court's Rules of Practice and Procedure, the United States moves to file under seal the following portions of its Answer to the Assignments of Error: portions of pages iii, 32-36, 39-45.¹ In a partially-sealed filing dated 12 November 2025, Appellant's second assignment of error relies on M.R.E. 412 matters and closed hearings that were sealed by the trial judge. (*See* App. Br. at 4, 17, 24, 27-36, 38). The United States' answer responding to Appellant's brief contains reference to and discussion of the underlying sealed matters. Therefore, Rule 17.2(b) requires portions of the brief to be filed under seal. Counsel for the United States cannot properly respond to Appellant's second assignment of error without citation to these materials.

¹ The sealed portions of these documents will be delivered via hard copy to the Court and the Appellate Defense Division today, and via mail to civilian appellate defense counsel.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to file under seal.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 12 December 2025.

[REDACTED]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel

[REDACTED]

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

UNITED STATES	)	No. ACM 40815
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF PANEL
Greg A. VELAZQUEZ	)	CHANGE
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to Panel 2 for appellate review.

This panel letter supersedes all previous panel assignments.



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee</i>	)	
	)	APPELLANT’S REPLY TO
v.	)	APPELLEE’S ANSWER TO
	)	ASSIGNMENTS OF ERROR
	)	
GREG A. VELAZQUEZ,	)	Before Panel 2
Airman First Class (E-3)	)	No. ACM 40815
United States Air Force	)	17 December 2025
<i>Appellant</i>	)	

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

The Government’s Answer attempts to rewrite the trial record and the law to salvage a conviction barred by *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024), which prohibits using evidence of a victim’s incapacity to prove a “without consent” charge. The Government has manufactured a post-hoc theory that S.L. was fully awake and capable of consenting—directly contradicting its trial strategy, which relied heavily on S.L.’s intoxication and sleep to explain her lack of resistance.

The Government cannot have it both ways. Because the Government failed to prove the essential element of penetration beyond a reasonable doubt and pursued a legal theory now barred by binding precedent, the findings must be set aside.

I.

**THE GOVERNMENT CANNOT SALVAGE A LEGALLY DEFECTIVE
CONVICTION BY AVOIDING *MENDOZA* OR BY RELYING ON INSUFFICIENT
EVIDENCE OF PENETRATION.**

A. The Government’s Case Violates *Mendoza* Because it Relied on Incapacity to Prove a “Lack of Consent” Offense.

The Government fundamentally misapprehends *Mendoza*. They argue that because S.L. allegedly “woke up” during the encounter, *Mendoza* does not apply. Gov. Ans. at 15.

Yet *Mendoza* holds: “what the Government cannot do is prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent.” *Mendoza*, 85 M.J. at 222. That is precisely what occurred here.

The Government charged A1C Velazquez under Article 120(b)(2)(A)—a theory requiring proof that the victim was capable of consenting but did not do so. *United States v. Robinson*, 77 M.J. 294, 298–99 (C.A.A.F. 2018). However, the trial record is replete with the prosecution’s reliance on S.L.’s incapacity—her intoxication and her state of being asleep—to establish her non-consent. S.L. testified: “I was asleep on my back... and I felt his hand touching my vagina.” R. at 581.

On appeal, the Government attempts to sever the incident into discrete micro-moments, arguing S.L. was asleep for the acquitted specification but “awake” for the convicted penetration. Gov. Ans. at 16–17. The alleged events occurred in a single, fluid continuum involving a heavily intoxicated complainant. By the Government’s own admission, S.L. did not verbally refuse, nor did she leave the bed immediately or call for help. R. at 433, 434. The Government cannot now abandon its incapacity theory to escape *Mendoza*. If S.L. was impaired enough to explain her lack of resistance, she was too impaired for a “lack of consent” theory; if she was awake and capable, her lack of resistance creates reasonable doubt as to consent. The “theory mismatch” identified in *Mendoza* is present and fatal. See *United States v. Evangelista*, No. ACM 40531, 2025 CCA LEXIS 501, at *20 (A.F. Ct. Crim. App. Nov. 5, 2025).

B. The Evidence of Penetration Remains Factually Insufficient

Stripped of the impermissible reliance on incapacity, the Government’s proof of penetration evaporates. S.L.’s testimony regarding penetration was plagued by inconsistency. She initially described feeling a hand “over my clothes” and only later claimed digits were inserted.

R. at 320, 581. This evolution, combined with her admission that she “can’t remember completely” parts of the night due to consuming 3-4 drinks on a 128-pound frame, creates insurmountable reasonable doubt. R. at 418–19. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The Government’s claim of “corroboration” is illusory. They cite A1C Velazquez’s apology as proof of guilt. Gov. Ans. at 21–22. A1C Velazquez consistently and specifically denied penetration to OSI, explaining his apology was for crossing a line by touching a friend over her clothes while drunk. R. at 226–27. An apology for inappropriate conduct is not a confession to a violation of the Uniform Code of Military Justice. S.L.’s “outcry” to Airman K.K. is not independent corroboration of the facts; it is merely a repetition of S.L.’s own impaired perception.

Finally, the complete absence of forensic evidence—no DNA, no SANE exam, no video footage—leaves S.L.’s wavering testimony standing alone against A1C Velazquez’s consistent denials. R. at 243. Where the Government fails to prove the physical act of penetration beyond a reasonable doubt, the conviction cannot stand.

II.

THE GOVERNMENT’S EVIDENCE DOES NOT PROVE S.L. WAS CAPABLE OF CONSENTING OR THAT SHE COMMUNICATED NON-CONSENT.

A. S.L.’s Physical State Establishes Incapacity for Meaningful Consent Communication

The Government acknowledges that S.L. “fell asleep” in A1C Velazquez’s bed and “awoke to Appellant’s hand on her vagina over her shorts.” Gov. Ans. at 5. Yet they ask this Court to treat the moment of her waking as a constitutional dividing line between incapacity and capacity. The law does not operate this way.

S.L.’s own description of her state upon waking is not one of clarity or decisiveness. She testified: “I was scared and did not know what to do.” R. at 321. She described feeling paralyzed: “I just couldn’t move.” R. at 327. This is not testimony of someone capable of engaging in the

affirmative, conscious decision-making required to either consent or communicate clear refusal. See *United States v. Rudometkin*, 82 M.J. 396, 407 (C.A.A.F. 2022).

The Government contends that S.L.’s physical responses—rolling away and pushing A1C Velazquez’s hand—constitute evidence of capacity to communicate. Gov. Ans. at 18. But S.L. testified she engaged in this behavior while “thinking about how she could leave” the bed, not from a position of conscious, deliberate refusal. R. at 323. She remained in the bed until morning and only left after extended deliberation. R. at 434–35. This pattern reflects the behavior of an impaired individual struggling to process what was happening to her due to a lack of capacity.

Moreover, S.L. admitted to consuming “2 to 4 alcoholic drinks” plus unrecalled prescription medications. R. at 418–20. She acknowledged experiencing blackouts from alcohol in the past. R. at 419. The Government argues there is “no evidence” of her incapacity because S.L. testified she did “not lose consciousness or have memory lapses that evening.” R. at 464–65. But this self-report contradicts basic toxicology and her own earlier admissions of memory gaps.

B. The Evidence Establishes Only Ambiguity and Reasonable Doubt, Not Clear Lack of Consent

Under the continuum framework in *United States v. Casillas*, __M.J. __, No. 24-0089, 2025 CAAF LEXIS 692 (C.A.A.F. Aug. 20, 2025), courts must examine “the entire course of conduct and relationship context” when assessing consent. *Evangelista*, 2025 CCA LEXIS 501, at *30. The Government’s rigid categorization of the relationship as purely “platonic” ignores evidence excluded by the military judge that would have illuminated the true dynamic.

S.L. voluntarily slept in A1C Velazquez’s bed on multiple occasions, including the night before the alleged incident. R. at 214–16. She wore short shorts and engaged in close physical proximity while consuming alcohol. R. at 220, 419. More significantly, S.L. herself initiated

intimate physical contact by guiding A1C Velazquez’s hand to touch a bruise on her inner thigh. R. at 214. A1C Velazquez consistently told investigators that S.L. “wanted him to touch her bruise” and guided his hand to the location. R. at 212–14. This material conflict in testimony exists precisely because critical evidence about [REDACTED] was excluded under M.R.E. 412.

A reasonable person in A1C Velazquez’s position could reasonably have misunderstood S.L.’s intentions or her capacity to communicate refusal. S.L. never verbally said “no” or “stop.” R. at 433. Her physical responses were ambiguous—a push followed by remaining in bed. R. at 325, 431–32, 434. The Government’s theory requires this Court to accept that in a state of mutual intoxication, with ambiguous signals, A1C Velazquez should have instantaneously intuited that S.L., despite her prior intimate physical contact and voluntary bed-sharing, did not consent. The burden of proof is on the Government, and they have failed to meet it beyond a reasonable doubt.

III.

THE MILITARY JUDGE COMMITTED CONSTITUTIONAL ERROR BY EXCLUDING EVIDENCE ESSENTIAL TO THE DEFENSE OF REASONABLE MISTAKE OF FACT.

The Government defends the military judge’s exclusion of evidence regarding [REDACTED] [REDACTED] by arguing that such evidence is irrelevant to consent. Gov. Ans. at 42. This position is constitutionally myopic. The Government’s entire case rested on portraying the relationship as strictly “platonic” and devoid of [REDACTED]. See Gov. Ans. at 2.

The excluded evidence was not offered to prove S.L.’s sexual predisposition or character—the danger M.R.E. 412 is designed to prevent. Rather, it was offered to prove A1C Velazquez’s state of mind and the reasonableness of his belief that S.L. was amenable to

sexual intimacy. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). If [REDACTED], S.L.'s behavior in sleeping in A1C Velazquez's bed takes on a different hue than if they were merely "work friends."

The probative value of evidence supporting a compelling defense—reasonable mistake of fact—is inextricably high. *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011). The exclusion of this evidence artificially bolstered S.L.'s credibility by shielding the fact-finder from the true nature of her interactions with the Appellant. Had the fact-finder been presented with the full picture—[REDACTED]—the Government's narrative of a "shocking" assault would have collapsed, and the defense of reasonable mistake of fact would have been squarely in play. The Government cannot prove beyond a reasonable doubt that this constitutional error did not contribute to the verdict. *See United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016).

CONCLUSION

The Government's case is legally barred by *Mendoza*, factually insufficient to prove penetration beyond a reasonable doubt, and constitutionally infirm. The conviction rests on the uncorroborated, shifting testimony of a witness who admitted she was asleep and intoxicated, contradicted by the Appellant's consistent denials and the complete absence of forensic evidence. The military judge's improper exclusion of critical M.R.E. 412 evidence denied A1C Velazquez his constitutional right to present a defense.

PRAYER FOR RELIEF

WHEREFORE, Appellant respectfully requests that this Honorable Court SET ASIDE the findings and sentence and DISMISS Specification 1 of the Charge.

Respectfully submitted,

JOSHUA TRAEGER, Esq.
Founding Attorney

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 December 2025.

Respectfully submitted,

[REDACTED]

JOSHUA TRAEGER, Esq.
Founding Attorney

[REDACTED]

[REDACTED]

Dwight H. Sullivan
Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION TO FILE
<i>Appellee,</i>	)	REPLY BRIEF UNDER SEAL
	)	
v.	)	
	)	Before Panel 2
Airman First Class (E-3)	)	
Greg A. Velazquez,	)	No. ACM 40815
United States Air Force,	)	
<i>Appellant.</i>	)	17 December 2025

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

COMES NOW Appellant, Airman First Class Greg A. Velazquez, by and through his undersigned counsel, and moves pursuant to Rule 23.3(o) of this Honorable Court’s Rules of Practice and Procedure to file his reply brief under seal.

The portion of Appellant’s reply brief addressing Assignment of Error III discusses matters from the closed Military Rule of Evidence 412 hearing, the transcript of which is sealed, and Appellate Exhibit XXVI, which is sealed. This Court’s Rules provide that information derived from materials under seal “shall be separately filed in accordance with Rule 13.2(b).” A.F. Ct. Crim. App. R. 17.2(b). Accordingly, it is necessary to file Appellant’s reply brief under seal. Accompanying this motion is a redacted version of the reply brief that obscures portions derived from sealed materials.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,



JOSHUA R. TRAEGER, Esq.
Founding Attorney



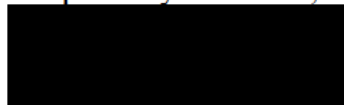
DWIGHT H. SULLIVAN
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 17 December 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

