IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FIRST)**
	)	
v.	)	Before Panel 2
	)	
Senior Airman (E-4)	)	No. ACM 40566
JUSTON D. BEYER,	)	
United States Air Force	)	20 March 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **31 May 2024**. The record of trial was docketed with this Court on 1 February 2024. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

22 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JUSTON D. BEYER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40566 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

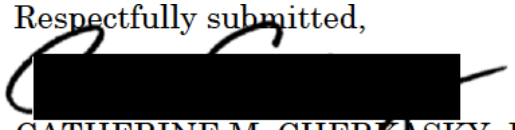
Before Panel No. 2

UNITED STATES, Appellee v. Juston D. BEYER Senior Airman/(E-4) United States Air Force, Appellant	**NOTICE OF APPEARANCE OF COUNSEL** Case No. ACM 40566 22May2024

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

COMES NOvV, Catherine M. Cherkasky, pursuant to rule 12 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court that: (1) her business mailing address is: 667 Madison Ave, 5th Floor, New York, NY 10065; (2) her phone number is: 949-391-1603; (3) her business email is: Katie@goldenlawinc.com; and (4) she is a member of this court's bar.

Respectfully submitted,



CATHERINE M. CHERKASKY, Esq.
Cherkasky Law, LLP
NY Bar: 6022842; IL Bar: 6311030
CA Bar: 266492
667 Madison Ave., 5th Floor
New York, NY 10065
Phone (949) 391-1603
Katie@GoldenLawInc.com

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 May 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40566**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Juston D. BEYER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 May 2024, 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 29th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **30 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order, *sua sponte*, a status conference to facilitate timely processing of this appeal.

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. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that anyfuture requests for enlargements of time that, if granted, would expire more than 360days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566
	)	21 May 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 June 2024**. The record of trial was docketed with this Court on 1 February 2024. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 5-8 September 2023, at Holloman Air Force Base, New Mexico, R. at 1, 939, Appellant was tried by a panel of officer and enlisted members. R. at 164. Contrary to his pleas, R. at 165, Appellant was found guilty of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 856. The panel of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for one year, reduction to the pay grade of E-1, and total forfeitures. R. at 935. The convening authority took no action with respect to the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Juston D. Beyer*.

The ROT is seven volumes consisting of four prosecution exhibits, four defense exhibits, 66 appellate exhibits, and one court exhibit. The transcript is 939 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 21 May 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

23 May2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Ainnan (E-4) *WSTON* D. BEYER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM40566 Panel No. 2

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

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

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

[redacted]
BRI S, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Militaiy Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 23 May 2024.

[redacted] S, Maj, US.AFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566
	)	21 June 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 July 2024**. The record of trial was docketed with this Court on 1 February 2024. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 5-8 September 2023, at Holloman Air Force Base, New Mexico, R. at 1, 939, Appellant was tried by a panel of officer and enlisted members. R. at 164. Contrary to his pleas, R. at 165, Appellant was found guilty of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 856. The panel of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for one year, reduction to the pay grade of E-1, and total forfeitures. R. at 935. The convening authority took no action with respect to the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Juston D. Beyer*.

The ROT is seven volumes consisting of four prosecution exhibits, four defense exhibits, 66 appellate exhibits, and one court exhibit. The transcript is 939 pages.

Through no fault of Appellant, undersigned an civilian co-counsel counsel have been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned and civilian co-counsel's review of his case. [1] Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division United States Air Force
(240) 612-2807

[1] Appellant consents to this limited disclosure of an attorney-client confidential communication.

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 21 June 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

25 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JUSTON D. BEYER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40566 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 25 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME(FOURTH)**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566
	)	18 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 August 2024**. The record of trial was docketed with this Court on 1 February 2024. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 5-8 September 2023, at Holloman Air Force Base, New Mexico, R. at 1, 939, Appellant was tried by a panel of officer and enlisted members. R. at 164. Contrary to his pleas, R. at 165, Appellant was found guilty of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 856. The panel of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for one year, reduction to the pay grade of E-1, and total forfeitures. R. at 935. The convening authority took no action with respect to the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Juston D. Beyer*. Appellant is not confined.

The ROT is seven volumes consisting of four prosecution exhibits, four defense exhibits, 66 appellate exhibits, and one court exhibit. The transcript is 939 pages. Civilian co-counsel has

completed a review of the unsealed record, identified potential errors, and has begun drafting the initial brief in this case. Undersigned counsel filed a consent motion to review sealed materials yesterday, 17 July 2024. Civilian co-counsel has the following cases which take priority over the instant one:

1) *United States v. Flores* – This case is before the Navy-Marine Corps Court of Criminal Appeals. An opening brief is anticipated to be filed on 25 July 2024.
2) *United States v. Jones* – This case is before the Army Court of Criminal Appeals. An opening brief is anticipated to be filed on 28 July 2024.

In addition, undersigned counsel is currently assigned 23 cases; 17 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. Undersigned counsel is presently conducting research in preparation to submit a petition and corresponding supplement to the CAAF, which is due on 1 August 2024. The following cases before this Court have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel filed the initial AOE brief on 16 July 2024. The Government's Answer is due on 15 August 2024, with any reply being due on 22 August 2024. This appellant is not confined.
2) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. Undersigned counsel has completed a review of

the unsealed record. Yesterday, 17 July 2024, this Court granted undersigned counsel's consent motion to review sealed materials; such review will be completed next week. Undersigned counsel anticipates filing an initial AOE with this Court next week. This appellant is confined.

3) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun a review of the unsealed record and identified several potential issues. On 15 July 2024, undersigned counsel filed a consent motion to review sealed materials; if granted, that review will be accomplished next week. This appellant is confined.

4) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.

5) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record and identified potential errors. This appellant is not currently confined.

6) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. Undersigned counsel has identified at least one issue in this record. This appellant is currently confined.

7) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. This appellant is currently confined.

8) *United States v. Barlow*, ACM 40552 – The record of trial is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. This appellant is not currently confined.

Through no fault of Appellant, undersigned and civilian co-counsel counsel have been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status of undersigned and civilian co-counsel's review of his case. [1] Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] Appellant consents to this limited disclosure of an attorney-client confidential communication.

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 July 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

18 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JUSTON D. BEYER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40566 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 18 July 2024.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40566**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Juston D. BEYER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 17 July 2024, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine the audio recording and transcript pages of the closed Article 39a sessions, and Appellate Exhibits VII–XXI and XXXII–XXXVIII. All requested items were reviewed by trial counsel and defense counsel at Appellant's court-martial.

Upon review of the record, we note that the transcript pages referenced above have not been properly sealed as ordered by the military judge. Pages 13–153 reflect the first closed session. Additional closed sessions were held as noted in pages 173–215, 596–601, 670–677, 727–741, and 753–761.[1] Those pages appear to be unsealed and are also available in their entirety in the online transcript repository.

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), *Manual for Courts-Martial*, *United States* (2019 ed.).

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

---

[1] The court has determined that there is good cause for trial transcript pages 13–153, 173–215, 596–601, 670–677, 727–741, and 753–761 to be sealed pursuant to Mil. R. Evid. 412 and Mil. R. Evid. 513. *See also* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion."). Therefore, we order those pages be sealed. The Clerk of Court will ensure the documents are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

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

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **trial transcript pages 13-153, 173-215, 596-601, 670-677, 727-741, and 753-761; the audio recordings that accompany them; and Appellate Exhibits VII-XXI and XXXII-XXXVIII,** subject to the following conditions:

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

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

It is **further ordered:**

The Government shall take all steps necessary to ensure all copies of the transcription pages in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[2]

However, if appellate defense counsel and appellate government counsel cmTently possess any of the above referenced exhibits, counsel are authorized to retain copies of the materials in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense and appellate government counsel shall destroy any retained copies in their possession.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Deputy Clerk of Court

[2] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ,i 9.3.6 (21 Apr. 2021).

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (SrA) **JUSTON D. BEYER**, United States Air Force *Appellant*	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40566 17 July 2024

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

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

1) **Closed Session Audio Recording (Record of Trial (ROT), Volume 1)**. This closed session hearing was attended by trial counsel, defense counsel, victim's counsel, and military judge. The closed sessions were ostensibly held to consider Mil. R. Evid. 412 and Mil. R. Evid. 513 issues raised by the parties. *See, e.g.*, R. at 13-19. The closed sessions were ordered sealed by the military judge. R. at 20, 678, 937.
2) **Closed Session Transcript Pages (R. at 44-108)**. This closed session hearing was attended by trial counsel, defense counsel, victim's counsel, and military judge. The closed sessions were ostensibly held to consider Mil. R. Evid. 412 and Mil. R. Evid. 513 issues raised by the parties. *See, e.g.*, R. at 13-19. The closed sessions were ordered sealed by the military judge. R. at 20, 678, 937. It should be noted that the closed session transcript pages appear unredacted in both the electronic record available on Flite and undersigned counsel's hard copy of the record. Undersigned counsel has not

reviewed the substance of those pages and will not do so unless this Court grants this motion.

3) **Appellate Exhibits VII-XXI, XXXII-XXXVIII**. These exhibits were various motions, evidence, and rulings concerning the litigation of Mil. R. Evid. 412 and Mil. R. Evid. 513 issues. R. at 13-20; *cf.* R. at 215.. These various exhibits were reviewed by the parties, considered by the military judge, and ordered sealed. R. at 20, 215.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. The Appellant stands convicted of an offense related to the sealed materials admitted at trial. In order to fully present matters to this Court, the undersigned counsel requires access to sealed material.

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

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation."

Id. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
Office: (240) 612-4770

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 July 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
Office: (240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566
	)	20 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 September 2024**. The record of trial was docketed with this Court on 1 February 2024. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

On 5-8 September 2023, at Holloman Air Force Base, New Mexico, R. at 1, 939, Appellant was tried by a panel of officer and enlisted members. R. at 164. Contrary to his pleas, R. at 165, Appellant was found guilty of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 856. The panel of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for one year, reduction to the pay grade of E-1, and total forfeitures. R. at 935. The convening authority took no action with respect to the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Juston D. Beyer*. Appellant is not confined.

The ROT is seven volumes consisting of four prosecution exhibits, four defense exhibits, 66 appellate exhibits, and one court exhibit. The transcript is 939 pages. Civilian co-counsel has

completed a review of the unsealed record, identified potential errors, and has begun drafting the initial brief in this case. Undersigned counsel filed a consent motion to review sealed materials yesterday, 17 July 2024. Civilian co-counsel has no cases which take priority over the instant case.

Undersigned counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case: *United States v. Valentin-Andino*; and *United States v. Daughma*. Undersigned counsel is presently drafting a supplement for United States v. Valentin-Andino, which is due on 27 August 2024. The following cases before this Court have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel filed the initial AOE brief on 16 July 2024. The Government's filed their Answer on 15 August 2024 with a motion to exceed the page limit. Undersigned counsel is presently drafting the reply.
2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel filed an initial assignment of errors brief with this Court on 13 August 2024. The Government's Answer is due on 12 September 2024, with any reply due on 19 September 2024.
3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate

exhibits; the transcript is 494 pages. Undersigned counsel has completed an initial review of the record. This appellant is not confined.

4) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record and identified potential errors. This appellant is not currently confined.

5) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. Undersigned counsel has identified at least one issue in this record. This appellant is currently confined.

6) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. This appellant is currently confined.

7) *United States v. Barlow*, ACM 40552 – The record of trial is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. This appellant is not currently confined.

On 30 July 2024, undersigned counsel completed a review of sealed materials in this case. Additionally, civilian co-counsel is presently drafting the initial assignment of errors brief.

Through no fault of Appellant, undersigned and civilian co-counsel counsel have been unable to complete our review and finish drafting a brief in Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has also been apprised of the status

of undersigned and civilian co-counsel's review of his case.[1] Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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[1] Appellant consents to this limited disclosure of an attorney-client confidential communication.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
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22 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JUSTON D. BEYER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40566 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JUSTON BEYER,
Senior Airman (E-4), USAF
Appellant.

ACM 40566

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Senior Airman (E-4) **JUSTON BEYER** United States Air Force *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel 2 Case No. ACM 40566 Filed on: 30 September 2024

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING EVIDENCE THAT A CONDOM WASN'T USED DURING THE CHARGED EVENT WHERE THE MILITARY JUDGE SIMULTANEOUSLY PROHIBITED THE DEFENSE FROM INTRODUCING MIL. R. EVID. 412 EVIDENCE TO INDICATE THAT THE COUPLE HAD A HISTORY OF CONSENSUAL SEXUAL INTERCOURSE WITHOUT A CONDOM.

II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO CONFRONT M.L. ABOUT HER INITIAL REPORT TO HER SISTER THAT SHE "ACTED LIKE SHE WAS INTO THE SEX" THAT FORMS THE BASIS OF THE CHARGED EVENT.

Statement of the Case

Senior Airman Juston Beyer was tried before a general court-martial composed of a panel of officer members at Holloman Air Force Base, New Mexico, on 5-8 September 2023. (R. at 1, 164, 939.) Contrary to his pleas, Appellant was found guilty of one charge and specification of

sexual assault, in violation of Article 120 UCMJ,[1] 10 U.S.C. § 920. (R. at 165, 866.) He was sentenced by the members to a dishonorable discharge, confinement for one year, reduction to the pay grade of E-1, and total forfeitures. (R. at 935.) The Convening Authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

Statement of Facts

SrA Beyer and M.L.'s Relationship

SrA Beyer and the alleged victim, M.L., were in a long-term dating relationship, which began in September 2018 when M.L. was 17 years old and SrA Beyer was 18. (R. at 23; 613.) SrA Beyer and M.L. had known each other since childhood but did not have a romantic or sexual relationship prior to September 2018. (R. at 525.) At the time that their relationship began, SrA Beyer and M.L. were living in the same geographic area in Georgia. (R. at 608.) In January of 2019, SrA Beyer left to attend boot camp and the two decided to stay in a long-distance relationship. (R. at 531.) They reunited in August 2019 and continued their dating relationship until a brief breakup that fall, though M.L. testified that their relationship was difficult due to SrA Beyer being stationed in England. (R. at 532, 536.) In December of 2019, SrA Beyer and M.L. planned to spend "one last Christmas together" in Georgia; the two planned to breakup after Christmas. (R. at 539.) SrA Beyer arrived in Georgia on 19 December 2019 and spent every day with M.L. (R. at 622; App. Ex. XLIII.) M.L. testified that the two likely had sex every day of his visit leading up to the alleged assault on 23 December 2019 and continued to have consensual sex for several days after the alleged assault. (R. at 563;624; App. Ex. XLIII.)

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

The Alleged Incident

During SrA Beyer's visit, on 23 December 2019, he and M.L. went ice skating with M.L.'s sister and her boyfriend before returning to M.L.'s mother's house where SrA Beyer was going to spend the night. (R. at 543.) While they had mutually agreed that they would be ending their relationship at the end of the Christmas break, M.L. testified that she began to feel "sad, anxious, [and] upset" about their impending breakup. (R. at 544.)

Upon returning to the house, M.L. took a shower while SrA Beyer relaxed in her bedroom. (R. at 544.) After her shower, M.L. returned to the bedroom and informed SrA Beyer she had not shaved in the shower because she didn't want to have sex because she was anxious about their approaching breakup. (R. at 628.) SrA Beyer did not pressure her to agree to sex or argue with her about it. (R. at 628.) Instead, SrA Beyer offered her a massage, which she accepted. (R. at 546.) M.L. did not put on any underwear or other clothing prior to the massage. (R. at 547.) M.L. laid face down on her bed and SrA Beyer began the massage. (R. at 547.) M.L testified that SrA Beyer started by massaging her back and shoulders. (R. at 548.) SrA Beyer then began to move his hands lower down M.L.'s back before he stopped massaging her and began to masturbate. (R. at 549.) M.L. testified that she was aware of the fact that he began masturbating and that she didn't mind. (R. at 549.)

As SrA Beyer began to push his erection against her bare buttocks, M.L. did not say anything to him or move. (R. at 632.) M.L. claimed that when she noticed SrA Beyer move into a position to have sex, she responded by saying, "Juston, no sex." (R. at 549.) M.L. did not move from her position on the bed and testified that SrA Beyer continued to attempt to position his penis near her vagina. (R. at 549-50.) M.L. claimed she again told him, "no sex" but he did not respond to her. (R. at 550; 636.) M.L. conceded that she did not raise her voice or turn around to tell him "no," but that she assumed he had heard her. (R. at 636.)

M.L says that SrA Beyer then penetrated her vagina with his penis without her consent. (R. at 550.) Despite this, M.L. agreed that the position in which the sex occurred was one of the most frequent positions in which they had had sexual intercourse throughout their relationship. (R. at 636.) M.L. testified that she "froze" and after a few moments, SrA Beyer asked her if he should continue, to which she responded, "I don't care." (R. at 551.) M.L. testified that she has a heart condition that causes her heart to race, so she frequently does not move around much during sex, something that SrA Beyer was explicitly aware of. (R. at 639).

M.L.'s Actions after the Alleged Incident

According to M.L., SrA Beyer abruptly stopped having sex; M.L. claimed he began to apologize to her. (R. at 552.) M.L. testified that she got upset and left the bedroom to call a male friend, C.M., with whom she had reconnected a month earlier. She made the call from the garage. (R. at 554.) When SrA Beyer walked into the garage, M.L. abruptly hung up. SrA Beyer and M.L. got into an argument about his "jealousy," but she ultimately decided that SrA Beyer should still stay overnight in lieu of causing a scene in front of her family. (R. at 561, 643.) M.L. testified that she asked SrA Beyer to sleep in her bed with her that night because she, "needed someone that night" and "he was supposed to be that someone." (R. at 561.) The next morning, M.L. left the house early to go see C.M., admittedly lying to SrA Beyer that she was going to help feed a friend's turtles. (R. at 647.) SrA Beyer continued to stay at M.L.'s house and sleep in her bed with her for the duration of his time on leave. (R. at 562.) SrA Beyer even spent Christmas morning with M.L.'s family. (R. at 651; Def. Ex. A.) The two also continued to have consensual sex after the incident in question, to include the very next day. (R. at 563.) When SrA Beyer left to return to England, the two broke up as previously planned and only stayed infrequently in contact. (R. at 574). M.L. began a sexual relationship with her male friend, C.M., to whom she had made her original report, within days after SrA Beyer departed. (R. at 660.) M.L. conceded

that she had been planning to pursue a romantic relationship with C.M. while she was still in a relationship with SrA Beyer and had "gaslighted" SrA Beyer when he confronted her about having romantic feelings towards C.M. (R. at 660-668.)

Specific Instances of Sexual Behavior under Mil. R. Evid. 412

[redacted]

Despite not providing notice, the Government attempted to elicit specific instances of sexual acts between M.L. and SrA Beyer during M.L.'s direct examination. (R. at 533.) The Defense objected, citing the military judge's earlier Mil. R. Evid. 412 ruling barring testimony about specific sexual acts. (R. at 534.) Without holding a closed hearing, the military judge overruled the Defense's objection. (R. at 535.) M.L. then testified that, "consent was very complicated during the relationship." (R. at 533.) She elaborated that when engaged in a sexual encounter with SrA Beyer, they would, "start off with kissing typically, we would then move towards some sort of hand action, either by hand on his genitals or his hand on mine and then before we would have sex he would get a condom and that was sort of our get a condom queue (*sic*), we're about to have intercourse." (R. at 535.)

[redacted]

During closing argument the Government stated:

> [L]et's recall when Ms. Livingston testified to you all with respect to consent in the past in the relationship. She provided essentially four things, it will begin with kissing, from there it would go to some type of foreplay, the third thing would be a suggestion to someone to get a condom, and forth she said she typically shaved.

(R. at 814.) The Government continued, arguing that there was no consent, in part, because there was no condom on the night of the alleged incident. (R. at 814.)

Additional facts necessary for the resolution of the assigned errors are included below.

Argument

I.

THE MILITARY JUDGE ERRED IN ALLOWING EVIDENCE THAT A CONDOM WASN'T USED DURING THE CHARGED EVENT WHERE THE MILITARY JUDGE SIMULTANEOUSLY PROHIBITED THE DEFENSE FROM INTRODUCING MIL. R. EVID. 412 EVIDENCE TO INDICATE THAT THE COUPLE HAD A HISTORY OF CONSENSUAL SEXUAL INTERCOURSE WITHOUT A CONDOM.

Standard of Review

This Court "review[s] the military judge's ruling on whether to exclude evidence pursuant to M.R.E. 412 for an abuse of discretion." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) (citation omitted). 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).

Law and Analysis

The military judge abused his discretion by admitting, over defense objection, Mil. R. Evid. 412 testimony. Mil. R. Evid. 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. *United States v. St. Jean*, 83 M.J. 109 (C.A.A.F. 2022). Those exceptions are: (1) evidence of specific instances of sexual behavior between the victim and a third-person to prove that the third-person is the source of physical evidence; (2) evidence of specific instances of sexual behavior between the accused and victim "offered by the accused to prove consent or by the prosecution;" and (3) evidence otherwise constitutionally required. Mil. R. Evid. 412(b)(1).

> A party intending to offer evidence under [this rule] must file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial.

Mil. R. Evid. 412(c)(1)(A). "Before admitting evidence, the military judge must conduct a hearing, which shall be closed." Mil. R. Evid. 412(c)(2). Mil. R. Evid. 412's general rape shield rule is applicable to both parties and requires a determination by the military judge that evidence of past sexual behavior of the alleged victim is admissible before it may be admitted regardless of the proponent of the evidence. Mil. R. Evid. 412; *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004).

In this case, the military judge abused his discretion by failing to use correct legal principles. *Rudometkin*, 82 M.J. at 401. At the outset, the military judge did not follow the proper procedures to admit the evidence. Specifically, when the Government sought admission of specific

instances of sexual behavior, the military judge did not conduct a closed session hearing as required by Mil. R. Evid. 412(c)(2). Instead, the military judge briefly questioned the Government in front of the members before admitting the evidence. R. at 534-35. This is a far cry from the closed-session hearing envisioned by the rules.

The Government, too, failed to follow proper procedures when they sought admission of specific instances of sexual behavior during the trial despite never providing notice to either SrA Beyer or M.L. Mil. R. Evid. 412 requires a party to file a written motion at least five days before the entry of pleas to admit evidence of specific sexual behavior. Mil. R. Evid. 412(c)(1)(A). The Government failed to do so here. Perhaps making matters worse is that the Government intimated to the Court and all parties that they had no intent "to admit specific instances of sexual behavior beyond the sexual characterization of the relationship." (App. Ex. XIX.) Despite this representation, the Government clearly had the intent to admit such evidence, and that's exactly what they did during trial without providing the appropriate notice.

The military judge again abused his discretion by permitting the Government to admit such evidence, despite them not filing the timely motion required by the rules. While Mil. R. Evid. 412 allows a party to admit evidence without notice during a trial, there must be good cause to do so. Mil. R. Evid. 412(c)(1)(A). Here, the military judge did not find good cause before admitting unnoticed and un-litigated Mil. R. Evid. 412 testimony during trial.[2] Mil. R. Evid. 412(c)(1)(A).

Further, the military judge's decision allowing the Government to admit unnoticed and un-litigated Mil. R. Evid. 412 testimony was not an anomaly: the military judge permitted the members to ask questions that clearly implicated Mil. R. Evid. 412 as well. This evidence was admitted over Defense objections.

[2] The Government was not asked to offer good cause, nor did they, on their own, offer any good cause.

[redacted]

As a result of the military judge's rulings, which allowed M.L. to answer questions that implicated previously unnoticed and un-litigated Mil. R. Evid. 412 testimony, the Defense did not have a chance to prepare and present a case that demonstrated the infrequency of condom use during the couple's prior consensual sexual encounters. Instead, the members were left with the distinct impression that, because a condom was not used during the incident in question, it must have been non-consensual.

It is furthermore clear that the error was prejudicial, as the Government relied heavily upon the implication that a condom was required for consensual sex in the relationship, as they argued to the members in closing:

> So, let's recall when M.L. testified to you all with respect to consent in the past in the relationship. She provided essentially four things, it will begin with kissing, from there it would go to some type of foreplay, the third thing would be a suggestion to someone to get a condom, and forth she said she typically shaved.

(R. at 814). They continued by highlighting again, "there was no condom used either." (R. at 814). Evidence of prejudice is also clear from the amount and manner of questions posed by the members concerning this condom use.

The military judge abused his discretion by permitting the Government, over the Defense's objection, to illicit unnoticed and un-litigated Mil. R. Evid. 412 testimony in the middle of trial. By failing to follow the procedures in Mil. R. Evid. 412, the Government was allowed to surprise the Defense with evidence not previously noticed or litigated. Not only could the Defense not prepare a case about condom use in the middle of trial, the members themselves were gravely concerned about the condom use (or the purported lack thereof on the night of the incident). [redacted] As such, the military judge's rulings were an abuse of discretion, and the impact of those rulings caused prejudicial error.

WHEREFORE SrA Beyer requests this court set aside the findings and the sentence.

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO CONFRONT M.L. ABOUT HER INITIAL REPORT TO HER SISTER THAT SHE "ACTED LIKE SHE WAS INTO THE SEX" THAT FORMS THE BASIS OF THE CHARGED EVENT.

Additional Facts

During AFOSI's investigation, agents interviewed M.L.'s sister, J.L on 1 March 2022 via video-teleconference. (Def. App. Ex. A.) During this interview, J.L. relayed that M.L. had reported the alleged incident with SrA Beyer to her the week after it happened in January of 2020. (Def. App. Ex. A.) J.L. reported that M.L. told her that SrA Beyer "pressured her to have sex" on 23 December 2019. M.L. relayed that SrA Beyer had asked if she wanted a back rub and began to

massage her, but had then inserted his penis inside her vagina. (Def. App. Ex. A.) According to J.L., M.L. "froze" but then "*acted like she was into the sex*." (Def. App. Ex. A) (emphasis added).

J.L. was not called as a witness during trial. On cross-examination, the defense counsel did not confront M.L. about her prior report to her sister close in time to the charged event, in which she had relayed that she'd pretended to enjoy the sexual intercourse.

Standard of Review

This Court reviews *de novo* allegations of ineffective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

Law

"An appellant will prevail on an ineffective assistance of counsel claim if he 'demonstrate[s] both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice.'" *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)) (cleaned up). When conducting an analysis of deficient performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Captain*, 75 M.J. at 689 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). The reasonableness of counsel's challenged conduct must be judged based upon the facts of the individual case, at the time of the challenged conduct. *Id*. at 690. The presumption can be rebutted by showing that counsel committed "specific errors" which were "unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

To show prejudice, the appellant must demonstrate "a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." *Captain*, 75 M.J. at 103. (alteration in original) (quoting *Strickland*, 466 U.S. at 694). "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Additional Facts and Analysis

The decision of defense counsel to not confront M.L about her prior statement was prejudicial error. The case against SrA Beyer hinged on his reasonable mistake of fact as to consent. While M.L. claims that she declined sex with SrA Beyer earlier in the evening, as her naked massage progressed and SrA Beyer continued to escalate sexual contact without her protest, the question of her reaction to the intercourse is critical. J.L.'s specific memory that M.L. told her she had "pretended to be into the sex" stands in stark contrast to her trial testimony in which she claims she was frozen in fear and ultimately begrudgingly told SrA Beyer he could continue because she was simply too defeated to argue with him. (R. at 550-51; 635-36). Feigning enjoyment of the sexual activity sends an entirely different message, and one that strongly raises the defense of reasonable mistake of fact. While M.L. relayed in her testimony that she lay essentially lifeless on the bed – claiming she "completely froze" as SrA Beyer engaged in sexual intercourse with her – a direct question to M.L. about her statements to her sister that she pretended to enjoy the sex would have directly impeached her testimony, or at the very least called into question its credibility and accuracy. (R. at 550). The confrontation would have furthermore allowed the Defense to argue a reasonable mistake of fact as to consent more credibly, as M.L.'s own words evince that very distinct possibility. There is therefore a reasonable probability that, but for defense counsel's failure to confront M.L. about her prior inconsistent statement, the result of the proceedings would have been different.

From the record, there is no apparent strategic reason that trial defense counsel would have chosen not to call J.L. as a witness, confront ML, or both. J.L. was one of the first people to whom M.L. reported the incident. There is no clear reason why the trial defense counsel failed to confront

M.L. with her own prior statements regarding the alleged assault made close in time to its occmTence, or call J.L. in rebuttal to M.L.'s testimony on the ve1y critical issue of her response to the sexual intercourse.

WHEREFORE SrA Beyer requests this court set aside the findings and sentence.

Respectfully Submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 30 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO FILE CERTAIN PORTIONS OF BRIEF ON BEHALF OF APPELLANT UNDER SEAL**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566
	)	30 September 2024

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

Pursuant to Rules 17.2(b) and 23.3(o) of this Court's Rules of Practice and Procedure, Appellant moves to file sealed material or information derived from such material in Appellant's brief, under seal. Appellant asserts one assignment of error which relies on factual matters that were sealed by the military judge at trial, or by this Court on appeal. Specifically, the brief relies upon App. Exs. XIV, XVI, XIX, XXXIII, and XXXIV. Additionally, certain portions of closed sessions are also referenced: R. at 198-205, 214, 722-48. Discussion of these sealed materials occur on pages 5, 6, 9, and 10. Appellant's brief referencing the sealed material has been prepared to be filed under seal. Undersigned counsel cannot properly fulfill their responsibilities and cannot explain Appellant's assignment of error without citation to these materials.

This Court should grant this motion to file unredacted sealed material, under seal.

Respectfully submitted,

[redacted]

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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 30 September 2024.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JUSTON BEYER** United States Air Force *Appellant.*	)	No. ACM 40566
	)	28 October 2024

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Major Kelly A. Borders and Ms. (Major) Rebecca J. Chraim, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his assignments of error, Appellant claims, "[trial defense counsel were ineffective by failing to confront M.L. about her initial report to her sister that she 'acted like she was into the [sexual act]]'" for which Appellant was convicted under a theory of non-consent. (App. Br. at 10.)

As of this date, the government has been unable to obtain an affidavit or declaration from trial defense counsel providing the information responsive to the Appellant's ineffective assistance claim. On 25 October and 28 October, respectively, each trial defense counsel provided a firm declination to submit the same absent an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel failed to call an essential witness which would have aided the Defense's case. Only trial defense counsel can state for certain

whether they considered presenting this witness testimony and, if they did, why they ultimately did not call the witness to testify.

Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236,236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346,347 (C.A.A.F. 2008). In fact, this Comi cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Comi order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Comi's order.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JUSTON BEYER** United States Air Force *Appellant.*	)	No. ACM 40566
	)	29 October 2024

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 7 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate the information provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issues in the United States' Answer brief. This case was docketed with the Court on 1 February 2024 and Appellant's brief was served on the government on 30 September 2024 with a motion to file portions of Appellant's brief under seal. Appellant's motion to file under seal was granted on 8 October 2024. This is the government's first request for an enlargement of time. Since docketing, 171 days have elapsed.

Good cause exists for the enlargement of time in this case. Appellant has raised an assignment of error in which he claims his trial defense counsel were ineffective. The United States cannot fully respond to the allegation of ineffective assistance of counsel without a statement from trial defense counsel. As of this date, the government has been unable to obtain the required information absent a judicial order, despite diligent efforts. An enlargement of time

is necessaiy to ensure trial defense counsel have time to submit their statements to the Court, and to give the United States sufficient time to incmporate trial defense counsels' statements into its answer. The additional time will fmther pennit counsel to submit a complete draft which inco1porates the infonnation provided by trial defense counsel for superviso1y review before the filing the United States' answer. Accordingly, the Government seeks a sho1t extension of time to allow the United States to respond fully to Appellant's brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Comi and the Air Force Appellate Defense Division on 29 October 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S OPPOSITION TO UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel 2
Senior Airman (E-4) **JUSTON D. BEYER,** United States Air Force *Appellant*	)	No. ACM 40566 31 October 2024

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the Appellant hereby enters his general opposition to the Government's Motion for Enlargement of Time (EOT) (First) to file an answer in this case. Further, the Government seeks an enlargement of time for an indeterminate period. Government Motion for EOT (First), at 1 (asking for "7 days *after this Court's receipt* of a declaration or affidavit from trial defense counsel"). As such, the Government cannot—and did not—represent "the number of days that will have elapsed since docketing on the date requested," as required by this Court's rules. Rule 23.3(m).

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 31 October 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
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(240) 612-2807

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40566**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Juston D. BEYER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 September 2024, Appellant submitted his assignments of error brief in which he raised an issue claiming his "trial defense counsel were ineffective by failing to confront [ML] about her initial report to her sister that she 'acted like she was into the sex' that forms the basis of the charged event."

On 28 October 2024, the Government filed a Motion to Compel Declarations. The Government requests this court compel Appellant's trial defense counsel, Major (Maj) Kelly A. Borders and Maj[*] Rececca J. Chraim, each to provide declarations in response to the claimed ineffective assistance of counsel within 30 days of our order. According to the Government, Appellant's trial defense counsel both indicated they would not provide a declaration absent order by this court. Appellant did not respond to this motion.

On 29 October 2024, the Government filed a Motion for Enlargement of Time. The Government requests "7 days after this [c]ourt's receipt of a declaration or affidavit from trial defense counsel to submit its answer," or "a short extension of time to allow the United States to respond fully to Appellant's brief." Appellant opposed this motion, explaining that the Government "seeks an enlargement of time for an indeterminate period." Additionally, Appellant pointed out the Government failed to identify the number of days that will have elapsed since docketing on the date requested, as required by A.F. CT. CRIM. APP. R. 23.3(m).

The court has examined Appellant's error claiming ineffective assistance of trial defense counsel and finds good cause to compel a response from Appellant's trial defense counsel with regards to Appellant's claim. The court cannot fully resolve Appellant's claim without piercing the privileged communications

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[*] In its motion, the Government refers to "Ms. (Major) Rebecca J. Chraim," suggesting she no longer is on active duty.

between Appellant and his trial defense counsel. Moreover, in light of the court's order granting the Government's Motion to Compel Declarations, it finds good cause to grant the Government an enlargement of time, but for a specified time period.

Accordingly, it is by the court on this 6th day of November, 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Maj Borders and Maj Chraim are ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **5 December 2024**. The Government shall also deliver a copy of the responsive documents to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **12 December 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO ELECTRONICALLY TRANSMIT SEALED MATERIAL**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JUSTON BEYER**, United States Air Force *Appellant.*	)	No. ACM 40566 5 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to this Honorable Court's Rules of Practice and Procedure, the United States moves for permission to accomplish service of certain sealed material to Appellant's civilian appellate counsel, Ms. Catherine Cherkasky, through secure electronic transmission.

Specifically, the government requests to electronically submit via DoD SAFE its Appendix A, Declaration of Ms. Rebecca Chraim, dated 8 November 2024. This document is subject to the United States' Motion to File Under Seal, which simultaneously filed with this Court.

While the government may easily serve a hard copy of the sealed materials on military appellate defense counsel through physical means, the same is not feasible concerning civilian appellate defense counsel, whose practice is located far outside the Washington, D.C. area.

Transmitting the sealed filings via DoD SAFE is the most time-efficient and secure method for service to Appellant's civilian appellate defense counsel. Undersigned counsel has consulted with Appellant's counsel, who has no objection to this motion.

WHEREFORE, the United States respectfully requests this Court grant the United States' consent motion to electronically se1ve the aforementioned sealed materials on civilian appellate defense counsel via DoD SAFE.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Defense Division on 5 December 2024.

MORGAN L. BREWINGTON, Capt, USAF
Appellate Government Counsel
Government Trial and Appellant Counsel Division
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO FILE APPENDIX A TO**
	)	**MOTION TO ATTACH**
	)	**UNDER SEAL**
	)	
v.	)	Before Panel No.2
	)	
Senior Airman (E-4)	)	No. ACM 40566
JUSTON D. BEYER	)	
United States Air Force	)	5 December 2024
Appellant	)	

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

Pursuant to Rule 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 its "Appendix A," Declaration of Ms. Rebecca Chraim, under seal.

On 8 October 2024, this Court granted Appellant's request to file portions of his brief under seal which contains discussion of sealed materials in the record of trial. Due to the nature of the assigned errors (Mil. R. Evid. 412 issues) and the stated facts, the declaration provided by trial defense counsel in response to Appellant's ineffective assistance of counsel claim included similar material which was ordered sealed at trial. This declaration, Appendix A, has been excised from the electronic version of the United States' Motion to Attach. The Appendix was appropriately packaged, marked, and delivered to both this Court and the Air Force Appellate Defense Division on the date of this filing. A Consent Motion to Electronically Transmit Sealed Material to civilian appellate defense counsel was also filed on this date.

For these reasons, the United States respectfully requests this Honorable Comi grant this motion and pe1mit the United States to file its Appendix A under seal. Undersigned counsel has discussed this matter with Appellant's counsel, who has no objection to this motion.

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CERTIFICATE OF FILING AND SERVICE

I ce1iify that a copy of the foregoing was delivered to the Comi and the Air Force Appellate Defense Division on 5 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **JUSTON D. BEYER**, USAF *Appellant.*	)	No. ACM 40566
	)	5 December 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A – Ms. Rebecca Chraim Declaration, dated 8 November 2024 (5 pages)[1]
- Appendix B – Major Kelly Borders Declaration, dated 13 November 2024 (6 pages)

The attached declarations are responsive to this Court's order directing Ms. Rebecca Chraim and Maj Kelly Borders to provide declarations responsive to Appellant's Second Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 6 November 2024.)

Appellant claims his trial defense counsel were ineffective in declining to engage in a specific line of questioning during cross-examination of the named victim and in failing to call a particular witness to provide testimony that would have impeached the victim's statements by contradiction. (App. Br. at 10-13.) These declarations are necessary to resolve the issues raised by Appellant.

[1] The United States is simultaneously moving to file Appendix A under seal.

Our Superior Comi held matters outside the record may be considered "when doing so is necessa1y for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437,444 (C.A.A.F. 2020). The Comi concluded that "based on experience ... 'extra-record fact detenninations' may be 'necessaiy predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Pai·ker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessa1y to address this Comi's order and Appellant's Second Assignment of Enor.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 5 December 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40566**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Juston D. BEYER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 December 2024, counsel for the Government contemporaneously filed three motions. First is a Motion to Attach Documents, specifically declarations from Ms. RC and Maj KB.* Counsel for the Defense did not oppose this motion.

Next, counsel for the Government submitted a Consent Motion to File Appendix A to Motion to Attach Under Seal; Appendix A is the declaration from Ms. RC.

Lastly, the Government submitted a Consent Motion to Electronically Transmit Sealed Material—Appendix A—to Appellant's civilian defense counsel, Ms. Catherine Cherkasky, who does not have an office in the Washington D.C. area. Appellant's counsel stated they consulted with counsel for the Defense regarding these two motions, who has no objection to either motion.

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

Accordingly, it is by the court on this 10th day of December, 2024,

ORDERED:

The Government's Motion to Attach Documents is **GRANTED**.

The Government's Consent Motion to File Appendix A to Motion to Attach Under Seal is **GRANTED**.

It is further ordered:

The Government's Consent Motion to Electronically Transmit Sealed Material is **GRANTED**.

---

*Upon a Government motion, on 6 November 2024 this court ordered declarations from Ms. RC and Maj KB, Appellant's trial defense counsel, to respond to Appellant's raised issue of ineffective assistance of counsel.

The Government and Appellant's military appellate counsel are permitted to scan a hard copy of Appendix A, the declaration of Ms. RC, and to transmit an encrypted file containing the sealed material to Appellant's civilian appellate counsel, Ms. Catherine Cherkasky, via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted to Ms. Cherkasky. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman **JUSTON D. BEYER**, USAF Appellant.	))))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** Before Panel 2 No. ACM 40566 12 December 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JUSTON BEYER**, United States Air Force *Appellant.*	)	No. ACM 40566
	)	12 December 2024

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING EVIDENCE THAT A CONDOM WASN'T USED DURING THE CHARGED EVENT WHERE THE MILITARY JUDGE SIMULTANEOUSLY PROHIBITED THE DEFENSE FROM INTRODUCING MIL. R. EVID. 412 EVIDENCE TO INDICATE THAT THE COUPLE HAD A HISTORY OF CONSENSUAL SEXUAL INTERCOURSE WITHOUT A CONDOM.

II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO CONFRONT M.L. ABOUT HER INITIAL REPORT TO HER SISTER THAT SHE "ACTED LIKE SHE WAS INTO THE SEX" THAT FORMS THE BASIS OF THE CHARGED EVENT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

[redacted]

[redacted]

[redacted]

[redacted]

ML's Testimony

During direct examination of ML, Government trial counsel (GTC) elicited testimony about what consent would typically look like during the course of her consensual sexual relationship with Appellant. (R. at 532-535.) Specifically, the question was posed to ML as follows[2]:

> [T]his is a case about consent. So, and so what I would like to do - what I would like you to do rather, is talk to the members about what consent looked like in your relationship with Senior Ainnan Beyer. And so specifically, what I mean by that is, how would it be initiated? Sexual consent, would you, would he ask the question, "hey should we do something?" Would it be done just based off touching? How does consent look in the relationship?

(R. at 532-33.) In response, ML indicated that consent in the relationship was "complicated." (R. at 533.) Looking for more, the GTC continued the dialogue,

> GTC: So when you say [it] was complicated, is it safe to say that - [were there] words expressly used between the two of you to begin sexual intercourse?

[2] The trial transcript reads as though the question and was posed in a compound manner, without pause between each question to allow individual responses from the witness.

> ML: That aspect of it, I do not remember.
>
> GTC: So how would it initiate?
>
> ML: I believe it would typically progress from a kiss to more.
>
> GTC: When you say more, what do you mean by that?
>
> ML: Typically following – I guess the bases – a progression in that way.
>
> GTC: I apologize, I know some of this can be daunting talking to a lot of people that you do not know, but getting into detail, to the best of your recollection will be able to assist the members in understanding the relationship, okay. So, when you say that, you know, that getting into bases, what do you mean? Is it a progression?

(R. at 533-34.)

At that point, trial defense counsel ("TDC") objected and stated, "I think we're getting into the 412 ruling" as the basis. (R. at 534.) Neither trial or defense counsel requested a closed hearing or even a hearing outside the presence of the members. (Id.) ML's victim's counsel did not ask to be heard. (Id.) Government and defense trial counsel both presented argument on whether the evidence was encompassed by the government's Mil. R. Evid. 412 notice, which consisted of the following:

> GTC: I'm merely asking general statements as it relates to the consensual nature of their sexual relationship, Your Honor…
>
> TDC: And Your Honor [] the government[] specifically articulated in their notice, their motion, and their argument on their motion that they would be getting into the general idea that a sexual relationship existed without no specific instances. To get into specific expressions of consent, what "bases" meant, what acts of foreplay occurred, is a specific instance. There has already been a ruling and an agreement of the part[ies] that specific instances will not come in.

> GTC: Your Honor, I disagree with the characterization as this being specific instances []. Asking the generalized question of [ML] as to how consent typically worked in their relationship is relevant for the finder of fact to understand the nature of what happened on 23 December 2019[]. Her being able to describe that [] and give them that thought process is important, with respect to the issue at hand in this case.
>
> MJ: I will allow it, although defense, if you believe this opens the door to other evidence you can raise it at an appropriate time.
>
> TDC: Understood, Your Honor.

(R. at 535.) From there, the direct examination of ML continued:

> GTC: You said, Ms. [ML], that it would typically revolve around kissing, and it would start off from there?
>
> ML: Yes sir, and I will try to speak as generally as I can. Start off from the kissing typically, we would then move towards some sort of hand action, either by hand on his genitals or his hand on mine and then before we would have sex he would get a condom and that was sort of our get a condom queue, we're about to have intercourse.

(Id.)

Specific to the charged incident, ML indicated that she and Appellant had consensual sex in the days leading up to 23 December, and they had previously made plans to have sex during this reunion. (R. at 541-42.) ML only decided that she did not want to have sex on that particular evening after she was suddenly hit with feelings of sadness and anxiousness about their approaching breakup. (R. at 543-44.) When she showered that evening, she intentionally did not shave her private area, something she considered a personal "precursor to having sex" and she told Appellant about not shaving. (R. at 545.) She communicated her feelings to Appellant along with the fact that she was not interested in having sex that night, which Appellant acknowledged. (R. at 545-46.) From there, Appellant offered ML a massage, which she accepted. (R. at 546.) Appellant had given ML massages in the past and ML indicated that

she enjoyed them because she had a lot of pain in her shoulders. (R. at 546-47.) For the massage, she was lying on her stomach and Appellant was straddling her back. (R. at 547-48.)

During the massage, ML noticed that Appellant started moving lower down her back before he eventually began masturbating. (R. at 549.) She did not say anything because she figured he was just going to "do himself" since she had told him she did not want sex. (R. at 549.) When Appellant began to move into a sexual position above ML, though, she stated, "Juston, no sex." (Id.) ML clarified that Appellant had moved his penis toward her vagina at that time. (Id.) ML testified that she believed Appellant acknowledged what she said, but nevertheless, did not stop. (R. at 549-50.) As Appellant continued to try to penetrate ML's vagina, she reminded him a second time that she did not want to have sex, which was the third time that she told him since her shower. (R. at 550.) Again, Appellant did not stop and was eventually successful in penetrating ML's vagina with his penis. (Id.) In response, ML testified that she "froze and shut down." (R. at 551.)

After some unknown amount of time, Appellant asked ML if he "should keep going," to which she responded, "I don't care." (Id.) ML explained her response:

> It did not matter what I said in that position, he – it did not matter what I said. He proved that and I didn't want to be hurt anymore. He proved that it wasn't about me, that he was prioritizing what he wanted and that he would do anything to get it.

(Id.) Appellant continued for several minutes before finally stopping. (R. at 552.) When appellant finally stopped, he began to manifest and communicate feelings of guilt. (R. at 552-53.) ML comforted Appellant and told him, "it's okay." (Id.) Following the incident, on 28 March 2020, ML confronted Appellant about the incident using a messaging application. (Pros. Ex. 2; R. at 591-93.) During that conversation, ML directly stated, "you raped me." (Pros. Ex. 2 at 4; R. at 592.) She testified that she was referring to the incident on 23 December 2019. (Id.)

In response to ML's confrontation, Appellant stated, "you're right, I fucked up and there's no justifying it..." (Pros. Ex. 2 at 4.)

[redacted]

The comi was then reopened, and trial defense counsel began cross-examination of ML before the members. (R. at 603-08.) The Defense explored several areas during cross-examination which implicated Mil. R. Evid. 412, but never elicited any testimony from ML about condom use or asked the militaiy judge to do so. (R. at 603-697.) Finally, the topic was not discussed with ML on re-cross examination. (R. at 711-713.)

[redacted]

[redacted]

[redacted] In response to the members' question about whether Appellant used a condom during the act in question, ML testified that he did not. (R. at 744.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING THE EVIDENCE AT ISSUE NOTWITHSTANDING THE EXCLUSIONARY PURPOSE OF MIL. R. EVID. 412, NOR DID HE PROHIBIT DEFENSE FROM INTRODUCING CONTRADICTORY EVIDENCE.

Standard of Review

"[Appellate comis] review the milita1y judge's rnling on whether to exclude evidence pursuant to M.R.E. 412 for an abuse of discretion." United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011) (citing United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010)). Milita1y

judges have “broad discretion to impose reasonable limitations on cross-examination, based on concerns about, among other things, harassment, prejudice, confusion of the issues, a witness's safety, or interrogation that is repetitive or only marginally relevant.” United States v. Erikson, 76 M.J. 231, 235 (C.A.A.F. 2017).

"A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." Id. (citation omitted) (quotations omitted); *see also* Ellerbrock, 70 M.J. at 317 (“findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo”). The abuse of discretion standard is strict, “calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (citations omitted) (quotations omitted). Military judges' rulings may receive less deference on appeal if the analysis is not articulated on the record. United States v. St. Jean, 83 M.J. 109, 114 (C.A.A.F. 2023) (citing United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009)). Still, “an absence on the record of a military judge's reasoning does not—by itself provide a basis for finding error.” Id. Without evidence to the contrary supported by the record, “we must assume a military judge properly considered an accused's claim consistent with the law.” Id. (citing United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012)).

Law

The Supreme Court has said that in sexual assault prosecutions "[]victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." Michigan v. Lucas, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991). That principle in mind, a federal rule of evidence, commonly referred to as the “Rape-Shield Law,” was created to exclude certain types of evidence in sexual assault cases for the special

benefit and protection of sexual assault victims.[3] United States v. Banker, 60 M.J. 216, 219, 221 (C.A.A.F. 2004) ("By affording victims protection in most instances, the rule encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."). Although Mil. R. Evid. 412 is commonly called a "rape-shield" rule, "it really is a rape-victim shield rule because it is designed to protect a victim's privacy and thereby protect them from further trauma."[4] United States v. Sanchez, 44 M.J. 174, 177 (C.A.A.F. 1996).

The Rule is intended to shield victims of sexual assault from the "often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]," but it also prevents introduction of prohibited subject matter through other means such as reputation evidence. Erikson, 76 M.J. at 235 (citing Ellerbrock, 70 M.J. at 317-18) (citations omitted); *see also*, e.g., Sanchez, 44 M.J. at 178. By its text, Mil. R. Evid. 412(a) specifically prohibits introduction of evidence offered to prove: (1) that a victim engaged in "other sexual behavior" or (2) a victim's "sexual predisposition." Under Mil. R. Evid. 412(d), "sexual behavior" is defined as "any sexual behavior not encompassed by the alleged offense." Subsection (d) also states, "[s]exual predisposition refers to a victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts, but that may have a sexual connotation for the fact finder."

[3] Mil. R. Evid. 412 was modeled after the federal rule and, like its federal counterpart, was intended to safeguard victims from "the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process." Banker, 60 M.J. at 219 (citations omitted).

[4] "The in-camera-hearing provision for determining admissibility of this evidence was designed to protect the alleged victim…the rule require[s] that rape victims receive notice of the evidentiary hearing and a copy of the defendant's motion and offer of proof…the text, purpose, and legislative history of rule 412 clearly indicate that Congress enacted the *rule for the special benefit of the victims* of rape…(emphasis added)" Sanchez, 44 M.J. at 180 (Sullivan, J., concurring).

Appellate courts have consistently indicated that the rule's exclusionary reach requires a broad interpretation of (a)(1) and (2). *See* Sanchez, 44 M.J. 174, 178; *see also* Erikson, 76 M.J. at 235. Reviewing courts have clarified, for example, that evidence of a victim's chastity, the *absence* of a certain predisposition, or allegations of other non-consensual sexual acts by the victim may also fall under the ambit of Mil. R. Evid. 412(a). *See* Sanchez, 44 M.J. 174.

The rule's protection is broad, but Mil. R. Evid. 412 does not afford victims an absolute privilege. *See,* e.g., Banker, 60 M.J. at 216, 221 (internal citations omitted); United States v. Gaddis, 70 M.J. 248, 255 (C.A.A.F. 2011). The Rule contains limited exceptions which allow an accused the ability to present a defense as to consent or identity of the perpetrator. Mil. R. Evid. 412(b)(1)-(2). Additionally, Mil. R. Evid. 412(b)(2)'s exception allows the prosecution to offer evidence of victim sexual behavior as it relates to the issue of consent. Id. The Rule's exceptions further acknowledge an accused's constitutional right to confront and cross-examine the witnesses against him. Mil. R. Evid. 412(b)(3).

While the Rule recognizes that some protected material may be constitutionally required, appellate courts have explained that not everything an accused seeks to admit should be treated as such, even if potentially helpful to the defense. *See, e.g.*, Ellerbrock, 70 M.J. at 318 (highlighting an accused's right to cross-examine witnesses is not without limitation). For example, cross-examination is limited to the "subject matter of the direct examination and matters affecting the credibility of the witness." McElhaney, 54 M.J. at 129. Cross-examination cannot be conducted "without due regard for applicable rules of evidence." United States v. Velez, 48 M.J. 220, 226 (C.A.A.F. 1998) (citations omitted).

An accused's right to confrontation "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Michigan v. Lucas, 500 U.S. 145, 149.

Indeed, appellate comis have consistently found that Mil. R. Evid. 412 "is a reasonable restriction on the admissibility of evidence that may be minimally relevant, but also caITies a high risk of harassment, confusing the issues, and discouraging repo1is of sexual assault." Gaddis, 70 M.J. 248,252 (citations omitted).

Mil. R. Evid. 412 is a rnle of exclusion, unlike Mil. R. Evid. 403. Banker, 60 M.J. at 219. Thus, an accused has the burden to establish his entitlement to any exception to the Mil. R. Evid. 412 prohibition. Erikson, 76 M.J. at 235; Banker, 60 M.J. at 221. To establish a constitutional right to confrontation, an accused must demonstrate that the evidence is *necessary*, which requires such evidence to be relevant, material, and favorable to his defense.[5] Id. Likewise, an accused bears the burden to establish a factual basis for the evidence he seeks to admit. Id. Finally, the probative value of the evidence must "outweigh the danger of unfair prejudice to the victim's privacy." Mil. R. Evid. 412(c)(3).

As to the procedural rnles, Mil. R. Evid. 412(c)(l)(A) requires the pa1iy intending to offer evidence under a subsection (b) exception to file a written motion "specifically describing the evidence and stating the pmpose for which it is offered." If this proffer sufficiently describes the evidence and aiiiculates an applicable exception under Mil. R. Evid. 412(b)(l)-(3), "the militaiy judge shall conduct a heai·ing ... to detennine if such evidence is admissible." However, appellate comis have found on various occasions that a closed heai·ing was not required in eve1y case where a pa1iy wished to introduce evidence which may fall under Mil. R. Evid. 412.

In United States v. Sanchez CAAF explained:

> The reason for the hearing.. .is to serve as a check on questionable proffers in order to protect victims and, if the evidence is eventually rnled inadmissible, to have a record for appeal. To require a hearing

[5] "The te1m 'favorable' as used in both Supreme Comi and militaiy precedent is synonymous with 'vital.'" Erikson, 76 M.J. at 235 (citing Smith, 68 M.J. at 448).

> when the proffer has not met the threshold requirements for a hearing would unde1mine the rationale for [Mil. R. Evid.] 412(a) and (b)--to protect victims against humiliating, embanassing, and harassing questions... This prevents the hearing from being used as a discove1y device by the proponent.

44 M.J. at 177; *see also* Erikson, at 76 M.J. 235 (upholding a trial comt's dete1mination that the defense's failme to demonstrate adequate factual suppoit was dispositive of his claim to a right to confrontation on the subject matter, and thus, did not require a hearing); McElhaney, 54 M.J. 120 (upholding a trial comt's mling prohibiting defense counsel from calling a specific witness in a closed Mil. R. Evid. 412 because defense counsel proffered no credible evidence to suppoit the existence of the fact at issue).

Mil. R. Evid. 412(c)(3) then directs that:

> If the milita1y judge dete1mines that evidence is admissible on the basis of the hearing described in paragraph (2) of this subdivision, the evidence *the accused seeks* to offer is relevant for a pm-pose under subdivisions (b)(1) or (2) of this mle and that the probative value of such evidence outweighs the danger of unfair prejudice to the victims' privacy, or that the evidence is described by subdivisions (b)(3) of this mle, such evidence shall be admissible under this mle to the extent an order made by the militaiy judge specifies evidence that may be offered and area with respect to which the victim may be examined or cross examined.

(emphasis added).

Any evidence introduced or deemed admissible under a Mil. R. Evid. 412 exception is still "subject to challenge under Mil. R. Evid. 403." Mil. R. Evid. 412(c)(3). Mil. R. Evid. 403, a mle of inclusion, presumes admissibility. Banker, 60 M.J. at 221. Thus, the balancing test places the bmden on the opponent to show why the evidence is inadmissible. Id.

Analysis

Appellant makes two basic claims related to this issue. First, Appellant seems to take issue with the militaiy judge's mling which allowed ML to testify on direct examination about

the typical use of condoms during her relationship with Appellant because it the government and military judge did not follow proper procedures for admitting the evidence. (App. Br. at 6-8.) And Appellant also claims that the military judge simultaneously "prohibited" the defense from introducing contradictory evidence on the subject matter.[6] (App. Br. at 6.)

The military judge's Mil. R. Evid. 412 rulings were not erroneous for several reasons: (1) Appellant had no right to have evidence excluded under Mil. R. Evid. 412, as the Rule's exclusion exists for the special benefit of *sexual assault victims*; (2) there was no procedural error concerning the condom use testimony elicited; (3) the evidence elicited from the named victim, particularly the testimony concerning condom use during the charged offense, was not clearly within the ambit of Mil. R. Evid. 412(a); (4) even if the condom use evidence fell under Mil. R. Evid. 412(a), the military judge properly found that no danger of unfair prejudice to the victim's privacy existed without the need for a closed hearing because it was offered by the prosecution and the victim did not invoke her privilege or otherwise object; and (5) despite having the opportunity, Appellant failed to introduce contradictory evidence or request appropriate time to adjust and prepare the Defense case in light of the alleged "surprise." Each of these points will be addressed in turn.

[6] Appellant's first Assignment of Error specifically claims that the military judge "prohibited trial defense counsel from introducing Mil. R. Evid. 412 evidence to indicate that the couple had a history of consensual sexual intercourse without a condom," but later simply complains that the ruling to allow the government to elicit the condom use evidence, "the Defense did not have a chance to prepare and present a case that demonstrated the infrequency of condom use during the couple's prior consensual sexual encounters." (App. Br. at 9.) These two statements seem contradictory.

1. Appellant had no right to have the government's evidence excluded under Mil. R. Evid. 412 for failure to follow proper procedures.

Mil. R. Evid. 412 exists for the special benefit of sexual assault victims. Appellant focuses his argument on the text of the Rule's procedures but fails to consider its distinct unquestionable purpose: to protect the privacy of victims and encourage participation in prosecutions against perpetrators. (App. Br. at 6-10), *see* Banker, 60 M.J. at 219. And perhaps most significantly, Appellant neglects to articulate how a ruling effectively violative of a victim's privacy and due process rights could demonstrate prejudice to *him* or entitle him to relief. (App. Br. at 9-10.) Thus, even if the military judge did erroneously allow introduction of the evidence without strict adherence to Mil. R. Evid. 412 procedures as Appellant suggests, any prejudice suffered would be on the part of ML.

Mil. R. Evid. 412 was not created to provide an accused additional procedural rights concerning private information about the person he's accused of victimizing. Much to the contrary, the Rule serves to *limit* the rights an accused enjoys at his criminal trial concerning this type of material in recognition of the affected victim's legitimate privacy interests. *See generally* Michigan v. Lucas, 500 U.S. 145; *see also* Banker, 60 M.J. 216. Similarly, Mil. R. Evid. 412 was not intended to provide an accused an avenue to limit or dictate the probative evidence the government can present in its case-in-chief under a guise of concern for the law's procedural safeguards for victim privacy. Allowing an accused to use the rape-shield rule in this way would contradict the well-intended and victim-focused efforts of Congress.

To the extent that Appellant believes the fairness of the proceedings were prejudiced by the admission of the evidence at issue, his reliance on Mil. R. Evid. 412 procedure is misplaced. Appellant's grievance would be more properly analyzed under the inclusionary framework of Mil. R. Evid. 401 and 403. Mil. R. Evid. 412(c)(3) is supportive of this position, specifically

providing, "any evidence introduced under this rnle is subject to challenge under Mil. R. Evid. 403."

While the militru.y judge did not go through a full analysis on the record regarding the initial condom use testimony from ML, this Court can presume the militru.y judge properly understood and applied the Mil. R. Evid. 403 balancing test. This is pa1tly evidenced by the fact that when he allowed the initial introduction of the evidence over defense counsel's objection, he caveated his rnling with the defense's ability to introduce any evidence to which the government "opens the door." (R. at 535.) [redacted]

2. There was no procedural error concerning the condom use testimony elicited.

The government disagrees that the government's motion did not provide adequate notice of the evidence it intended to offer. The government fuither disagrees with the implication that whether Appellant used a condom during the charged offense was *per se* prohibited under the Mil. R. Evid. 412(a) as it relates to the charged incident.

[redacted]

[redacted] The general circumstances as to consent during ML's and Appellant's prior sexual relationship, i.e., the "condom cue," used to demonstrate contrast to the circumstances of the charged behavior was squarely within the scope of the government's motion. The milita1y judge did not abuse his discretion by dete1mining the condom use evidence fell within the scope of the government's notice - especially where there was no objection by the victim that she was unaware such evidence would be elicited.

3. Circumstances directly related to the charged sexual assault are res gestae of the offense and do not. per se. fall within the ambit of Mil R. Evid. 412(a)

While appellate courts have touched on the subject, no controlling guidance exists concerning whether the general inadmissibility of "other sexual behavior" would include facts and circumstances smTounding the charged sexual act. In United States v. Gaddy, the Almy Comi of Criminal Appeals held that conduct "inexorably intertwined with the alleged offense itself[] is not 'other sexual behavior,' but rather becomes paii of the *res gestae* of the offense." 2017 CCA LEXIS 179, *5 (unpub. op.)(App. C). Facts and circumstances sunounding the sexual act at issue is "admissible as paii of the same transaction as the assault" and, thus, fall outside of Mil. R. Evid. 412. Mil. R. Evid. 412(a)(l) which only prohibits evidence that "any alleged victim engaged in other sexual behavior." Id. (citing United States v. Peel, 29 M.J. 235, 239 (CAAF 1989)).

Later, in United States v. Washington, this Comi rejected the appellant's reliance on Gaddy and noted that it was not controlling authority in this jurisdiction. No. ACM 39761, 2021 CCA LEXIS 379, 99-100 (A.F. Ct. Crim. App. July 30, 2021) (unpub. op.). Still, the

Washington opinion did not criticize ACCA's holding or even question whether certain *res gestae* evidence could ever fall outside the parameters of Mil. R. Evid. 412(a) and even seemed to suggest that it could be a viable argument, *if properly before the court*. Id. at 100. Instead, this Court simply said, "[i]t is the military judge and not the parties who must decide" whether evidence falls under Mil. R. Evid. 412(a) and, if so, whether an exception has been met to allow its admission under 412(b)(1)-(3). Id. at 103-104 (specifically holding "[t]he question whether evidence implicates the rule is a question of law to be decided by the military judge when raised *sua sponte* or by a party.").

Once general evidence of condom use during the relationship was before the members, subsequent questions from the panel simply inquired as to whether that same circumstance was present immediately before the charged sexual offense a circumstance which was inextricably intertwined with the charged offense. It went directly to the essential element of consent and did not, in and of itself, constitute "other sexual behavior." Therefore, the military judge did not err in allowing those member questions.[7]

4. A closed hearing under Mil. R. Evid. 412 was unnecessary where the military judge could assess the probative value and find minimal risk for unfair prejudice to ML's privacy without a hearing.

It is true that Mil. R. Evid. 412(a)'s general rape shield rule is generally applicable to both the government and defense, and victims enjoy a right to be heard concerning admissibility of this evidence regardless of the proponent, should they choose to exercise that right. However, in the context of the rape shield statute, the concern for prejudice refers to that which unfairly

[7] In his brief, Appellant claims, "the military judge permitted the members to ask questions that clearly implicated Mil. R. Evid. 412 as well." (App. Br. at 8.) The government clarifies that the military judge only allowed the court to ask the question about whether a condom was used on the specific night of the charged offense. (R. at 736-37, 744.)

threatens the privacy interests of the alleged victim. Banker, 60 M.J. at 223; *see also* Sanchez, 44 M.J. at 178 ("In determining admissibility there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy."). By its text, the Rule contemplates a balancing test concerning "*evidence the accused seeks to offer*." Mil. R. Evid. 412(c)(3); Banker, 60 M.J. at 223. And indeed, "[i]t would be illogical if the judge were required to evaluate evidence 'offered by the accused' for unfair prejudice to the accused." Id. In other words, the hearing contemplated by Mil. R. Evid. 412(c)(2) and the following balancing test under (c)(3) considers whether evidence should be admitted without regard for prejudice to an accused.

Here, concerning the specific condom use evidence, ML did not object through her counsel, assert implication of Mil. R. Evid. 412, or otherwise request to be heard on the matter. (R. at 535, 731-48.) Once the evidence was determined admissible notwithstanding Mil. R. Evid. 412's exclusion, in this instance Mil. R. Evid. 412(b)(2), the judge was only required to conduct analyses under Mil. R. Evid. 401 and 403, rules of inclusion, to determine admissibility upon trial defense counsel's objection. And the military judge did exactly that. (R. at 535, 736-37.)

In sum, the procedural requirements can differ concerning Mil. R. Evid. 412(a) evidence when it is offered by the government, and the victim does not wish to be heard or otherwise object to its admission. While the rule itself may be confusing, our high court has demonstrated that a military judge does not *always* have to hold a hearing to decide on admissibility of evidence that is Mil. R. 412(a)-protected. *See, e.g.*, Banker, 60 M.J. at 221 (finding that a closed hearing was unnecessary where the defense failed to make a sufficient proffer concerning the intended evidence).

Finally, Appellant asserts that the military judge improperly conducted an inquiry on defense counsel's Mil. R. Evid. 412 objection in an open session, before the panel members. (App. Br. at 7.) Even if a closed hearing were held to determine admissibility of the condom use evidence, though, the outcome would have been no different. The hearing prescribed under Mil. R. Evid. 412(c)(2) is not a forum for an accused to object to the admission of evidence implicating the privacy rights someone else. While allowing a brief hearing on the matter outside the presence of the members, whether in an open or closed session, may have been *safest* practice, the same was not necessarily required. And moreover, the option to hold a closed hearing to determine admissibility of Mil. R. Evid. 412 material exists to protect the privacy of the victim. It is, therefore, unclear how the lack of such a hearing could have been prejudicial to Appellant.[8]

5. The Defense had the opportunity to introduce any available contradictory evidence, but did not do so.

The military judge never prohibited the Defense from rebutting evidence of condom use during consensual acts, as Appellant alleges. (App. Br. at 6.) The military judge's ruling on the defense Mil. R. Evid. 412 motion did not mention this type of evidence in any way, shape, or form. (R. at 198-215.) Thus, despite Appellant's claim, trial defense counsel was never precluded from introducing it, to the extent it existed. And even if it had been precluded in the initial ruling, nothing in the record suggests that the military judge's ruling would have prevented trial defense counsel from introducing contrary evidence after the government counsel opened the door.

[8] Neither trial defense counsel, trial counsel, nor the victims' counsel requested a closed hearing prior to discussing the objection from the Defense. (R. at 534).

In fact, the record supports the opposite. At the same time the milita1y judge made his rnling on the prosecution's ability to elicit testimony from ML on what consent typically looked like prior to consensual sexual interactions, he encouraged trial defense counsel that they may ask for reconsideration if they believe a door was opened by the prosecution. (R. at 535.) The militaiy judge stated the same regarding his rnling on the panel members' questions on the issue. (R. at 736-37.)

Trial defense counsel never asked for reconsideration on the Mil. R. Evid. 412 rnling nor did they make a new motion to introduce rebuttal evidence concerning condom use, though they did ask for consideration of other related issues. But above all, trial defense counsel actually took a fnm position of opposition to this type of evidence coming in when the panel members' questions attempted to elicit it. (R. at 731-41.) [redacted]

Because Appellant's argument suggests some unfair element of "surprise," it should be noted that nothing in the record would suppo1t the existence of a discove1y issue that ML's testimony was the first time they heard the evidence. (App. Br. at 9.) And while Appellant does not explicitly allege any discove1y issues it should be noted that the Defense unquestionably had access to this info1mation through the typical discove1y process, ML specifically stated during her interview with OSI that she and Appellant had always used condoms in the past. *(Preliminary Hearing*, Ex. 7, ROT, Vol. 4 at 49:25.) During cross-examination, trial defense

counsel referenced this interview, asking ML if she recalled her statements to OSI. (*See* R. at 609.)

Instead, Appellant's argument is that the Defense did not expect the evidence to come in because it was not sufficiently described in a Mil. R. Evid. 412 notice. (App. Br. at 9.) Any reliance defense counsel placed in the government's Mil. R. Evid. 412 notice and motion in deciding not to fully prepare its mistake of fact defense should not entitle Appellant to relief. Appellant's claim that his counsel were left unable to prepare an adequate defense based on its understanding that the government would not offer all of its available evidence relevant to the question of consent, in a case that centered around whether ML consented, was unreasonable. But in any event, Appellant never established at trial or now on appeal that it even had evidence he could have produced that he and ML had sex without a condom on other occasions. Trial defense counsel never asserted at trial that they were unprepared to deal with this evidence, nor did they ask for a continuance to prepare a defense.

In conclusion, Appellant was not afforded protection under Mil. R. Evid. 412 that would entitle him to relief for any procedural violations thereunder. Also, the condom use evidence presented was within the scope of the government's Mil. R. Evid. 412 motion or was otherwise *res gestae* of the charged offense. And even if this Court were to find the evidence prohibited by Mil. R. Evid. 412(a) which exceeded the scope of the government's notice, to which Appellant could object on Mil. R. Evid. 412 grounds, trial defense counsel was never actually "prohibited" from introducing contradictory evidence. Further, trial defense counsel waived any opportunity Appellant may have had to introduce evidence to the contrary. The Defense could have requested reconsideration or clarification on the court's prior Mil. R. Evid. 412 ruling or made a new motion to admit its purported rebuttal evidence. Or, the Defense could have simply

withheld its objections when the panel members tried to do it for them. Under those circumstances, the military judge did not abuse his discretion in his handling of the Mil R. Evid. 412 issue.

Addressing prejudice as it pertains to the specific condom use evidence, Appellant asserts that it was clearly prejudicial, "as the Government relied heavily upon the implication that a condom was required for consensual sex in the relationship" during closing argument. (App. Br. at 9). And the government would agree that evidence consistent with the government's case theory is, in fact, typically "prejudicial" to the accused. Still, the simple fact that it's adverse to the defense's case does not necessarily render it inadmissible. In order to properly have this evidence excluded, the Defense would have needed to articulate how the evidence was *unfairly* prejudicial to the Appellant under Mil. R. Evid. 403. *See, e.g.*, United States v. Abel, 469 U.S. 45, 105 S. Ct. 465 (1984); Banker, 60 M.J. at 223.

Overall prejudice

Even if Appellant were correct in his assertion of error, his claim should still be denied because the evidence admitted through ML's testimony did not prejudice Appellant's substantial rights either under Mil. R. Evid. 412 or Mil. R. Evid. 403. *See* United States v. Lopez, 76 M.J. 151, 156 (C.A.A.F. 2017).

Appellant argues that because the government did not follow Mil. R. Evid. 412(c) procedures concerning a written motion, and because a closed hearing was not held, the military judge could not have properly admitted the evidence. (App. Br. at 8.) As previously discussed, neither an additional written motion or closed hearing were *required* in this case. The military judge was able to determine that either Mil. R. Evid. 412 was not implicated by the evidence or that the evidence was admissible and carried no risk for unfair prejudice to

the victim's privacy without the need for a hearing. Moreover, Appellant cannot validly claim that evidence admitted contrary to procedures enumerated under an exclusionary rule created for the sole benefit and protection of his victim effectively unfairly prejudiced him.

While the Rule has built in procedures and exceptions to protect an accused's interests under Mil. R. Evid. 412(b)(1)-(3), the exclusionary provision of the Rule simply does not exist for an accused's benefit. The balancing test for admission of this evidence, after determining an exception applies, does not call for consideration prejudice to an accused. Instead, when determining admissibility of relevant evidence opposed by an accused for danger of unfair prejudice, the correct balancing test is limited to the confines of Mil. R. Evid. 403, a rule of inclusion.

Here, the evidence was highly probative to the court's determination of an essential element to the charged offense – that is, the question of ML's consent – as well as the reasonable mistake of fact defense raised by Appellant, as the military judge acknowledged. (R. at 736-37.) The fact that ML and Appellant normally used condoms during a consensual sexual encounter made it more likely that on the occasion where no condom was used, the encounter was not consensual. That Appellant violated this norm made is less likely he reasonably and mistakenly believed ML was consenting. Additionally, the military judge appropriately determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. (Id.) There was nothing unfair to the accused about introducing evidence of how the charged incident differed from prior consensual encounters. And procedurally, the military judge never precluded the Defense from rebutting this evidence, and the Defense never asked for more time to rebut it. In fact, the Defense objected to the members being allowed to ask

questions about whether there had been prior instances where condom had not been used. Appellant can hardly claim prejudice now related to evidence he helped prevent from being introduced.

Finally, Appellant's first assignment of error seems to assert that the military judge unfairly or inconsistently applied the rule because he allowed ML to testify about what consent looked like during their relationship, including the fact that Appellant would usually get a condom prior to sex, but disallowed the Defense's Mil. R. Evid. 412 evidence.[9] Even if this Court were to find that Mil. R. Evid. 412 procedures applied, the military judge's admission of evidence about condom use during prior consensual sexual acts hardly demonstrates error, much less an abuse of discretion. The evidence was facts and circumstances related to consent, specific to Appellant, in a case that hinged on the question of consent. Conversely, the Defense's Mil. R. Evid. 412 material largely related to someone other than Appellant or was not probative to any particular fact of consequence. The military rules of evidence are to be interpreted and applied based on the facts presented to the court and the applicable law, not in the tit-for-tat fashion that Appellant would have preferred and asks this Court to endorse.

Any presumed error in admitting, rather than excluding, Mil. R. Evid. 412 material, could not have prejudiced Appellant, as the rule was never designed to protect an accused from having this evidence admitted. The Rule, instead, only contemplates the opposite scenario, where Mil. R. Evid. 412-protected evidence is excluded notwithstanding the accused's rights to have the evidence admitted. Thus, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

[9] For example, a large part of the Defense's proposed Mil. R. Evid. 412 evidence was related to an individual other than Appellant. (App. Ex. XXXIII, XXXIV.) Further, nothing noticed by the Defense specifically related to condom use or a lack thereof. (Id.)

II.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE BY FAILING TO CONFRONT M.L. ABOUT HER INITIAL REPORT TO HER SISTER THAT SHE "ACTED LIKE SHE WAS INTO THE SEX" THAT FORMED THE BASIS FOR THE CHARGE.

Additional Facts

As a part of the OSI investigation, Special Agent Johnathan Hicks ("SA Hicks") conducted a telephonic interview of ML's sister, JL. (Preliminary Hearing, Ex. 4 at 8, ROT, Vol. 4.). During that interview, SA Hicks took handwritten notes which became a part of the OSI case file. This note was later incorporated into the Report of Investigation by a different agent, SA IW, as follows:

> [ML] told [Appellant] no several times because she was stressed and worried about school. [Appellant] asked [ML] if she wanted a back rub. [Appellant] massaged [ML] but then inserted his penis into her vagina. [ML] froze but acted like she was into the sex. After an unknown amount of time, she stopped acting like she was enjoying the sexual intercourse.

(Preliminary Hearing, Ex. 4 at 1, 8, ROT, Vol. 4.)

Declaration of Ms. Chraim

The senior trial defense counsel, Ms. Rebecca Chraim,[10] provided a signed declaration dated 8 November 2024 concerning the defense team's decision not to directly confront ML on the alleged statement she made to her sister, JL that ML had initially pretended to be "into the sex." (Appendix A, *Ms. Chraim Delcaration.*) Therein, Ms. Chraim essentially explained that the defense did not have a sufficient factual basis for the same. (Id.)

[10] Ms. Rebecca Chraim, formerly Major Chraim, recently separated from the Air Force. At the time of Appellant's trial, she was on active duty and held the rank of Captain.

Ms. Chraim explained that she, her co-counsel, and defense paralegal conducted a pre-trial interview of ML wherein ML "was adamant that she had not said or done anything that might give SrA Beyer the impression she was consenting to or enjoying the alleged sexual assault." (Id. at 2.) Ms. Chraim further stated that, "[w]hen pressed about whether there was any ambiguity surrounding consent, [ML] became upset and combative…[i]n short, she started to shut down." (Id. at 2.)

Concerning JL, Ms. Chraim noted the initial difficulty to get her to speak with the Defense. (Id. at 2-3.) Once JL finally agreed to an interview, in March 2023, JL was "hostile to the Defense and eager to support ML's interests in the case." (Id.) JL repeatedly claimed she "could not remember any specific statements by [ML] about the alleged sexual assault. However, [she was] adamant that [ML] had described what happened as a rape, remained consistent about it being a rape in every conversation [] regarding the incident, and was extremely emotional whenever she talked about it." (Id. 3.) Most importantly, in this defense interview, JL "*denied telling law enforcement that [ML] had communicated pretending to be 'into' the sexual encounter that night* (or even making a statement that could be interpreted that way)." (Id.) (emphasis added.)

The trial defense team also interviewed SA Hicks in March 2023. "SA Hicks recalled very little about the interview he conducted with [JL] and could not provide any further details about what was captured in the Report of Investigation. He confirmed that the interview with JL was neither video nor audio recorded." (Id.)

Following these interviews, Ms. Chraim and Maj Borders had a discussion about the witnesses they would call at trial. (Id.) Both trial defense counsel were concerned that JL was "emphatically supportive of [ML] and would present to a jury as loving, credible family

members of [ML] who corroborated her claim. (Id.) Based on this, the defense team concluded that J.L. would not likely testify that ML had made any statement about pretending to be "into" the sex and would instead, just reinforce and corroborate M.L.'s testimony. (Id.) The only way to impeach JL's testimony on this fact would have been through SA Hicks, who said during his interview with Defense that he did not remember details from the interview, leaving the Defense with no "effective means of impeaching" ML or JL on the alleged statement. (Id. at 4-5.)

Ms. Chraim resolved that the risk was "unnecessary when ML had already subscribed to many facts that got to the same underlying point." (Id. at 5.) She continued,

> For example, she did not object as the massage became increasingly sexual. Or, that her lack of movement during the alleged sexual assault was typical of their encounters due to her heart condition. Or, that she made noises during the act that could have been interpreted as enthusiasm. Or, that she told SrA Beyer to keep going in the middle of the sexual act.

(Id. at 5.)

Declaration of Major Kelly Borders

On 13 November 2024, Major Kelly Borders also provided her declaration addressing the issues raised by Appellant. (Appendix B, *Major Borders Declaration*.) Maj Borders also discussed ML's interview and recalled being under time constraints. (Id. at 2.) She does not have any notes concerning ML's statements to her family members and assumes it is because the defense team did not ask questions on that specific subject. (Id.)

Maj Borders also recalled the difficultly accomplishing an interview with JL. (Id. at 4.) When JL finally spoke to the Defense, JL stated that she did not remember any details about what ML told her after the charged event and could not recall exactly what she told law enforcement. (Id.) Additionally, Maj Borders discussed the Defense's interview of SA Hicks, who, by the time of the interview, was no longer a special agent or member of OSI. (Id. at 4.)

The former special agent did not remember the details of the conversation well enough to speak to what was discussed during JL's OSI interview. (Id.) He also confirmed that the interview was not recorded. (Id.) Although not a part of the appellate record, Maj Borders indicated that the specific notes the former agent made, and the ROI author subsequently relied on, were as follows:

> (S) wanted to have sex, pressure, no repeatedly, stressed + worried about school, back rub, decided to insert himself + (V) froze, acted like she was into it, stopped acting like she enjoyed it, (V) "no", (S) started crying + (V) comforted him, (S) said "sorry."

(Id. at 5). Similar to Ms. Chraim, Maj Borders stated that she did not believe JL's testimony would have helped their case if ML were asked the question about her alleged statement to JL and denied it. (Id.) Instead, ML's family all "saw her as a victim of rape, and would, at best, say they couldn't remember if confronted with anything objectively harmful to [ML's] version of events." She also explained the problem with having to call former SA Hicks, and added the difficulty of having to explain why he was no longer an OSI agent. (Id.)

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Law

The Sixth Amendment guarantees an accused the right to counsel in criminal proceedings which necessarily requires effectiveness in the assistance received. U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and

begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

The Court can decide an ineffective assistance claim on either of these two elements without consideration of the other. Strickland, 466 U.S. at 697. So, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id.

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on Appellant to prove both deficient performance and prejudice. Datavs, 71 M.J. at 424.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial

tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009).

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.).

To show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689).

This Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, 1998 CCA LEXIS at *7-8. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Impeachment Using Extrinsic Evidence

"The use of extrinsic evidence to impeach a witness is highly circumscribed. *See, e.g.*, Mil. R. Evid. 608, 609, 613. The rules on the use of extrinsic evidence to impeach depend on the method of impeachment. Broadly, there are four methods of impeachment: character for untruthfulness; prior inconsistent statements; bias, prejudice, or motive to misrepresent; or impeachment by contradiction." Extrinsic evidence to prove a character for untruthfulness is, with a limited exception, prohibited. Mil. R. Evid. 608(b). On the other hand, extrinsic evidence is permitted to show bias, prejudice, or motive to misrepresent. Mil. R. Evid. 608(c). In re Y.B., 83 M.J. 501, 506 (C.G. Ct. Crim. App. 2022) (citing United States v. Banker, 15 M.J. 207, 210 (C.M.A. 1983).

While not discussed in detail in the Military Rules of Evidence, impeachment by contradiction is a common law doctrine recognized by military courts. Id. (citations omitted). "This line of attack involves showing the tribunal the contrary of a witness' asserted fact, so as to raise an inference of a general defective trustworthiness." Id. (quoting Banker, 15 M.J. at 210).

The general rule is that if a witness's asserted fact is "collateral," then extrinsic evidence to contradict it is inadmissible. Id. A matter is "collateral" if "the fact could not be shown in evidence for any purpose independent of the contradiction." United States v. Langhorne, 77 M.J. 547 (A.F. Ct. Crim. App. 2017). The rules of professional conduct require attorneys to have a sufficient basis for the questions asked on direct and cross-examination.[11]

[11] Concerning the examination of witnesses, the Air Force Standards for Criminal Justice, Standard 3-5.7(a)-(b) state, "[t]he interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and

Analysis

Appellant's alleged errors by trial defense counsel do not amount to ineffective assistance of counsel as a matter of law. The conduct alleged, on its face, does not constitute ineffectiveness based on the context in this case and the applicable evidentiary rules. Without having to even consider trial defense counsel's stated strategic reasoning, which is later discussed, this Court can find that the failure to "confront" ML on a statement ML allegedly made to her sister, JL, about the assault, and a decision not to call JL to attempt to impeach ML's testimony by contradiction do not constitute ineffective assistance. And even if some error by trial counsel were found without yet considering trial defense counsel's stated strategic reasoning, Appellant has failed to show how he was prejudiced or a reasonable probability that the result would have been different had the alleged error not existed.

Truth of the Allegation

Appellant's allegations that trial defense counsel did not call ML's sister, JL, to testify in the defense case to impeach ML's testimony is true. (*Appendix A-B.*) Also, Appellant correctly asserts that trial defense counsel failed to directly confront ML on her alleged outcry statements; trial defense counsel did not specifically ask ML whether she told her sister about what happened from ML's perspective, nor did they elicit testimony about ML's specific words. (Id.) However, trial defense counsel had a reasonable explanation for their actions. The OSI agent's statement about JL's statement about ML's statement was not sufficiently reliable to confront

without seeking to intimidate or humiliate the witness unnecessarily…[a] trial counsel should not abuse the power of cross-examination to discredit or undermine a witness if the trial counsel knows the witness is testifying truthfully." Air Force Instruction 51-110, *Professional Responsibility Program*, Atch 7, Standard 3-5.7. Subsection (d) further provides, "[i]t is unprofessional conduct for a trial counsel to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." Id.

ML. Further, based on the expected testimony of JL and SA Hicks and information provided in the pretrial interviews with the Defense, the applicable rules of evidence and professional conduct would not likely have permitted the Defense to call these other witnesses for the sole purpose of attempting to contradict ML's denial of the statement.

And even if they were allowed to attempt the impeachment, trial defense counsel were not ineffective in their decision not to assume the risk it involved: additional bolstering of ML's testimony or, best case, a waste of time. To the contrary, the decision not to attempt to confront a key witness on a relatively minor topic without sufficient basis or means for impeachment would arguably be the most logical choice.

Performance "Measurably Below" the Standard

Moreover, the decision not to directly "confront" ML on a multiple-level-hearsay statement trial defense counsel knew she would deny does not constitute a level of advocacy that falls "measurably below the performance… [ordinarily expected] of fallible lawyers." Gooch, 69 M.J. at 362. Similarly, failing to call JL to testify about the statement, knowing she would deny making the statement in the manner recorded by the OSI agent did not fall measurably below the expected performance of trial defense counsel. Finally, calling the OSI agent who did not remember the statement or confidently state that it was made in the manner recorded would not have been prudent.

Based on the proffers of testimony the Defense would have been able to make to the court, it is, again, questionable whether the military judge would have allowed trial defense counsel to engage in this method of impeachment at all. The Sixth Amendment right to confrontation, limited and defined by the rules of evidence and applicable case law, simply does not permit trial defense counsel to cross-examine witnesses in whatever way, or introduce

evidence to whatever extent, they may wish. *See*, e.g., Michigan v. Lucas, 500 U.S. at 149. In sum, Appellant has not met his burden to show that his trial defense counsel were deficient.

Prejudice

Even if this Court were to believe Appellant's allegation of ineffective assistance of counsel held merit, Appellant fails to show prejudice. To prove prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7.

Appellant claims that his trial defense counsel's actions in failing to ask a specific question during cross-examination and failing to call impeachment witnesses amounted to ineffective assistance. (App. Br. at 10-13.) However, he failed to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7.

The alleged statement by ML to JL as recorded by the OSI agent's notes, if established at trial, would have merely added to Appellant's reasonable mistake of fact defense. Given the vast amount of other evidence available, provided through ML's testimony, the notion that this multiple-layered hearsay statement would have likely changed the outcome in this case is illogical. ML's testimony was that after Appellant penetrated her, she did not try to move away from him or otherwise fight him off. (R. at 551.) Instead, she remained still, which was not uncommon due to her heart condition, which the Appellant was aware of. (R. at 638-39.) Trial defense counsel asked her whether they had ever had consensual sex in this same position and ML agreed that they frequently did. (R. at 637.) ML agreed that she was making noises but couldn't describe them. (R. at 639.) She did not shout or scream for help although there were others in the house who could have heard her if she did. (R. at 640.) Finally, she testified that, at

one point, the Appellant stopped and asked her if she wanted him to keep going, to which she responded, "I don't care." (R. at 551.) Finally, immediately after Appellant stopped, ML told him it was "okay." (Id.)

Based on the evidence in this case, it seems apparent that the members' finding that ML did not consent focused on the events which occurred *prior* to the sexual act wherein ML communicated her lack of consent to sex to Appellant. (R. at 545-46, 549-50.) Thus, even viewing the hypothetical evidence in the light most favorable to the Appellant, it remains unclear how ML's nonverbal cues that she may have been into the sex after it had already begun without her consent could have led a reasonable factfinder to a different conclusion. This evidence would similarly do nothing to overcome Appellant's acknowledgment that he "fucked up" when ML confronted him with "raping" her. (Pros. Ex. 2 at 4.)

Appellant was not prejudiced by the lack of his purported evidence or confrontation on the subject, in that the probative value it would have had on a reasonable mistake of fact defense was minimal. Appellant has failed to show "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Trial defense counsel was not ineffective, and Appellant was not prejudiced by trial defense counsel's decisions, based both in strategy and in compliance with the rules for courts-martial. This assignment of error should be denied.

Appellant has not surmounted the "very high hurdle" to prove ineffective assistance of counsel. Alves, 53 M.J. at 289. Rather, Appellant is a "[d]isaffected client[]" and he is seeking to blame his predicament on his lawyers rather than himself. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7. Trial defense counsel was not ineffective in their failure to to explicitly ask ML about the alleged statement to ML's sister during cross-examination. Equally, trial defense counsel was not ineffective in their decision not to call ML's sister to

testify. Even if trial defense counsel was ineffective, Appellant did not suffer any prejudice. This Comi should deny this assignment of enor.

CONCLUSION

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I ce1tify that a copy of the foregoing was delivered to the Comt and the Air Force Appellate Defense Division on 12 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO FILE PORTIONS OF**
	)	**UNITED STATES' ANSWER**
	)	**UNDER SEAL**
	)	
v.	)	Before Panel No.2
	)	
Senior Airman (E-4)	)	No. ACM 40566
JUSTON D. BEYER	)	
United States Air Force	)	12 December 2024
Appellant	)	

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

Pursuant to Rule 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 portions of its Answer (pp. 2-5, 9-11, 19-20, and 24) under seal.

On 8 October 2024, this Court granted Appellant's request to file portions of his brief under seal which contains discussion of sealed materials in the record of trial. Due to the nature of the assigned errors (Mil. R. Evid. 412 issues) and the stated facts, the United States' Answer discusses similar material which was ordered sealed at trial. The references to sealed material from the trial record has been excised from the electronic version of the United States' Answer. The sealed portions have been appropriately packaged, marked, and delivered to both this Court and the Air Force Appellate Defense Division on the date of this filing. A Consent Motion to Electronically Transmit Sealed Material to civilian appellate defense counsel was also filed on this date.

For these reasons, the United States respectfully requests this Honorable Comi grant this motion and pe1mit the United States to file po1iions of its Answer under seal. Undersigned counsel has discussed this matter with Appellant's counsel, who has no objection to this motion.

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CERTIFICATE OF FILING AND SERVICE

I ce1iify that a copy of the foregoing was delivered to the Comi and the Air Force Appellate Defense Division on 12 December 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40566**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Juston BEYER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 12 December 2024, counsel for Appellee filed a Consent Motion to File Portions of United States' Answer Under Seal. The court granted the said motion. Appellee also filed a consent motion to transmit the sealed portions of the Answer brief to Appellant's civilian appellate counsel whose offices are not within reasonable traveling distance to view the sealed portions of the brief.

Appellate counsel may examine sealed materials "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i).

The court finds Appellee has made a colorable showing that review of the sealed materials is necessary to fulfill appellate counsel's responsibilities.

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

ORDERED:

Appellee's Consent Motion to Electronically Transmit to Sealed Material is **GRANTED**.

Appellee's counsel is permitted to scan a hard copy and to transmit encrypted files containing the sealed materials to Appellant's civilian appellate counsel, Ms. Catherine Cherkasky, via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted to Ms. Cherkasky. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JUSTON BEYER,
Senior Airman (E-4), USAF
Appellant.

ACM 40566

REPLY BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, *v.* Senior Airman (E-4) JUSTON BEYER, United States Air Force, *Appellant*.	REPLY BRIEF ON BEHALF OF APPELLANT Before Panel 2 Case No. ACM 40566 Filed on: 27 December 2024

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

COMES NOW SrA Juston Beyer, Appellant, who, by and through counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, submits this Reply to the United States' Answer (Gov. Br.), submitted on 12 December 2024. Appellant stands by the arguments advanced in his opening brief submitted to this Court on 30 September 2024. He further submits the following for the Court's consideration:

The Government's response advances a novel and dangerous interpretation of Military Rule of Evidence (MRE) 412 that would fundamentally alter the landscape of criminal trials in sexual assault cases. By suggesting that an alleged victim can selectively waive procedural protections and dictate which sexual behavior evidence requires proper notice and hearing, the Government seeks to transform MRE 412 from a comprehensive evidentiary framework into a malleable tool that can be wielded against an accused's constitutional rights. This interpretation, if accepted, would create an unprecedented system where the right to present a complete

defense and confront witnesses depends not on established procedural safeguards, but on the strategic choices of complaining witnesses. Such a framework would eviscerate the fundamental protections guaranteed by both MRE 412 and the Constitution itself.

I. THE MILITARY JUDGE'S HANDLING OF MRE 412 EVIDENCE EFFECTIVELY DENIED APPELLANT HIS RIGHT TO PRESENT A COMPLETE DEFENSE

The Government's response fundamentally mischaracterizes both the nature of Appellant's argument and the constitutional implications of the military judge's handling of MRE 412 evidence. While attempting to frame the issue as merely procedural (Gov. Br. at 17-18), the Government overlooks how the military judge's rulings effectively prevented Appellant from presenting a complete defense on the critical issue of consent—a right guaranteed by the Fifth and Sixth Amendments. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."); *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F.2001) ("It is undeniable that a defendant has a constitutional right to present a defense."); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause ... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment ... the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."); *United States v. Bess,* 75 M.J. 70, 74 (C.A.A.F. 2016).

A. The Government Attempts to Reframe and Expand the Issue to Avoid MRE 412's Requirements

The Government's response attempts to fundamentally reframe the issue on appeal, posing a much broader question than that presented in Appellant's brief: namely, to what extent does MRE 412 apply to the government's evidence when an alleged victim does not object to its admission? (Gov. Br. at 21-22). This reframing seeks to avoid the specific procedural violations at issue while raising a far more troubling suggestion: that MRE 412 might not apply to the prosecution at all.

By questioning whether MRE 412 applies to prosecution evidence at all, the Government ignores the rule's plain language and structure. MRE 412 is not written with party-specific applications; it governs the admission of specific types of evidence regardless of which party offers it. The Government's suggestion that they might be exempt from these requirements would create an unconscionable double standard in the application of evidentiary rules.

B. MRE 412's Procedural Requirements Protect All Parties and Serve Essential Evidentiary Functions

The Government's position reflects a deeply flawed interpretation of both MRE 412's purpose and its proper application at trial. While claiming that "Mil. R. Evid. 412 exists for the special benefit of sexual assault victims" (Gov. Br. at 17), the Government ignores a critical aspect of criminal procedure: an accused person, presumed innocent until proven guilty, has legitimate privacy interests in evidence about their own sexual behavior and predisposition.

When the Government sought to admit evidence about Appellant's sexual practices and predispositions regarding condom use during consensual encounters,

these procedures should have protected his interests as well. The presumption of innocence means that, at the time this evidence was offered, Appellant stood in a position deserving of the rule's procedural protections.

Moreover, the Government's suggestion that procedural violations can be excused when evidence is offered by the prosecution (Gov. Br. at 17-19) would create an unworkable double standard. MRE 412's procedures - including notice, written motion, and hearing requirements - serve essential functions in the proper administration of justice that transcend any single party's interests. These procedures ensure that evidence of sexual behavior or predisposition is properly evaluated before admission, prevent unfair surprise, and create a complete record for appellate review.

C. The Military Judge's Ruling Created an Unconstitutional Framework for Confrontation Rights

The Supreme Court has consistently held that the Confrontation Clause of the Sixth Amendment is a procedural guarantee that cannot be subject to case-by-case determinations of utility or reliability. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Yet the Government's position would do exactly that—allowing an alleged victim to effectively dictate when and how an accused may exercise confrontation rights regarding sexual behavior evidence.

The right to confrontation "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). It includes the right to meaningful cross-examination and the opportunity to present contradictory evidence within established procedural frameworks. *Id*. The Government's position

would replace these constitutional guarantees with a system where the alleged victim could strategically consent to admission of certain evidence while using MRE 412 to block related contextual evidence that might favor the accused.

Even under the Government's own interpretation, significant procedural questions remain unanswered. If victim consent eliminates procedural requirements, would the Government still need to receive notice of specific MRE 412 evidence so they could anticipate and prepare for its use at trial? If the victim personally consents to admission of certain evidence, would the remaining MRE 412 procedures still apply? Most critically, who would have standing to object to the evidence if the victim consents to its admission? The Government's position creates an unworkable framework that would require military judges to make ad hoc determinations about which procedural protections apply in any given case.

D. The Defense Was Systematically Denied a Fair Opportunity to Present Contradictory Evidence

The Government's assertion that the Defense was "never prohibited" from introducing contradictory evidence (Gov. Br. at 23) ignores the practical impossibilities the Defense faced at trial. Once ML testified that condom use was a "sign of consent" in their relationship (R. at 534-35), the Defense was placed in an untenable position. Any attempt to contradict this evidence would have required the Defense to: (1) locate and prepare witnesses who could testify about specific instances of sexual activity without condoms, without having received prior notice this would be necessary; (2) seek a mid-trial continuance that would have highlighted this issue for the members and potentially strengthened the

Government's consent theory; (3) file a new motion under MRE 412 to admit specific instances of sexual behavior, which would have required a hearing and likely opposition from both the Government and victim's counsel; and (4) risk opening the door to even more prejudicial evidence about the couple's sexual practices.

The suggestion that the Defense could have overcome these practical and procedural hurdles in the middle of trial, after the members had already heard this unchallenged evidence about consent, ignores the realities of the courtroom. The damage was done the moment ML was permitted to testify about condom use as a "signal" of consent, and no mid-trial remedy could have effectively countered the prejudicial inference that had been created.

E. Member Questions Cannot Circumvent Prior MRE 412 Rulings

The military judge had already conducted a full MRE 412 analysis and established clear boundaries for admissible evidence about the couple's sexual history. Member questions about matters covered by MRE 412 should have amplified, not diminished, the force of the court's earlier rulings. When the members sought information about specific instances of sexual behavior, this should have heightened the military judge's attention to maintaining the established MRE 412 boundaries. Instead, the opposite occurred—member questions were allowed to erode these boundaries, resulting in admission of evidence that had been explicitly considered and excluded during the MRE 412 hearing.

At trial, the Defense was prohibited from presenting evidence about numerous similarities between the alleged sexual assault and other prior specific acts to show consent by routine (App. Exs. XIV, XVI, XXXIII, XXXIV; R. at 198-205).

The Defense was effectively barred from developing the narrative that many aspects of the charged event mirrored previous consensual encounters between Appellant and ML. Yet, when members asked about one narrow aspect of the couple's prior sexual history—condom use—this evidence was suddenly deemed admissible.

F. The Government's Closing Argument Reveals the True Nature of the Evidence

The Government's claim that the condom use evidence was merely res gestae is belied by their own use of this evidence at trial. Most tellingly, during closing argument, trial counsel did not treat this as mere background evidence of the relationship or evidence solely about the specific charged event, but rather weaponized it as substantive evidence of non-consent, reminding the members of the specific "steps" the couple would allegedly take during consensual sexual encounters, with particular emphasis on the "condom cue" (R. at 814).

This calculated use of the evidence in closing argument reveals that the Government knew full well they had obtained a tactical advantage through the unbalanced admission of sexual history evidence. While claiming on appeal that this evidence was merely "inextricably intertwined" with the charged offense (Gov. Br. at 20), their closing argument tells a different story: one where they relied heavily on this evidence of prior sexual behavior to argue lack of consent in this case.

The prosecution allowed, and indeed encouraged, the members to be misled by this unbalanced presentation of the couple's sexual history. The fact that trial

counsel specifically highlighted the "condom cue" in closing argument demonstrates that this evidence was never truly about res gestae-it wasabout establishing a pattern of behavior that the Government could then use to argue non-consent when that pattern was absent.

CONCLUSION

The military judge's handling of this evidence created far more than mere procedural error-it effectively denied Appellant his constitutional right to present a complete defense on the critical issue of consent. The admission of this evidence without proper notice or procedure under MRE 412, combined with the practical impossibility of presenting contradictory evidence, created substantial prejudice that requires reversal. The fundamental unfairness of allowing the Government to use evidence of sexual predisposition to create an inference about consent, while effectively preventing the Defense from challenging that inference, strikes at the heart of the constitutional right to a fair trial.

WHEREFORE SrA Beyer requests this court set aside the findings and sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 27 December 2024.