IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 1 September 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **9 November 2022**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

GRANTED
8 SEP 2022

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 1 September 2022.

Respectfully submitted,

[redacted]F
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 2 November 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 December 2022**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child and two specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474.

GRANTED
3 NOVEMBER 2022

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 November 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

2 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 2 December 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 January 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child and two specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474.

GRANTED

6 DEC 2022

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 December 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

5 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 December 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 3 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 February 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 175 days[1] have elapsed. On the date requested, 210 days will have elapsed.

March, and 28-30 March 2022, contrary to his pleas,[2] Appellant was convicted at a martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code

GRANTED
6 JAN 2023

[1] This EOT is being filed on 3 January 2023 based upon the Court's closure for the family day and federal holiday.

[2] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's seventh priority case, and sixth priority case before this Court. The following cases have priority over the present case:

1. *United States v. Knodel*, ACM 40018 – Counsel and Appellant's civilian appellate defense attorney will be representing Appellant at his *DuBay* hearing, which is scheduled for 10-12 January 2023, with the potential for the hearing to continue through 13 January 2023. The hearing will be held at the naval base located near MCAS Miramar, San Diego. Undersigned

[3] Since the filing of Appellant's last EOT, counsel argued *United States v. Witt*, USCA Dkt. No. 22-0090/AF on 6 December 2022, filed a reply brief in *United States v. Kitchen*, ACM 40155 on 13 December 2022, and participated in a *DuBay* motions hearing held at MCAS Miramar in *United States v. Knodel*, ACM 40018 on 13 December 2022.

counsel will be traveling on Saturday, 7 January 2023 and is scheduled to return on Saturday, 14 January 2023 (in the event that Appellant's *DuBay* hearing concludes on 13 January 2023). Twenty-four witnesses are currently anticipated to testify at the *DuBay* hearing.

2. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel has completed her review of Appellant's transcript and will be finishing up her review of the rest of his ROT in order to consult with him regarding potential issues to raise in his brief in order to begin drafting his brief.

3. *United States v McTheny*, ACM S32725 – The record of trial is 2 volumes; the trial transcript is 108 pages. There are 3 prosecution exhibits, 5 defense exhibits, and 4 appellate exhibits. Counsel has completed her review of Appellant's ROT and is consulting with Appellant on issues to raise before this Court.

4. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

5. *United States v. Arbo*, ACM 40285 – The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

6. *United States v Flores*, ACM S32728 – The record of trial is 2 volumes; the trial transcript is 143 pages. There are 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 January 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

5 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 31 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 March 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 21 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's fifth priority case. The following cases have priority over the present case:

1. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel is currently consulting with Appellant on issues to raise, researching issues, and drafting Appellant's brief which is due to this Court on 21 February 2023.

[2] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review in *United States v. Ramirez*, ACM S32538 on 5 January 2023, and represented another client at his *DuBay* hearing (*United States v. Knodel*, ACM 40018), which was conducted from 10-14 January 2023 at Naval Base San Diego.

2. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has begun her review of Appellant's ROT.

3. *United States v. Arbo*, ACM 40285 – The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

4. *United States v Flores*, ACM S32728 – The record of trial is 2 volumes; the trial transcript is 143 pages. There are 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. Counsel has read approximately three-fourths of Appellant's transcript.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
AF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 January 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 January 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40303**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jason M. BLACKBURN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 31 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 1st day of February, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 March 2023**.

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

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 2 March 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 April 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child

GRANTED
6 MAR 2023

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case. The following cases have priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has reviewed approximately 175 pages of Appellant's transcript.

2. *United States v. Arbo*, ACM 40285 – The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits.

[2] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Jones*, ACM 40226, on 21 February 2023.

Counsel has reviewed Appellant's transcript, has reviewed ¾ of Appellant's ROT, and submitted a request to view sealed materials.

3. *United States v Flores*, ACM S32728 – The record of trial is 2 volumes; the trial transcript is 143 pages. There are 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. Counsel has completed her review of Appellant's case, identified potential issues to raise, and has spoken with Appellant to discuss what issues she would like raised in her brief so counsel can begin drafting her Assignments of Error.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
AF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 March 2023.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

3 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 March 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 31 March 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 May 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child

GRANTED
4 APR 2023

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel is currently assigned 22 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's third priority case. The following cases have priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has reviewed Appellant's ROT, consulted with Appellant concerning issues to raise, has been conducting research on those issues, and is drafting Appellant's Assignments of Error.

2. *United States v. Arbo*, ACM 40285 – The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits.

[2] Since the filing of Appellant's last EOT, counsel filed a petition for reconsideration in *United States v. Daniels III*, ACM 39407 (rem) to the Court of Appeals for the Armed Forces on 10 March 2023, and filed a brief in *United States v. Flores*, ACM S32728, on 21 March 2023.

Counsel has reviewed Appellant's ROT and has consulted with Appellant on potential issues to raise.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
AF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 March 2023.

Respectfully submitted,

[redacted]F
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

3 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 April 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 1 Case No. ACM 40303 Filed on: 31 March 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to examine the sealed material in Appellant's record of trial: Prosecution Exhibit (Pros. Ex.) 3, Appellate Exhibits (App. Ex.) XIV, XV, XVI, XXII, XXIII, XXXIV, XXXV and transcript pages 61-71, 126-167, 370-372. These exhibits, which reference Mil. R. Evid. 513 evidence, were released to trial counsel and defense counsel and ordered sealed by the military judge.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's 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. A review of the entire record is necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), 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(c), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, military defense counsel's examination of sealed materials is reasonably necessary to fulfill their responsibilities in this case, since counsel cannot perform their duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 31 March 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

4 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40303 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion –which appear to have been available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 April 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40303**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jason M. BLACKBURN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 31 March 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, specifically, Prosecution Exhibit 3; Appellate Exhibits XIV, XV, XVI, XXII, XXIII, XXXIV, XXXV; and transcript pages 61–71, 126–167, and 370–372.

The motion states the materials were reviewed by counsel at trial and that examination of these sealed materials is reasonably necessary to fulfill appellate counsel's responsibilities. The Government does not oppose the motion, as long as the materials were viewed by both counsel at trial and Government counsel can also examine the sealed materials.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court has reviewed the requested material. The court also finds that appellate defense counsel has made a colorable showing that review of the material is reasonably necessary to a proper fulfillment of appellate defense counsel's responsibilities.

Accordingly, it is by the court on this 6th day of April, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED.** Appellate defense counsel and appellate government counsel are authorized to examine **Prosecution Exhibit 3; Appellate Exhibits XIV, XV, XVI, XXII, XXIII, XXXIV, XXXV; and transcript pages 61–71, 126–167, and 370–372**, subject to the following conditions:

To examine these materials, counsel will coordinate with the court.

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

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (EIGHTH)**
	)	
v.	)	Before Panel No. 1
	)	
Airman Basic (E-1)	)	No. ACM 40303
JASON M. BLACKBURN,	)	
United States Air Force	)	28 April 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 7 **June 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[2] and has yet to complete her review of Appellant's case. Counsel has begun reviewing Appellant's ROT and has reviewed half of the sealed materials in his case. Counsel is currently assigned 23 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's second priority case. The following case has priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has reviewed Appellant's ROT, has consulted with Appellant on issues to raise, is

[2] Since the filing of Appellant's last EOT, counsel filed a reply brief in *United States v. Jones*, ACM 40226, on 18 April 2023, filed a Supplement to Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Kitchen*, ACM 40155, on 20 April 2023, and filed a reply brief in *United States v. Flores*, ACM S32728, on 26 April 2023.

researching the issues, and is drafting Appellant's Assignments of Error to submit to this Court by 7 May 2023.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 April 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

1 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 May 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40303**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jason M. BLACKBURN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 28 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposed the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 2d day of May 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 June 2023**.

Appellant's counsel is advised that given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	))))))))))	**MOTION FOR LEAVE TO GIVE NOTICE TO COURT** Before Panel No. 1 Case No. ACM 40303 Filed on: 9 May 2023

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

Pursuant to Rules 3.1 and 23(d) and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to give notice regarding her review of sealed materials in Appellant's Record of Trial. Counsel filed a Motion to Examine Sealed Materials on 31 March 2023. Counsel requested to review Prosecution Exhibit (Pros. Ex. 3), Appellate Exhibits (App. Ex.) XIV, XV, XVI, XXII, XXIII, XXXIV, XXXV, and transcript pages 61-71, and 126-167, 370-372. When she filed her motion, counsel believed these documents had been released to both trial counsel and defense counsel. This Court granted Appellant's Motion to Examine on 6 April 2023.

Counsel reviewed App. Ex. XIV, XV, XVI, XXII, and XXIII and transcript pages 370-72 on 21 April 2023, and took notes concerning these documents. On 9 May 2023, counsel reviewed transcript pages 61-71, 126-167, and App. EX. XXXIV, and XXXV. Upon reviewing transcript pages 126-67, and XXXIV and XXXV, counsel released that XXIII (9 pages of mental health records) was reviewed in camera and that the military judge released only 1 of these pages to the parties. The one page that was released is found at XXXV. While counsel took notes on the 9

pages of mental health records on 21 April 2023, she has only vague recollections of the content of the mental health records and has not reviewed her notes of these records since taking them on 21 April 2023. Counsel has not discussed her notes of the mental health records with Appellant, and has sealed these notes in a separate Word document while awaiting further guidance from this Court concerning the disposition of her notes.

WHEREFORE, Appellant respectfully requests leave to provide notice to this Court concerning her review of the sealed materials in Appellant's case and guidance concerning further actions in this case.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40303**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jason M. BLACKBURN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 6 April 2023, this court granted Appellant's Motion to Examine Sealed Materials, specifically, Prosecution Exhibit 3; Appellate Exhibits XIV, XV, XVI, XXII, XXIII, XXXIV, XXXV; and transcript pages 61–71, 126–167, and 370–372. In the same order, this court ordered that no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

On 9 May 2023, Appellant's counsel submitted a motion for leave to file to give notice to the court that during her review of the above sealed document, Appellate Exhibit XXIII, she discovered that it was not reviewed by counsel at trial as previously represented and was only reviewed by the military judge in camera.[*] Further, Appellant's counsel informed this court that she took notes from Appellate Exhibit XXIII and has only a vague recollection of the content and has not reviewed her notes of this exhibit since taking them on 21 April 2023. Appellant's counsel stated she has not discussed her notes of Appellate Exhibit XXIII with anyone, and "has sealed these notes in a separate Word document while awaiting further guidance from this [c]ourt concerning the disposition of her notes." Finally, Appellant's counsel requested guidance from this court concerning further actions in this case. The Government did not provide any response.

Accordingly, it is by the court on this 18th day of May, 2023,

ORDERED:

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[*] Appellate Exhibit XXIII is nine pages, and the military judge did allow counsel at trial to view the first page of this exhibit by first having portions of it redacted and then remarking this one page as Appellate Exhibit XXXV.

This court's order of 6 April 2023 is **AMENDED** with respect to Appellate XXIII. Neither appellate government nor appellate defense counsel may examine Appellate Exhibit XXIII without this court's prior written authorization. Appellant's counsel is also ordered to immediately destroy all notes concerning Appellate Exhibit XXIII.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 23 May 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 21 days, which will end on **28 June 2023**. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 315 days have elapsed. On the date requested, 351 days will have elapsed.

In this Court's Order, dated 2 May 2023, counsel was advised that no further enlargements of time would be granted, absent extraordinary circumstances. Good cause and extraordinary circumstances exist to grant this EOT for the following reasons: Appellant's counsel tested positive for COVID-19 on 1 May 2023, and was feeling under the weather for the next several days. Counsel's 4-year-old daughter was home sick with an ear infection and cold on 15-16 May 2023. While counsel was teleworking during the above time periods, she accomplished less than she would ordinarily have accomplished due to her illness and her daughter's illness. Additionally, counsel had turn-over for her next assignment to AFOSI JA on 18 May 2023, and [illegible] office that day. Finally, counsel will be on approved leave from 29 May - 2 June 202[illegible] upcoming Memorial Day holiday.

GRANTED
31 MAY 2023

During the above period, counsel filed a brief in *United States v. Robles*, ACM 40280, on 8 May 2023. Counsel has not opposed Government counsel's EOT request in *Robles.* Counsel also filed a Supplement to Petition for Grant of Review to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Hernandez*, ACM 39606 (rem.) on 17 May 2023.

Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this specific request. Counsel has completed her review of Appellant's ROT and consulted with Appellant concerning issues to raise. Counsel is set to begin drafting Appellant's Assignment of Errors, and believes this request is necessary to ensure she has time to research and brief the issues she has identified given that Appellant litigated his case, and his case involves eight child sexual assault and abuse specifications, as noted below.

On 1 March, and 28-30 March 2022, contrary to his pleas,[1] Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ. R. at 474. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years and to be dishonorably discharged from

[1] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits; the transcript is 519 pages.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet drafted Appellant's Assignments of Error. Counsel is currently assigned 22 cases; 9 cases are pending initial AOEs before this Court. This is military counsel's first priority case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to research and finalize Appellant's Assignments of Error. If counsel finalizes Appellant's brief earlier than anticipated, counsel will file Appellant's Assignments of Error as soon as it is completed.

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

Respectfully submitted,

[redacted]
AF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 May 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

24 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40303 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 351 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)))))))))	**MOTION FOR LEAVE TO FILE IN EXCESS OF PAGE LIMIT** Before Panel No. 1 No. ACM 40303 28 June 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Airman Basic Jason M. Blackburn, Appellant, thereby moves for leave to file his brief in excess of this Court's 50-page limit.

Appellant's brief exceeds the page limit by 8 pages. Good cause exists for exceeding this Court's page limit requirement. Apellant has raised six substantive and complex issues in his brief. The enumerated issues include the following: (1) legal and factual sufficiency of his eight rape and sexual abuse of a child convictions, (2) three issues relating to the admission of Mil. R. Evid. 414 evidence, (3) and issue relating to the completeness of his record of trial, and (4) prosecutorial misconduct during trial counsel's findings argument. Exceeding the page limit is necessary to address these aforementioned issues with sufficient discussion of the facts and relevant law.

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

GRANTED

6 JULY 2023

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 June 2023.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JASON M. BLACKBURN,
Airman Basic (E-1),
United States Air Force
Appellant.

No. ACM 40303

BRIEF ON BEHALF OF APPELLANT

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman Basic (E-1) **JASON M. BLACKBURN**, United States Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel 1 No. ACM 40303 Filed on: 28 June 2023

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

Assignments of Error

I.

WHETHER APPELLANT'S CONVICTIONS FOR RAPE OF A CHILD, AGGRAVATED SEXUAL CONTACT OF A CHILD, AND SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY INSUFFICIENT?

II.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR INDECENT RECORDING IN VIOLATION OF ARTICLE 120c, UMCJ, AS AN OFFENSE OF CHILD MOLESTATION UNDER MIL. R. EVID. 414?

III.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD UNDER MIL. R. EVID. 414?

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE VIDEOS OF E.S. WHICH FORMED THE BASIS FOR APPELLANT'S INDECENT RECORDING CONVICTION IN VIOLATION OF ARTICLE 120c, UCMJ?

V.

WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS INCOMPLETE?

VI.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT WHEN HE VOUCHED FOR THE VERACITY OF E.S., THE COMPLAINING WITNESS?

VII.

WHETHER APPELLANT'S SENTENCE—WHICH INCLUDED 14 YEARS' CONFINEMENT—IS INAPPROPRIATELY SEVERE?[1]

VIII.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT?

IX.

WHETHER THE GOVERNMENT'S REPROSECUTION OF APPELLANT FOLLOWING THE MILITARY JUDGE'S R.C.M. 917 FINDING OF NOT GUILTY AT HIS 2017 COURT-MARIAL VIOLATES THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITIONS AGAINST DOUBLE JEOPARDY?

X.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT AT HIS 2017 COURT-MARTIAL?

Statement of the Case

On 1 March and 28-30 March 2022, contrary to his pleas, Appellant was convicted by a military judge at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article

[1] Issues VII-X are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, *Manual for Courts-Martial, United States* (2008 ed.) (2008 *MCM*),[2] and one charge and two specifications of rape of a child and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012 *MCM*). R. at 474. For one of the sexual abuse of a child specifications, Appellant was found guilty by exceptions. *Id*. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

Additionally, one charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact with a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008 *MCM*). *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2008 *MCM*), and two specifications of sexual assault of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012 *MCM*). *Id*.

The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 14 years, and to be dishonorably discharged from the service. R. at 521. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the entry of judgement and waived the automatic forfeitures for a period of six months from the date of entry of judgement for the benefit of Appellant's dependents. *Id*.

[2] References to the punitive articles are identified by year. References to the Rules for Court-Martial, and Military Rules of Evidence are to the 2019 *MCM*, unless otherwise noted.

Statement of Facts

Background

E.S. was born on 7 May 2003. R. at 232. E.S.'s father, J.S., and mother, M.A., were separated in 2009, and divorced in May 2010. R. at 413. M.A. started dating Appellant in June/July 2010. R. at 234. While they were dating, he visited the home she shared with E.S. *Id.* Appellant later moved in with M.A. and E.S. on 25 April 2011 after a tornado damaged his mother's house. R. at 234, 276. When he lived with them in 2011, E.S. was in school during the normal school year. R. at 238. She also had summer break. *Id*. During this time period, M.A. usually worked shifts at a local restaurant from 7 am to 3 pm. R. at 237. However, based on her position as a general manager, she would also work some evenings and weekends. *Id.* When he lived with them, Appellant worked nights. R. at 294. Appellant lived with M.A. and E.S. until Thanksgiving 2011, when he and M.A. broke up and he moved out at M.A.'s request. R. at 235, 270.

M.A. and Appellant got back together shortly before they got married in August 2012. R. at 270. While they were broken up, Appellant had been attending training in Texas. R. at 235. He had only been back to Arkansas two weeks when he and M.A. got married on 25 August 2012. *Id.* While Appellant moved to Biloxi, Mississippi, in August 2012, M.A. and E.S. did not move to Biloxi until 1 January 2013. R. at 239, 332. After moving to Mississippi, M.A. was "mostly a homemaker," but she also ran an in-home daycare. R. at 239.

J.S. and L.B., E.S.'s stepmother, were married from 2012 until 2017. R. at 177. However, L.B. met E.S. sometime in 2010, as E.S. had just turned 7 when L.B. first met her. *Id.* Initially, when E.S. lived in Arkansas, J.S. and L.B. had visitation every other weekend. *Id*. When E.S. moved to Biloxi, J.S. and L.B.'s custody arrangement changed so that they had E.S. four times a year. *Id.* E.S. stayed with them over spring break, half of the summer (6 weeks), Thanksgiving break, and half of

Christmas break. R. at 177, 415. E.S. and L.B. were close, and L.B. characterized herself as a "close friend," such that she remained close with E.S. even after she and J.S. got divorced in 2017. R. at 176-77. J.S. indicated E.S. and L.B. had a very close relationship, and that L.B. was one of E.S.'s best friends up to the date of Appellant's second court-martial. R. at 426.

Appellant and M.A. had two children after moving to Mississippi. R. at 240. They had a son, N., in November 2013, and they had a daughter, A., in March 2015. *Id.* In October 2015, M.A. started attending night classes. *Id.* During their time in Mississippi, E.S. lived with M.A. and Appellant in two different houses. R. at 295. E.S. called the first house the Van Buren house. *Id*. She did not have a name for the second house, as they were not there as long. *Id*.

Appellant's Prior Court-Martial

In September 2017, Appellant was court-martialed at Keesler Air Force Base, Mississippi. *United States v. Blackburn*, No. ACM 39397 (rem), 2021 CCA LEXIS 212, at *1 (A.F. Ct. Crim. App. 30 Apr. 2021) (unpub. op.). He was convicted of one charge and one specification of sexual abuse of a child for requesting his 12-year-old stepdaughter, E.S., send him nude pictures of herself in violation of Article 120b, UCMJ, and one charge and one specification of indecent recording in violation of Article 120c, UCMJ. *Id*. at *1, *5. He was acquitted of one charge and one specification of knowingly enticing a minor to engage in sexually explicit conduct in violation of Article 134, UCMJ, when the military judge granted the Defense's Rule for Courts-Martial (R.C.M.) 917 motion for a finding of not guilty. *Id*. at *1 n.2.

At his 2022 court-martial—the subject of this appeal—Appellant's stepdaughter, E.S. testified regarding the events of April 2016, which formed the basis of the indecent recording charge at his 2017 court-martial. R. at 320, 335. E.S. explained Appellant's brother, his brother's wife, and their two children lived with them in their second Mississippi house. R. at 306. E.S. shared the

bathroom with her mom and Appellant, as his family used the other bathroom. R. at 320. In April 2020, when she started to get undressed in the bathroom, she saw there was a camera on the floor and there was a red light flashing. *Id.* The camera also said it was recording when she looked at it. *Id.*

After finding his camera, E.S. frantically called her dad and stepmom, L.B. R. at 335, 416-17. J.S. testified to receiving about eight missed calls from E.S. "about one every 20 to 30 seconds and a voicemail." R. at 416. When he spoke to her on the phone, E.S. was crying and was having a hard time breathing. R. at 417. E.S. told J.S. she found a camera in the bathroom where Appellant was videotaping her without her knowledge. *Id*. According to J.S., E.S. sounded scared. *Id*. In fact, he had "never heard her talk like that in [his] life. It made [his] hair stand up." *Id*. Upon reaching her dad and stepmom, E.S. explained about seeing a camera in the bathroom and realizing Appellant was "videoing her with her knowing it." R. at 185, 417. During this conversation, her parents specifically asked E.S. if Appellant had touched her. R. at 340. E.S. said no. *Id*. They also specifically asked her if he had ever touched her before. *Id*. E.S. replied no. *Id*. Her parents then asked if this was the first time that something had been weird. *Id*. E.S. responded yes. *Id*. During this same conversation, her dad told E.S. to tell the truth, and to not lie for Appellant. R. at 342. Her stepmom also advised E.S. to tell the police the truth. *Id*. Additionally, her parents told her not to worry about getting into any trouble. R. at 358.

When she was interviewed about the camcorder recordings, E.S. did not tell the Air Force Office of Special Investigations (AFOSI) that Appellant had ever touched her. R. at 343, 347. However, she did disclose facts concerning a new allegation. R. at 348. During these interviews, she told AFOSI that Appellant had asked her to send him nude photographs. *Id*. As a result of her interviews and this new disclosure, Appellant was court-martialed for not only making indecent recordings of E.S., he also faced two charges relating to asking E.S. to send him nude photographs:

a sexual abuse of a child charge in violation of Article 120b, UCMJ, and a charge under Article 134, UCMJ, for knowingly enticing a minor to engage in sexually explicit conduct. 2021 CCA LEXIS 212, at *1 & n.2. During his 2022 court-martial, E.S. explained that while they were living in their second house in Mississippi, Appellant was set to go away for the military. R. at 319, 320. According to E.S., he came into her bedroom and said he was going away and that he would miss her. R. at 320. He asked her to send him pictures without any clothes on from her phone to his. *Id*. E.S. indicated she said initially said no. *Id*. Appellant asked her to think about it, and she did not respond. *Id*.

E.S. testified at Appellant's 2017 court-martial. R. at 348. She was 14 years old when she testified. R. at 354. She was sworn in, admonished to tell the truth, and swore to tell the truth. *Id*. At trial, Appellant's defense counsel asked E.S., "He never touched you in any way?" and E.S. replied, "no." R. at 349. She was also asked if she ever touched Appellant. R. at 350. E.S. testified "no." *Id*. When she testified at his 2017 court-martial, Appellant was not present in the courtroom. R. at 351. When E.S. heard Appellant's sentence at his first court-martial, she was disappointed because his sentence was short. R. at 360. She did not like the fact that it was short. *Id.*

E.S.'s February 2020 Allegations

In January 2020, E.S. was allowed to create a Facebook page. R. at 324. After creating her Facebook page, E.S. added Appellant's mother, C.B., as a friend. *Id.* When E.S. looked through C.B.'s pictures, she saw pictures of Appellant, which caused her significant emotions. R. at 325. E.S. was aware Appellant was coming up on parole, and that he would be getting out of confinement in the near future. R. at 329. In January 2020, E.S.'s father, J.S., brought E.S. to see Dr. H.T., a therapist. R. at 326. He took her to see Dr. H.T. because she started having nightmares. R. at 424. E.S. had met with Dr. H.T. previously. R. at 326. In February 2020, E.S. told Dr. H.T. Appellant had sexually abused her, which caused Dr. H.T. to file a report. *Id*. During Appellant's 2022 court-martial, E.S.

testified Appellant sexually abused her in both Arkansas and Mississippi. R. at 328. When questioned about telling Dr. H.T. that the abuse occurred only in Mississippi, E.S. responded, "I don't remember exactly what I said, but I didn't clarify which state or if both." R. at 327. In her meeting notes, Dr. H.T. wrote the following: [redacted] Appellate Exhibit (App. Ex.) XXXV.

During her testimony at Appellant's 2022 court-martial, E.S. claimed Appellant began touching her in Arkansas (R. at 285), and the touching continued and progressed once she moved to Mississippi. R. at 295. According to E.S., Appellant told her it was their little secret. R. at 290. She understood that it was a secret shared between them and "nobody else could know about it." *Id.* After E.S. moved to Mississippi, Appellant would still mention that it was their little secret. R. at 293.

Specification 1 of Charge I[3]

E.S. testified that when they lived in Arkansas and her mom was at work, she would take naps with Appellant. R. at 283, 284. E.S. indicated that Appellant would touch her during these nap times. R. at 285. He would pull her on top of him and touch her under her clothing. *Id*. R. at 285. When he pulled her on top of him, his hands would be on her hips or touching her butt. R. at 286. According to E.S., every time they took naps together, he would touch her butt under her clothing. *Id*. He would also touch her vagina or her chest during nap time. R. at 287. Sometimes, he would put his hand under her shirt, move it up toward her chest, and "he would just leave it there." R. at 288. When he touched her vagina, he would stick his hand underneath her pants and touch her, near the top of her vagina. R. at 289.

[3] Aggravated sexual contact by intentionally touching E.S.'s genitalia. ROT, Vol. 2, Charge Sheet.

Specification 2 of Charge I[4]

During her testimony, E.S. was asked whether Appellant made her touch his penis. R. at 293. She responded affirmatively, indicating it happened during nap time. R. at 294. When asked where it occurred, she stated, "I believe in Arkansas and Mississippi." *Id*. She claimed that she made contact with his penis "under and over his pants." *Id*. After he put her hand on his penis, E.S. would not do anything. *Id*. She would just leave her hand there, and then pull it away. When asked what Appellant would do, she testified, "[s]ometimes he would take my hand back and put it on his penis." *Id*. According to E.S., Appellant only made her touch his penis a few times. *Id*.

Specifications 1, 3, 5, 6, 7 of Charge III[5]

M.A. and E.S. moved to Mississippi on 1 January 2013. R. at 239, 332. According to E.S., Appellant continued touching her after she moved to Mississippi. R. at 295. E.S. testified that during family movie nights, Appellant would touch her while she laid in bed between him and her mom while her mom was asleep. R. at 291-92. As she laid in their bed, Appellant would drape his arm over her and touch her chest, over and under her shirt. *Id*. He would also put his hands down her pants and touch her butt under her clothing. *Id*. He would touch her like this "pretty often" during family movie nights. R. at 293. During these family movie nights, E.S. never called out to her mom or grabbed her mom because she did not want to wake her. *Id*. E.S. claimed there were a couple of times when she woke up in their bed and her pants would be off or they would be pulled down to her

[4] Aggravated sexual contact by intentionally causing E.S.'s hand to touch his penis. ROT, Vol 2, Charge Sheet.

[5] Specification 1: rape of a child under 12 years by digital penetration. ROT, Vol. 2, Charge Sheet. Specification 3: rape of a child who has attained the age of 12 years by force by digital penetration. *Id*. Specification 5: sexual abuse of a child involving sexual contact - intentionally touching E.S.'s genitalia. *Id*. Specification 6: sexual abuse of a child involving sexual contact - intentionally touching E.S.'s breasts. *Id*. Specification 7: sexual abuse of a child involving sexual contact - intentionally touching E.S.'s buttocks. *Id*.

feet. R. at 317. Her mother was in the bed during these instances. *Id*. While describing one instance, E.S. initially indicated her mom was in the bed, but then corrected herself and claimed her mom was not in the bed. R. at 318. Instead, she testified her mom came upstairs and flicked on the lights. *Id*. When her mom came in, E.S. did not tell her that Appellant was touching her. *Id*. Instead, she made up a story about one of her stuffed animals. *Id*.

Additionally, E.S. testified that Appellant would touch her when he came to her bedroom to say good night. R. at 296. He would touch her chest, butt, and vagina. R. at 295. According to E.S., he would touch her chest, both over and under the clothing, almost every night. R. at 297. Likewise, he would touch her butt, both over and under the clothing, almost every night. R. at 297-98. When Appellant was touching her, her mom would "either be in her room asleep or at her school." R. at 297. E.S. explained that her mom was going to nursing school and she attended night classes. R. at 299.

When they were living in their first Mississippi house, the Van Buren house (R. at 302), E.S. testified the touching progressed, and Appellant would put his fingers inside her vagina. R. at 304, 306. She claimed she could feel his fingers and his fingernails. R. at 305. She said his fingernails would scratch her and "it kind of hurt." *Id*. According to E.S., Appellant would penetrate her vagina "pretty often." *Id*.

Specification 8 of Charge III[6]

E.S. described a scenario where Appellant allegedly asked her to touch his penis and she said no. R. at 310. According to E.S., this scenario occurred when they lived in their first house, the Van Buren house, in Mississippi. *Id*. While she described hearing him shuffling around and she stated she believed he had pulled his pants down, she refused to look at him and she never saw his penis. R.

[6] Sexual abuse of a child by intentionally exposing his penis to E.S. ROT, Vol. 2, Charge Sheet.

at 310-11. When he then came to stand beside the bed, he had his shorts on. R. at 310. When she was asked whether she ever saw his penis, she stated she saw it one time in the bedroom of the Van Buren house. R. at 311. According to E.S., she was reading a book in her mom and Appellant's room. *Id*. She was unsure where her mom was during this exchange. *Id*. He came in and laid down next to her. R. at 313. But then he pushed his way on top of her, by kind of rolling on top of her. R. at 311. He pulled both of their pants down and grabbed a sheet and draped the sheet so it was "kind of covering [them]." R. at 312. E.S. was still holding her book, but when she lifted the book up for a second, she stated she could see his penis. *Id*. When asked to describe who she saw, she replied, "I don't have a description because it was moving and it was a glance." R. at 314.

The Government Expert's Testimony

The Government called Dr. S.P., a licensed clinical psychologist, to discuss research relating to external and internal barriers to the reporting of child sexual abuse. R. at 393-94, 399-400. She explained that there are a variety of external barriers to the reporting of abuse, including the age of the child at the time the abuse is happening and the child's ability to appreciate the wrongfulness of the abuse. R. at 399. She noted that the age differential between the abuser and the child is a barrier as is the nature of the abuse. *Id.* If the abuse is more severe or has continued for a longer duration, the child may be less likely to report. *Id*. She discussed the impact of the nature of the relationship between the abuser and the child, such that when the abuser is part of the family, the likelihood of reporting is reduced. R. at 400. Additionally, she catalogued the internal factors, which include "psychological factors, the feelings of shame, feelings of embarrassment, responsibility and guilt, self-blame." *Id.* Dr. S.P. also detailed factors that would facilitate reporting, noting that older individuals may be more likely to report, including adolescents. R. at 401. If the victim has a trusting relationship with one or two adults, this may facilitate reporting, as may the victim's involvement in

counseling, therapy, or an open dialogue relating to sexual abuse. R. at 402, 406-7. Being specifically asked about the abuse and assured of their safety may also increase reporting. R. at 406. Dr. S.P. agreed that it would not be typical for an abuser to empower a victim, or to tell the victim she has autonomy and can make her own decision. R. at 403. She also stated that one of the facilitators is that the abuser is not living with the victim. R. at 408.

E.S. claimed she did not report Appellant had been touching her because she was worried it would get back to him and he would know she had told that more had happened. R. at 367. She was afraid he would find her somehow and try to get back at her. *Id.* She agreed she could not point to anything specific, it was just a general overall fear. *Id.*

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR RAPE OF A CHILD, AGGRAVATED SEXUAL CONTACT WITH A CHILD, AND SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Knarr*, 80 M.J. 522, 528 (A.F. Ct. Crim. App. 2020), *rev. denied*, 80 M.J. 348 (C.A.A.F. 2020) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Additional Facts

When asked to announce the general nature of the charges, the trial counsel stated:

> The general nature of the charges in this case are: one charge including five total specifications as follows: one specification of aggravated sexual assault of a child, three specifications of aggravated sexual contact of a child, one specification of indecent liberty with a child, all in violation of Article 120, UCMJ; one charge with one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ; and one charge with eight total specifications as follows: four

specifications of sexual assault of a child and four specifications of sexual abuse of a child, all in violation of Article 120b, UCMJ.

R. at 8.

In his ruling on the Defense's motion *in limine* relating to the Government's Mil. R. Evid. 414 notice, the military judge made the following findings of fact:

> One charge and one Specification of aggravated sexual assault,[7] three Specifications of aggravated sexual contact, and one Specification of indecent liberty with a child, in violation of Article 120 UCMJ (October 2007); one Specification of attempted aggravated sexual contact, in violation of Article 80 UCMJ (October 2007); two specifications of sexual assault of a child,[8] two Specifications of rape of a child, and four Specifications of sexual abuse of a child, in violation of Article 120b UCMJ (June 2012), were preferred on the accused on 8 April 2021.

Appellate Exhibit (App. Ex.) XXI.

The military announced the findings as follows:

> Of Specification 1 of Charge I: Guilty,
> Of Specification 2 of Charge I: Guilty,
> Of Specification 3 of Charge I: Not Guilty,
> Of Specification 4 of Charge I: Not Guilty,
> Of Charge I, Guilty.
>
> Of Charge II and its Specification: Not Guilty.
>
> Of Specification 1 of Charge III: Guilty,
> Of Specification 2 of Charge III: Not Guilty,
> Of Specification 3 of Charge III: Guilty,

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[7] This charge and its specification were withdrawn and dismissed without prejudice. ROT, Vol. 2, Charge Sheet. However, both the trial counsel and the military judge incorrectly stated Appellant was charged with aggravated sexual assault. R. at 8; App. Ex. XXI. Appellant was charged with rape of a child, as he was alleged to have committed a sexual act (penetration of E.S.'s genital opening with his finger) with a child, E.S., who had not attained the age of twelve years. *See* 2008 *MCM*, pt. IV, ¶ 45.b.(2)(a) (providing elements of rape of a child); 2008 *MCM*, pt. IV, ¶ 45.a.(t)(1)(B) (defining "sexual act.").

[8] Both trial counsel and the military judge incorrectly stated Appellant was charged with two specifications of sexual assault of a child in violation of Article 120b, UCMJ. R. at 8; App. Ex. XXI. The Government charged Appellant with four specifications of rape of a child. ROT, Vol. 1, Charge Sheet. He was charged with two specifications of rape of a child who has not attained the age of 12 (2019 *MCM*, Appendix 22, ¶ 45b.b.(2)(a)) and two specifications of rape by force of a child who has attained the age of 12. 2019 *MCM*, Appendix 22, ¶ 45b.b.(2)(b).

Of Specification 4 of Charge III: Not Guilty,
Of Specification 5 of Charge III: Guilty
Of Specification 6 of Charge III: Guilty
Of Specification 7 of Charge III: Guilty,
Of Specification 8 of Charge III, Guilty, except the words "on divers occasions,"
of the excepted words: Not Guilty.
Of Charge III: Guilty.

R. at 474.

Law

Article 66(c), UCMJ,[9] mandates that this Court review the legal and factual sufficiency of the evidence and affirm only those findings of guilty which this Court finds correct in law and in fact. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Wheeler*, 76 M.J. 565, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)). It does, however, mean "a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence," such that if there is "a real possibility that the accused is not guilty, [the panel] must give him the benefit of the doubt and find him not guilty." *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1844 (29 Feb. 2020) [*Benchbook*].

In reviewing for legal sufficiency, this Court asks "whether, viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.'" *United States v. Richard*, __M.J. __, No. 22-0091, 2022 CAAF LEXIS 637, at *7-8 (C.A.A.F. 7 Sep. 2022) (citation omitted). The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances

[9] This language now appears in Article 66(d) (2019 ed.).

for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003) (citing *Turner*, 25 M.J. at 325)). "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

1. The Elements of the Charged Offenses

To convict AB Blackburn of aggravated sexual contact with a child (Specification 1 and Specification 2 of Charge I), in violation of Article 120, UCMJ, the Government was required to prove beyond a reasonable doubt:

> (i)(a) That the accused engaged in sexual contact with a child; or
>
> (i)(b) That the accused caused sexual contact with or by a child or by another person with a child; and
>
> (ii) That at the time of the sexual contact the child had not attained the age of twelve years.

See 2008 *MCM*, pt. IV, ¶ 45.b.(7)(a).

To convict AB Blackburn of rape of a child (Specification 1 of Charge III), in violation of Article 120b, UCMJ, the Government was required to prove beyond a reasonable doubt:

> (i) That the accused committed a sexual act upon a child causing penetration, however slight, of the vulva or anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had not attained the age of 12 years; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

See 2019 *MCM*, Appendix 22, ¶ 45b.b.(2)(a).[10]

To convict AB Blackburn of rape of a child (Specification 3 of Charge III), in violation of Article 120b, UCMJ, the Government was required to prove beyond a reasonable doubt:

(i) That the accused committed a sexual act upon a child causing penetration, however slight, of the vulva or anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years;

(iii) That the accused did so by using force against the child or any other person; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

See 2019 *MCM*, Appendix 22, ¶ 45b.b.(2)(b). In defining force, the MCM provides: "the use or abuse of parental or similar authority is sufficient to constitute the use of force." 2019 *MCM*, Appendix 22, ¶ 45b.a.(h)(2).

To convict AB Blackburn of sexual abuse of a child involving sexual contact (Specifications 5-7 of Charge III), in violation of Article 120b, UCMJ, the Government was required to prove beyond a reasonable doubt:

(i) That the accused committed sexual contact upon a child by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person; and

(ii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

[10] Appendix 22 contains the punitive articles applicable to sexual offenses committed between 12 June 2012 and 31 December 2018.

See 2019 *MCM*, Appendix 22, ¶ 45b.b.(4)(a).

To convict AB Blackburn of sexual abuse of a child involving indecent exposure (Specification 8 of Charge III), in violation of Article 120b, UCMJ, the Government was required to prove beyond a reasonable doubt:

> (i) That the accused intentionally exposed his or her genitalia, anus, buttocks, or female areola or nipple to a child by any means; and
>
> (ii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

See 2019 *MCM*, Appendix 22, ¶ 45b.b.(4)(c).

Analysis

AB Blackburn's convictions for rape and sexual abuse of a child are legally and factually insufficient because the military judge's findings of fact demonstrate he misapprehended which sexual offenses the Government charged Appellant with violating, E.S. was not credible, and even if E.S. was credible, her testimony and the Government's scant additional evidence was insufficient to prove all the required elements beyond a reasonable doubt.

In closing, the Government stated:

> I know we have a lot of specifications on the charge sheet there and there are elements to those. But this really boils down to one thing, and it boils down to this court's duty to determine [E.S.'s] credibility. She's either believable or she's not. The testimony that she provided is believable or it's not. If it's believable, he's guilty. And if it's not believable, he's not guilty.

R. at 441. During his closing argument, the trial counsel did not focus on what elements the Government needed to prove beyond a reasonable doubt for any of the charges and specifications. R. at 438-57. Nor did he discuss any of these elements during his rebuttal argument. R. at 468-472.

As the Government aptly argued, E.S.'s credibility was critical, and for a multitude of

reasons, E.S. was not credible. The military judge found the evidence insufficient to convict Appellant of five specifications. R. at 474. This Court should find that the remaining charges and specifications are legally and factually insufficient.

1. The Military Judge's Findings of Fact relating to Specifications 1-4 of Charge III

In his Mil. R. Evid. 414 ruling, the military judge made several findings of fact, including a finding that the Government had charged Appellant with two specifications of rape of a child and two specifications of sexual assault of a child. App. Ex. XXI. As noted above, the Government charged Appellant with four specifications of rape of a child—two specifications of rape of a child under 12 years of age[11] and two specifications of rape by force of a child who had attained the age of 12 years old.[12] ROT, Vol. 2, Charge Sheet.

At the outset of Appellant's court-martial, the Government incorrectly characterized the nature of the charges it had referred against Appellant, stating he was charged with four specifications of sexual assault. R. at 8. Later, during his closing argument, the trial counsel did not frame the Government's case in terms of the elements it needed to prove, instead, he focused on E.S.'s credibility as the linchpin of the Government's case. While in other cases the Government's misstatement may have been harmless, here, it was not harmless when the evidence demonstrated the military judge also misunderstood the Government's charging scheme. "Military judges are presumed to know the law and follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Here, there is clear evidence to the contrary. The military judge's finding of fact demonstrates that he labored under a similar misconception regarding two of the charged specifications, and thus, he misunderstood

[11] *See* Specifications 1 and 2 of Charge III.
[12] *See* Specifications 3 and 4 of Charge III.

what elements the Government needed to prove—beyond a reasonable doubt—to convict Appellant for those specifications. The military judge did not identify which two specifications of Charge III he believed constituted rape of a child and which two specifications he believed constituted sexual assault of a child. App. Ex. XXI. Exacerbating the confusion, the military judge acquitted Appellant of Specifications 2 and 4 of Charge III. R. at 474. Because the military judge did not identify which offenses he believed constituted rape versus sexual assault, Appellant's convictions for Specifications 1 and 3 of Charge III are legally and factually insufficient. *Walters*, 58 M.J. at 396 (holding a Court of Criminal Appeals is required to weigh the evidence and themselves be convinced beyond a reasonable doubt of Appellant's guilt[.]").

For Specification 3 of Charge III, it is impossible to know whether the military judge found the elements of rape of a child beyond a reasonable doubt when he mistakenly believed the Government had charged Appellant with sexual assault of a child. The elements of rape of a child are distinct from the elements of sexual assault of a child, as the Government's specifications alleging rape of a child required the Government to prove the additional element of force. ROT, Vol. 2, Charge Sheet. Because Appellant was tried by a military judge sitting alone, the military judge did not provide instructions on the law and the elements of the offenses prior to his deliberations and announcement of findings. Notably, during his findings argument, the trial counsel did not explain how the Government had proven Appellant had committed a sexual act against E.S. "by using force." See438-57 (closing); 468-472 (rebuttal). Thus, it is probable the military judge did *not* find the element of force beyond a reasonable doubt as he was operating under the mistaken belief that the specification alleged sexual assault of a child.

2. E.S.'s Credibility and Reasonable Doubt

At the outset, E.S. told her therapist—the first individual she reported the alleged abuse

to[13] —Appellant began touching her when she was 6 years old. App. Ex. XXV. However, M.A. did not start dating Appellant until June/July 2010, and he did not move in with M.A. and E.S. until April 2011. R. at 234, 276. E.S. would have been 7 years old when her mom first met Appellant, and she would turned 8 shortly after he moved in with them. R. at 232, 276. To rehabilitate E.S.'s credibility on this point, the Government attempted to minimize her claim that Appellant began touching her when she was 6 years old. R. at 442-443. Given that these allegations hinged on E.S.'s credibility, the Government cannot simply explain away her claim that Appellant began sexually abusing her a full year *before* he even began dating her mother.

However, this was far from E.S.'s only inconsistency. She also testified that Appellant first touched her in Arkansas (R. at 285), and the abuse continued in Mississippi (R. at 295), yet she told her therapist the abuse happened in Mississippi. App. Ex. XXV. When confronted, E.S. claimed that she never specified where the abuse occurred. R. at 327. However, E.S.'s claim is inconsistent with her therapist's meeting notes and her therapist's statements to J.S. that Arkansas was "sending [the report] to Mississippi for investigation since it happened there." App. Ex. XXXI; App. Ex. XXV. Despite her therapist clearly noting the abuse took place in Mississippi and filing a mandatory report with these details, E.S. described multiple instances of sexual abuse in Arkansas. R. at 285-290, 294. Notably, E.S. was a teenager—16 years old—when she first reported the alleged abuse to her therapist. R. at 326. As a teenager, E.S. understood her words have meaning, and as such, Arkansas and Mississippi are two different locations. It is telling that E.S.'s therapist, with no stake in the outcome of the case, did not mention Arkansas in her notes, nor did Arkansas believe it could take action.

Furthermore, when E.S. was confronted about telling AFOSI that her therapist was the first

[13] R. at 326.

person to ask her about the abuse, she claimed she did not recall making such a statement. R. at 327, 335-36. Yet, she acknowledged that AFOSI's notes of her interview indicated she told them that the only time she was asked if Appellant touched her was by her therapist. R. at 339; App. Ex. XXIV. She confirmed that she expected AFOSI to take impeccable notes. R. at 339.

Most significantly, this Court has every reason to question E.S.'s credibility because of AFOSI's prior investigation into Appellant and E.S.'s testimony at his 2017 court-martial. At Appellant's prior court-martial, E.S. took an oath to tell the truth, the whole truth, and nothing but the truth. R. at 328. Significantly, Appellant was not even in the courtroom when E.S. provided her 2017 testimony, thus there can be no claim his presence impacted her testimony. R. at 351. At his 2017 court-martial, E.S. claimed she answered the trial counsel's questions truthfully. R. at 348. She claimed she answered the defense counsel's questions truthfully as well, just not about the touching. R. at 349. As Appellant's defense counsel emphasized:

> But, Your Honor, it's not simply that she says something or that she says nothing outside of the incident that is initially reported regarding the video camera in the bathroom. Because she did say something else. She told OSI information that ended up being in Charge II of the previous charge sheet. She told them the accused asked her to send him nudes. So, she told them additional things that happened, but she never mentioned touching. Why? Because it never happened. She was encouraged to be truthful by her parents, by law enforcement, and most importantly, she was admonished by the court as an oath. She swore an oath to tell the truth, the whole truth, and nothing but the truth.

R. at 467.

E.S. had multiple opportunities to report Appellant's sexual touching. Her father, J.S., described E.S.'s demeanor after finding the camcorder in the bathroom. R. at 417. E.S. was crying and she was having difficulty breathing. *Id.* Despite being in such a heightened emotional state, when her parents asked E.S. whether Appellant had touched her that night, and whether he had *ever* touched her before, she said no. R. at 340. Additionally, when her parents asked her if this

was the first time something had been weird, she said yes. *Id.*

Moreover, E.S.'s reaction to finding the camcorder is significant. According to E.S., by April 2016, Appellant had been touching her for years. Yet, she never told anyone because it was their little secret. R. at 290, 293. However, upon finding Appellant's camcorder recording her while she was in the bathroom, E.S. immediately called her father for help. R. at 416. J.S. testified he had a voicemail and eight missed calls from E.S., "about one call every 20 to 30 seconds." *Id.* J.S. had "never heard [E.S.] talk like that in [his] life. It made [his] hair stand up." R. at 417. L.B. described E.S. as seeming distraught. R. at 209. This was the first time E.S. had ever reported anything relating to Appellant. R. at 347. Upon hearing from E.S. about the camera, J.S. and L.B. called the police and immediately began driving from Texas to Biloxi. R. at 417. After the report, she went to live with her father in Arkansas, hundreds of miles from Biloxi. *Id.*

As Appellant's defense counsel highlighted, when E.S. was interviewed, she discussed not only the recordings, but she told investigators Appellant had asked her for nude pictures. R. at 348. During his argument, the trial counsel queried, "why then would she tell an OSI agent? This is a 12-year-old girl. Why would she tell a room full of strangers back in 2017 . . ." R. at 457. Yet, that is exactly what E.S. did when the told the room full of strangers Appellant asked her for nude pictures. These agents had no knowledge of his alleged request, yet E.S. felt empowered to tell these agents Appellant had committed additional misconduct.

In explaining why she did not tell anyone prior to February 2020, E.S. said she "was scared that somehow [Appellant] would find out that I had shared more of our little secret than I was supposed to and that he would find a way to get back at me." R. at 354. When the military judge asked her what she meant by her "word choice 'shared more of your little secret than supposed to,'" E.S. responded, "Because I had already talked about the camera incident and I just didn't

want to share the touching." R. at 363. E.S.'s response, and her reason for not reporting Appellant's sexual abuse, makes little sense as she was unaware the video recordings were being made. Thus, "the camera incident" was not a part of any alleged little secret. E.S. also testified that she blamed herself for breaking up the family. R. at 355. Yet, E.S. knew back when Appellant was being investigated for recording her that there was a strong possibility he would go to prison. R. at 352. She knew even then that a prison sentence would take him away from her brother and sister. *Id.* She still chose to testify against him.

Additionally, E.S. said she did not tell anyone about the touching because she felt a sense of shame and she was embarrassed. R. at 355. She indicated she "was afraid that maybe even I would get in trouble or that people would be mad at [her]." *Id.* She was worried her parents or family would be disappointed or mad she "didn't put a stop to it sooner or tell people sooner." R. at 357. However, prior to meeting with AFOSI, her parents, J.S. and L.B. told E.S. she would not get in any trouble. They asked her not to lie for Appellant. R. at 342; App. Ex. XXXVII. Most significantly, her father asked her to tell the truth. *Id.* E.S. testified being truthful is considered very important in her family. R. at 353. Moreover, her stepmom, L.B., someone she was close to and trusted, also advised her to tell the truth. R. at 342; App. Ex. XXXVII. Additionally, E.S. agreed Appellant never told her she could not tell anyone. R. at 343. He never threatened her. R. at 359. In fact, Appellant empowered her when he told her she was her own person, and she could make her own decisions. R. at 344. Despite everyone encouraging her to be truthful with AFOSI and to not protect Appellant, E.S. told them Appellant never touched her. R. at 352.

3. E.S.'s Motive to Fabricate

E.S. admitted she was disappointed in the sentence Appellant received at his 2017 court-martial. R. at 360. L.B. confirmed she was disappointed, stating E.S. had questioned why his

sentence was so short. R. at 203. E.S. first reported Appellant sexually touched her in February 2020. R. at 329. At the time she told her therapist about the alleged touching, E.S. knew Appellant was up for parole. *Id*. She was aware his minimum release date was approaching in 2021. *Id.* After leaving Mississippi in 2016, E.S. had been living in Arkansas with her dad, J.S. R. at 418, 423. She was attending high school in Arkansas, at Cabot High School. R. at 430. Appellant's family also lived in Arkansas (R. at 428) and E.S.'s mother had moved in with Appellant's mother at one point. R. at 429. Thus, E.S. had a strong motive to fabricate, given she knew Appellant was going to be paroled soon, he would likely be returning to Arkansas, and she was felt his prior sentence was too short.

4. Charged Time Frame

In arguing the military judge should believe E.S., the Government focused on whether her testimony was corroborated by other evidence. R. at 442. In discussing the alleged touching in Arkansas, the Government focused on E.S.'s testimony that Appellant touched her during nap time, and his access to her while her mom was at work. However, it is important to consider the charged time frame for each of these allegations.

For Specification 1 of Charge I, the Government charged Appellant with intentionally touching E.S.'s genitalia between on or about 1 June 2010 and on or about 27 June 2012. ROT, Vol. 2, Charge Sheet. The same charged time frame is found in Specification 2 of Charge I, which alleged Appellant caused E.S.'s hand to touch his penis. *Id*. For Specification 1 of Charge III, the Government charged Appellant with penetrating E.S.'s vulva with his fingers between on or about 28 June 2012 and on or about 6 May 2015. *Id*. For Specifications 5, 6, and 7 of Charge III, the Government charged Appellant with touching E.S.'s genitalia, breasts, and buttocks, between on or about 28 June 2012 and on or about 20 April 2016. *Id*. For Specification 8 of Charge III, the

Government charged Appellant with intentionally exposing his genitalia to E.S. between on or about 28 June 2012 and on or about 20 April 2016. *Id*.

M.A., E.S.'s mom said she did not start dating Appellant until the end of June or beginning of July 2010. R. at 234. Even then, Appellant and M.A. were in a dating relationship and he was not living with her and E.S. Appellant's access to E.S. when he was not living in the same house with her would have been greatly reduced. Additionally, E.S. was visiting her father and L.B. every other weekend, which continued until she moved to Mississippi. R. at 177. While Appellant moved in with M.A. and E.S. on 25 April 2011, E.S. would still have been at school for a typical school day until early June 2011. R. at 238. She would have returned to school in late August 2011. *Id.* Appellant moved out of her house Thanksgiving 2011, and E.S. did not live in the same house as him again until 1 January 2013, when she moved to Mississippi. R. at 235, 270, 332.

Thus, the alleged nap times E.S. described would ostensibly have occurred between June 2011 and August 2011, when she returned to school and would have been out of the house for the majority of the day. The Government essentially conceded as much when it argued the touching happened in the summer of 2011. R. at 442. In June 2011, E.S. would have already turned 8 years old, and she was spending every other weekend with her dad and L.B., someone she trusted. R. at 176-77, 426. Yet, E.S. did not tell anyone Appellant was touching her. Despite having numerous opportunities to tell L.B. and her dad that her mom's boyfriend was inappropriately touching her, she did not. R. at 326, 343. Nor did she tell her mom that Appellant—her mom's boyfriend, not her stepfather—was inappropriately touching her. R. at 331, 333. Upon returning to school, she did not tell any of her teachers about the inappropriate touching, because if she had told one of her teachers, the teacher would have reported it.

Furthermore, M.A. described E.S. and Appellant's relationship as good, stating they got

along well. R. at 238. Even L.B. did not notice any changes until E.S. moved to Mississippi. R. at 180-81. After E.S. moved to Mississippi, L.B. noticed E.S. seemed sad. R. at 228. Notably, she described seeing this change "immediately," (*id*.) which coincides with E.S. leaving her home, moving away from her friends, moving to a new state and being homeschooled for the first time. R. at 202. L.B. attributed the change in E.S.'s demeanor to her new living situation. R. at 181.

Notably, no evidence was presented that any alleged touching occurred between 28 June 2012 and 1 January 2013 for any of the allegations—Specifications 1 and 2 of Charge I, nor Specifications 1, 5, 6, 7, or 8 of Charge III. This is because Appellant and M.A. broke up in November 2011 (R. at 235, 270), and Appellant did not return to Arkansas until August 2012. R. at M.A. and Appellant were married on 25 August 2012 (R. at 235), and he moved to Biloxi, Mississippi following their wedding (R. at 332). Yet, M.A. and E.S. did not move to Biloxi until 1 January 2013 (R. at 239, 332). Additionally, for Specification 1 of Charge III, E.S. first alleged Appellant penetrated her vulva with his fingers while they were living in Mississippi. R. at 304. As such, the Government presented no evidence of digital penetration between the time frame of 28 June 2012 and 1 January 2013, as E.S. did not move to Mississippi until 1 January 2013. R. at 239, 332.

5. Specification 2 of Charge I and Specification 6 of Charge II

Additionally, even E.S.'s testimony concerning the charged offenses is less than believable. In describing Appellant's actions when he touched her breast, she testified he would put move his hand up her chest and "just leave it there." R. at 288. According to E.S., Appellant would touch her breast, but he never attempted to fondle her. Likewise, he would take her hand, place it on his penis, and not do anything else. R. at 294. Notably, E.S. "believed" Appellant made her touch his penis in Arkansas and Mississippi. *Id*. She claimed he made her touch his penis during nap time

(R. at 294), but she provided no details regarding when he made her touch his penis in Mississippi. R. at 293-94. Additionally, she provided minimal facts when describing being forced to touch his penis. *Id.* She did not describe what it felt like to touch his penis. *Id.* She did not say whether his penis felt soft or hard, or whether it became firmer as she touched it. *Id.* She did not mention if Appellant ever ejaculated while she was touching him. *Id.* It is not believable that Appellant, upon placing his hand on E.S.'s breast or upon forcing E.S. to touch his penis, would make no attempt to fondle her, or to move her hand up and down on his penis. If Appellant's purpose in touching her breast, or in making E.S. touch his penis, was to gratify his sexual desire, Appellant's actions make little sense.

6. Specification 3 of Charge III

In addition to the aforementioned reasons why all Appellant's charges and specifications are legally and factually insufficient, Specification 3 of Charge III suffers from several other deficiencies of proof. Specification 3 of Charge III alleges Appellant penetrated E.S.'s vulva between on or about 7 May 2015 and on or about 20 April 2016. ROT, Vol. 2, Charge Sheet**.** This specification is specifically tied to E.S.'s birthday, 7 May 2015, as that is when she turned 12 years old. However, E.S. did not provide any sort of time frame for when any of the alleged events occurred, other than to allege the majority of the touching occurred at the Van Buren house in Mississippi. The Van Buren house was the first house she lived in upon moving to Mississippi. R. at 306, 311, 363. It is unclear from the record whether E.S. turned 12 while still living in the Van Buren house. Neither E.S. nor M.A. provided any sort of timeline establishing *when* they moved from the Van Buren house to the second house in Mississippi. R. at 239, 306. Both E.S. and M.A. mentioned that Appellant's brother and his brother's family lived with them for several months while they were in the second house. R. at 240, 306.

Additionally, the Government failed to provide sufficient evidence that Appellant used force against E.S. between on or about 7 May 2015 and 20 April 2016. ROT, Vol. 2, Charge Sheet. While force may be established if the evidence demonstrates an accused used parental authority to accomplish the sexual act, E.S. stated she told Appellant "no" on several occasions (R. at 344, 362), demonstrating that she did not feel any obligation to obey him as a parental authority. Specifically, E.S. described a time when Appellant told her to have her pants off when he returned to her bedroom. R. at 363. While E.S. indicated she was 10 or 11 at the time (*id*.), her reaction–when she was under 12—is telling. When asked whether she complied with his demand, E.S. informed the military judge, "I did not. I didn't take my pants off." R. at 363.

7. Specification 8 of Charge III

As with Specification 3, the Government failed to present sufficient evidence to convict Appellant of Specification 8 of Charge III. According to E.S., the only time she saw Appellant's penis was when she was reading a book in her mom and Appellant's bedroom. R. at 311. This alleged exposure occurred in the Van Buren house in Mississippi. R. at 310. To convict Appellant of this specification, the Government needed to prove Appellant intentionally exposed his penis to E.S. with the intent to gratify his sexual desire. ROT, Vol. 2, Charge Sheet; 2019 *MCM*, Appendix 22, ¶ 45b.b.(4)(c). However, according to E.S., during this encounter, Appellant grabbed a sheet and draped the sheet over them so it was "kind of covering [them]." R. at 312. Thus, E.S.'s own testimony proves Appellant was not intentionally exposing his penis to her but was instead seeking to cover himself. Nor did the Government prove Appellant exposed his penis with the intent to gratify his sexual desire. Based upon E.S.'s testimony, it is unclear whether Appellant was even aware E.S. saw his penis. If Appellant did not realize E.S. saw his penis—which is likely as he allegedly draped a sheet over them to cover them—then his inadvertent exposure was not

intentional, and the Government failed to prove he exposed his penis with the intent to gratify his sexual desire. Additionally, E.S.'s testimony was woefully lacking in detail. She only glanced at "it" and she could not provide any description of his penis at all. R. at 314. Notably, E.S. did not testify she saw his penis, but had to be asked to clarify that by "it" she meant Appellant's penis. R. at 314. While several of these facts alone should have resulted in a finding of not guilty, in combination, these facts would lead a rational fact finder to conclude the Government did *not* prove its case beyond a reasonable doubt.

8. Specification 5 of Charge III

In addition to E.S.'s credibility issues, discussed above, her testimony itself is internally inconsistent. During her testimony, E.S. claimed that after touching her, Appellant would tell her that it was their little secret. R. at 290, 293. He would mention it being their little secret "pretty often." In the context of the alleged touching in Arkansas, E.S. testified that she and Appellant did not take naps when her mom was home. R. at 284. Thus, the alleged touching only happened when her mom was out of the house. According to E.S., after moving to Mississippi, Appellant would come to her bedroom to say good night. R. at 296. It was then that he would touch her. R. at 296. Her mom would either be asleep in the bedroom she shared with Appellant or at work. R. at 297. During his closing, the trial counsel emphasized, "[t]hese crimes are crimes that occur when no one else is around[.]" R. at 445.

However, according to E.S., Appellant began touching her during family movie nights. R. at 291-92. She would be laying in her mom and Appellant's bed, between her mom and Appellant. R. at 291. He would touch her butt, her breasts, and put his hand down her pants. R. at 292. Additionally, she woke up in their bed with her pants off or down at her feet and Appellant would be touching her. R. at 317. Thus, despite Appellant allegedly indoctrinating E.S. to not tell anyone

about the touching and a modus operandi of committing his crimes when her mom was not around, Appellant was suddenly willing to fondle her breasts and butt and pull her pants down to touch her when her mom lay just inches away, asleep in the same bed. R. at 291-93, 317. Nor was this a singular occurrence, as E.S. claimed Appellant would touch her like this "pretty often" when she slept in their bed for family movie nights. R. at 293, 317. In considering this allegation, E.S.'s testimony is not believable.

9. Conclusion

For the aforementioned reasons, this Court should find Appellant's convictions legally and factually insufficient. First, the military judge misunderstood the Government's charging scheme, and as a result, it is impossible for this Court to know whether he correctly applied the elements to find Appellant guilty of rape, as charged, as opposed to sexual assault. Second, this Court cannot credit E.S.'s testimony given her significant credibility issues, including her previous testimony under oath that Appellant never touched her and she never touched him, her inconsistent statements about where the abuse occurred, and her lack of detail concerning several of the offenses. Finally, the Government did not provide sufficient evidence on dates, location, and force to sustain Appellant's convictions.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

II.

THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR INDECENT RECORDING IN VIOLATION OF ARTICLE 120c, UMCJ, AS AN OFFENSE OF CHILD MOLESTATION UNDER MIL. R. EVID. 414.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016). The absence of an objection forfeits the error. A forfeited issue is reviewed for plain error, with an appellant bearing the burden of showing: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018).

Additional Facts

On 10 September 2021, the Government provided Appellant's defense counsel with notice of its intent to offer, under Mil. R. Evid. 414, Appellant's conviction for committing a lewd act upon E.S., on or about 1 January 2016 to on or about 30 April 2016, when he asked E.S. to "'Send me nude pictures of yourself,' or words to that effect, with an intent to arouse the sexual desire of the Accused." App. Ex. X at 13.

Likewise, on 10 September 2021, the Government provided Appellant's defense counsel with a Mil. R. Evid. 404(b) notice of its intent to offer evidence that Appellant, from on or about 1 January 2016 to on or about 30 April 2016, "knowingly made a recording of the private area of E.S., without her consent and under circumstances in which E.S. had a reasonable expectation of privacy." App. Ex. XIX. The Government noted Appellant had been convicted of this offense and of its intent to offer this evidence to prove Appellant's "knowledge, absence of mistake and consciousness of guilt." *Id*. The Defense objected to the introduction of this evidence under Mil. R. Evid. 404(b). App. Ex. XII.

On 8 December 2021, the Government filed its response to the Defense's motion *in limine* to exclude Mil. R. Evid. 404(b) evidence. App. Ex. XIII. In its response, the Government argued

Appellant's conviction for indecent recording under Article 120c, UCMJ, should be admitted as an offense of child molestation under Mil. R. Evid. 414. *Id*. at 5. The Government admitted it had failed to provide notice of its intent to offer this evidence under Mil. R. Evid. 414. *Id*. The Government claimed that this offense qualified as an offense of child molestation under Mil. R. Evid. 414 "because this conduct constitutes a production of child pornography under 18 U.S.C. chapter 110, as defined by M.R.E. 414." *Id*. Additionally, the Government offered an additional theory of admissibility under Mil. R. Evid. 404(b), claiming this evidence would be offered to show Appellant's intent. *Id*. at 4.

During the motions hearing, the Government argued Appellant's conviction for indecent recording in violation of Article 120c, UMCJ, qualified as an offense of child molestation under 18 U.S.C. § 2252a and 18 U.S.C. § 2251. R. at 22. The defense counsel explained they were objecting to lack of notice, as the Government had not noticed this evidence in its Mil. R. Evid. 414 notice or in its Mil. R. Evid. 414 motion response. R. at 23; *see also* App. Ex. X at 13; App. Ex. XI. The defense counsel noted that the Government had first referenced this evidence as qualifying as Mil. R. Evid. 414 evidence in its Mil. R. Evid. 404(b) response. R. at 23; *see* App. Ex. XIII. In clarifying the Defense's objection, the military judge asked, "you only have issue with the 414 item that is on the 404b motion. You don't have anything with the other 414 notice, the original one, correct?" R. at 25. The defense counsel responded, "Correct, Your Honor." *Id*. When asked what the remedy would be, the Defense argued the Government should be excluded from admitting the Mil. R. Evid. 414 evidence. R. at 24. In response, the military queried, "is that normally how that works? I mean, normally if you don't have enough time for a notice, then I make sure you have enough time, right?" *Id*. The defense counsel concurred. *Id*.

After hearing arguments on the Mil. R. Evid. 414 motions, the military judge heard arguments concerning the Mil. R. Evid. 404(b) motions. R. at 27. In discussing the first noticed item, 1.a.,[14] the Government stated that the item "was actually intended to be under a 414 notice." R. at 27. The trial counsel then stated, "I believe based on the discussion that we just had with Your Honor, that we intend to put that one into 414 at the moment. So, I believe that one would be a moot point at this . . ." *Id*. The military judge responded, "Assuming that I disagree with the defense's argument on notice, yes, it would be a moot point. So, I think you are safe to go to part B." R. at 27.

In his 18 March 2022 ruling regarding Mil. R. Evid. 414, the military judge stated the Defense had clarified that "their argument was only to notice of other MRE 414 evidence, should the Government attempt to introduce other MRE 414 evidence." App. Ex. XXI. In analyzing the Defense's motion *in limine*, the military judge noted,

> At this time, the government has unequivocally stated the only evidence it intends to admit under MRE 414 is "[b]etween approximately 1 January 2016 and 30 April 2016, Accused committed a lewd act upon E.S., a child who had not attained the age of 16 years, intentionally asking E.S. to 'Send me nude pictures of yourself,' or words to that effect, with an intent to arouse the sexual desire of Accused." The defense has not objected to this evidence.

Id. The military judge did not mention the Government's desire to introduce Appellant's conviction for indecent recording in violation of Article 120c, UMCJ, in this ruling. He also made no determination of whether Appellant's Article 120c, UCMJ conviction constituted an offense of child molestation as defined by Mil. R. Evid. 414. Nor did he discuss the Defense's objection to this evidence on the basis of notice.

[14] Item 1.a. of the Government's Mil. R. Evid. 404(b) notices pertains to the Government's intent to offer evidence of Appellant's conviction for indecent recording under Article 120c, UCMJ. App. Ex. XIX.

Law

Mil. R. Evid. 414(a) provides:

> Permitted Uses. In a court-martial proceeding, in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered for any matter to which it is relevant.

Mil. R. Evid. 414(d)(2) defines an offense of "child molestation" as including the following:

> (A) any conduct prohibited by Article 120 and committed with a child, or prohibited by Article 120b.
>
> (B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
>
> (C) any conduct prohibited by 18 U.S.C. chapter 110;
>
> (D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;
>
> (E) contact between the accused's genitals or anus and any part of a child's body;
>
> (F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
>
> (G) any attempt or conspiracy to engage in conduct described in subdivisions (d)(2)(A)-(F).

Analysis

The military judge erred in admitting Appellant's conviction for indecent recording in violation of Article 120c, UCMJ as evidence of an offense of child molestation under Mil. R. Evid. 414. Despite the Government's failure to notice this evidence, the Defense's objection to the lack of notice, and motion arguments, the military judge did not discuss, or even mention, Appellant's conviction for indecent recording in his Mil. R. Evid. 414 ruling. App. Ex. XXI. Instead, he found the Government had "unequivocally stated the *only* evidence it intends to admit under MRE 414" was Appellant's conviction for sexual abuse of a child based upon Appellant's request for nude

pictures of E.S. *Id*. (emphasis added). The military judge's ruling demonstrates he never made a threshold determination of whether Appellant's Article 120c, UCMJ conviction qualified as an offense of child molestation under Mil. R. Evid. 414. In *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000), the Court of Appeals for the Armed Forces (CAAF) stated, "Before admitting evidence under Rule 413,[15] three threshold findings are required:

1. The accused is charged with an offense of sexual assault -- Mil. R. Evid. 413(a);

2. The evidence proffered is "evidence of the defendant's commission of another offense of . . . sexual assault"

3. The evidence is relevant under Rules 401 and 402. *United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998).

53 M.J. at 482. In discussing whether evidence is relevant, the Tenth Circuit noted, "[a] defendant with a propensity to commit acts similar to the charged crime is more likely to have committed the charged crime than another." *Guardia*, 135 F.3d at 1328. "Once these three findings are made, the military judge is constitutionally required to also apply a balancing test under M.R.E. 403." *United States v. Solomon*, 72 M.J. 176, 179-80 (C.A.A.F. 2013).

Here, not only did the military judge fail to make the required three threshold findings, but he failed to conduct a balancing test under Mil. R. Evid. 403. The plain text of Mil. R. Evid. 414 makes it apparent that Appellant's conviction for indecent recording under Article 120c, UCMJ is not an offense of child molestation. In looking at Mil. R. Evid. 414(d)(2), Appellant's conviction for indecent recording would not satisfy (A), (B), (D), (E), or (F), as his offense was not an Article 120, UCMJ or Article 120b, UCMJ offense, nor did his conviction involve any sexual contact.

[15] In *United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006), the CAAF noted Mil. R. Evid. 413 and Mil. R. Evid. 414 have "a common history and similar purpose," and found there was "no need to distinguish the two" when discussing the granted issue in that case.

The Government's theory of admissibility was that Appellant's conviction would qualify as an offense under Mil. R. Evid. 414(d)(2)(C). R. at 22; App. Ex. XIII. In its response to the Defense's motion *in limine* regarding Mil. R. Evid. 404(b), the Government, for the first time, argued that his conviction for indecent recording qualified as an offense of child molestation for purposes of Mil. R. Evid. 414. App. Ex. XIII. According to the Government, "this conduct constitutes a production of child pornography under 18 U.S.C. chapter 110, as defined by M.R.E. 414." *Id*. However, despite the Government's claim, it did not charge Appellant with, nor secure a conviction for, production of child pornography under Article 134, UCMJ. *See* Prosecution Exhibit (Pros. Ex.) 4.[16] Instead, the Government convicted Appellant of violating Article 120c, UCMJ, for knowingly making a recording of the private area of E.S. on divers occasions. *Id*.

What constitutes child pornography is defined in both the UCMJ and within 18 U.S.C. chapter 110. "Child pornography" is defined as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." 2016 *MCM*, pt. IV., ¶ 68b.c.(1). "Sexually explicit conduct is defined as: "actual or simulated:

(a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person."

[16] General Court-Martial Order No. 3 shows Appellant was convicted of one charge and specification of Article 120b, UCMJ, for committing a lewd act by communicating indecent language, and one charge and specification of Article 120c, UMCJ, for making an indecent recording. Pros. Ex. 4.

2016 *MCM*, pt. IV., ¶ 68b.c.(7). This same definition of sexually explicit conduct is found in 18 U.S.C. chapter 110, specifically in 18 U.S.C. § 2256 entitled "Definitions for chapter." The maximum punishment for producing child pornography is a dishonorable discharge, total forfeitures, and confinement for 30 years. 2016 *MCM*, pt. IV., ¶ 68b.e.(4). Both possession and viewing of child pornography have a maximum confinement term of 10 years. 2016 *MCM*, pt. IV., ¶ 68b.e.(1).

By contrast, to convict Appellant of indecent recording under Article 120c, UCMJ, the Government was required to prove he knowingly recorded the private area of E.S. without her consent and under conditions where she had a reasonable expectation of privacy. 2016 *MCM*, pt. IV., ¶ 45c.b.(2). For purposes of Article 120c, UCMJ, "private area" is defined as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." The maximum punishment for making an indecent recording is a dishonorable discharge, total forfeitures, and confinement for 5 years. 2016 *MCM*, pt. IV., ¶ 45c.e.(2).

Because the Government did not charge Appellant with production of child pornography, the panel never determined that Appellant *produced* child pornography when he recorded E.S.'s private area. In fact, the panel was never even presented with this question. The Government made a deliberate decision to forego charging Appellant with any offenses involving child pornography—production, possession, or viewing. After all, it is the Government who controls the charge sheet. *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021). In making this decision, the Government limited the maximum punishment it could seek if it secured a conviction—from a maximum of 30 years for producing child pornography (or even a maximum of 10 years for viewing and/or possession of child pornography) to a maximum of 5 years for indecent recording. Nor was the Government's charging scheme an oversight, as the Government

did charge Appellant with an offense under Article 134, UCMJ. Pros. Ex. 4. However, Appellant's Article 134, UCMJ, charge did not involve his recordings of E.S.'s private area. *Id.* Instead, this Article 134, UCMJ offense related to his request for nude pictures of E.S. *Id*.

Furthermore, the decision to forego charging Appellant with a child pornography offense was made *after* the Government sought and received permission to search and seize Appellant's electronics for child pornography. *United States v. Blackburn*, 80 M.J. 205, 208 (C.A.A.F. 2020) (discussing search authorization being premised on the law enforcement agent's belief that "evidence proving [Appellee]'s intent to manufacture child pornography is located within his residence"). As such, it is clear the Government, at least at one time, contemplated charging Appellant with a child pornography offense. Notably, in finding that law enforcement agents had not acted in good faith, this Court emphasized, "'the search authorization in this case was premised on the search for child pornography' but Appellee's charge was for indecent recording, which does not require sexually explicit images. *Blackburn*, 80 M.J. at 209 (quoting *United States v. Blackburn*, No. ACM 39397, 2019 CCA LEXIS 336, at *47 (A.F. Ct. Crim. App. 22 Aug. 2019)), *rev'd* in part by 80 M.J. 205. This Court then stressed, "[w]e find the distinction significant[.]" *Blackburn*, 2019 CCA LEXIS 336, at *47.

Mil. R. Evid. 414(a) states, "the military judge *may* admit evidence that the accused committed *any other offense of child molestation*." (Emphasis added). Here, before admitting Appellant's conviction for indecent recording in violation of Article 120c, UCMJ, the military judge was required to make a threshold determination of whether Appellant's Article 120c, UCMJ offense constituted an offense of child molestation under Mil. R. Evid. 414. The military judge failed to do so, and Appellant suffered material prejudice as a result. Appellant's conviction for indecent recording in violation of Article 120c, UCMJ, is not a qualifying offense. Moreover,

even if the military judge had incorrectly determined Appellant's offense did qualify, he failed to conduct the required Mil. R. Evid. 403 balancing test prior to admitting this evidence. The Government capitalized on the military judge's error, repeatedly arguing Appellant's conviction for indecent recording as evidence of his propensity to sexually abuse E.S. R. at 439-440, 446, 450, 453, 471-72.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

III.

THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD IN VIOLATION OF ARTICLE 120b, UCMJ, UNDER MIL. R. EVID. 414.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *Hills*, 75 M.J. at 354. When an accused fails to make a timely objection, he has either forfeited or waived an objection. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). However, this Court is "not bound to apply waiver" when exercising its powers under Article 66(d), UCMJ. *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000) (citing *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)). "[F]ailure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief." *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988).

Additional Facts

On 10 September 2021, the Government provided Appellant's defense counsel with a Mil. R. Evid. 414 notice. App. Ex. X at 13. The Government notified the Defense of its intent to offer, under Mil. R. Evid. 414, Appellant's conviction for sexual abuse of a child under Article 120b, UCMJ. *Id*. The Defense did not object to the admission of this evidence. R. at 25.

Law[17] *& Analysis*

Mil. R. Evid. 414 is an exception to the general prohibition against the admission of evidence of uncharged misconduct used to prove propensity. *James,* 63 M.J. at 220. While Mil. R. Evid. 414 allows the Government to admit "propensity" evidence in cases involving child sexual molestation, in *James* the CAAF stated, "We remain mindful of the dangers inherent in admitting propensity evidence[.]" *Id*. at 222. The CAAF highlighted that these dangers are kept in check by Mil. R. Evid. 403. *Id*. "M.R.E. 403 is designed specifically to address the unduly prejudicial impact of otherwise admissible evidence and gives military judges broad discretionary powers to ensure that the probative value is not outweighed by the danger of unfair prejudice." *Id*. In fact, "a careful M.R.E. 403 balancing [is] an essential ingredient of a constitutional application of the rule. The importance of a careful balancing arises from the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *Id*. When conducting the Mil. R. Evid. 403 balancing test, the factors a military judge should consider include:

> [T]he strength of proof of the prior act [conviction versus gossip]; the probative weight of the evidence; potential for less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; temporal proximity of the prior act; the frequency of the acts; presence of any intervening circumstances; and the relationship between the parties.

United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (quoting *Wright,* 53 M.J. at 482).

[17] Appellant incorporates the law from Issue II, *supra.*

Here, in looking at the Mil. R. Evid. 414 threshold requirements, the first and second requirements were met, as Appellant was charged with several offenses of child molestation, and his conviction for sexual abuse of a child qualifies as an offense of child molestation under Mil. R. Evid. 414(d)(2)(A). While an argument can be made that his request for nude photographs of E.S. would not make it more probable that he touched E.S., it seems likely that this evidence would be deemed relevant, as it involved the same alleged victim.

However, even relevant evidence may be excluded after being subjected to "a thorough [Mil. R. Evid. 403] balancing test . . . Where that balancing test requires exclusion of the evidence, the presumption of admissibility is overcome." *Berry*, 61 M.J. at 95 (citing *Wright*, 53 M.J. at 482-83)) (internal citation omitted). An examination of the *Wright* factors demonstrates Appellant's Article 120b conviction should have been excluded. Here, the strength of the proof was strong as Appellant was convicted of committing a lewd act upon E.S. "by intentionally communicating to [E.S.] indecent language, to wit: 'Send me nude pictures of yourself,' or words to that effect." Pros. Ex. 4. E.S. was the proponent of the evidence, and her testimony would not have taken long. In looking at the relationship between Appellant and E.S., he was her mother's boyfriend for some of the current allegations, and her stepfather for others. R. at 235. He was her stepfather during the time frame covered by the Article 120b conviction. *Id*.

However, the probative weight of the requested Mil. R. Evid. 414 evidence was minimal. Appellant was convicted of communicating this indecent language between on or about 1 January 2016 and on or about 30 April 2016. Pros. Ex. 4. The current charges span a time frame ranging from 1 June 2010 through 20 April 2016. ROT, Vol. 2, Charge Sheet. In *James*, the CAAF found Mil. R. Evid. 414 is not limited to only prior acts. 63 M.J. at 221. However, it emphasized that

temporal factors may be important when a military judge conducts his Mil. R. Evid. 403 balancing test. *Id*. Specifically, the CAAF stated:

> People certainly do change over time and the fact that someone acts in a particular manner does not mean they have always acted in that manner, or for that matter that they always will. The acts in this case took place within a matter of days, were similar in their sexual nature, were similar in the fact that the girls were the same age, and were similar in the fact that they met Appellant in the same church group where he was a counselor.

Id. Here, temporally, the Government alleged Appellant had been inappropriately touching E.S. as far back as 2010, when she would have been 7 years old. ROT, Vol. 2, Charge Sheet. Yet, his request for naked pictures did not occur until E.S. was a preteen. R. at 232[18]; Pros. Ex. 4. Using one's common sense and understanding of the ways of the world, E.S.'s body would have looked very different at 7 than at almost 13 years old. *See also* Pros. Ex. 3. The allegations at issue and the Mil. R. Evid. 414 evidence were separated by as much as six years, and were extremely dissimilar: asking E.S. for nude pictures—which she did not provide[19]—versus rape and sexual touching on divers occasions. *Compare* Pros. Ex. 4 *with* ROT, Vol. 2, Charge Sheet.

Notably, E.S. testified at Appellant's 2017 court-martial and disavowed he had ever touched her or that she had ever touched him. R. at 349-50. E.S. had numerous opportunities to tell others Appellant had been sexually abusing her: her mom, her dad and stepmom, her teachers, and AFOSI. Her final opportunity arose when she took an oath to tell the truth, the whole truth, and nothing but the truth. R. at 328. Thus, Appellant's first court-martial was the first intervening circumstance. If E.S. had told anyone Appellant had been inappropriately touching her, the charges at his first court-martial would have looked vastly different. Nor would the Government have been able use Appellant's alleged indecent communication as propensity evidence at a 2017

[18] E.S. would have turned 13 on 7 May 2016. R. at 232.
[19] R. at 320.

court-martial involving indecent recording, indecent communication, *and* allegations involving sexual touching, as the Government would have needed to prove each allegation beyond a reasonable doubt. The second intervening circumstance arose when E.S. learned Appellant was up for parole and "he was coming out soon." R. at 329. At a minimum, E.S. knew Appellant would be released from prison in 2021. *Id*. With this knowledge, E.S. reported Appellant had been sexually touching her from the time she was 6 years old. R. at 329; App. Ex. XXV. Finally, the frequency of the acts also favors Appellant. Appellant was convicted of having requested nude pictures from E.S. one time. Pros. Ex. 4. As noted above, E.S. declined to send Appellant any pictures. R. at 320. Yet, E.S.'s current allegations involve her claims that Appellant repeatedly raped and touched her.

In considering the highly prejudicial nature of this evidence, involving the same victim, the military judge erred in admitting Appellant's conviction for indecent communication, which materially prejudiced Appellant. The Government used his conviction for requesting nude photographs from E.S. to show a propensity to commit the charged offenses on several occasions. R. at 453, 471-72. Notably, the trial counsel initially argued hearing Appellant requested nude photographs from E.S. should help the military judge answer the question "[w]ould a parental figure look at their stepchild in a sexual manner?" R. at 439. The trial counsel then argued hearing about "those things should help this court answer that question, would this accused do this, with a yes." *Id*.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

IV.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE VIDEOS OF E.S. WHICH FORMED THE BASIS FOR APPELLANT'S INDECENT RECORDING CONVICTION IN VIOLATION OF ARTICLE 120c, UCMJ.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *Hills*, 75 M.J. at 354.

Additional Facts

1. The Government's Stipulation of Expected Testimony

During its case in chief, the Government provided the military judge a Stipulation of Expected Testimony from B.W., a forensic examiner. R. at 380; App Ex. XLI. The Government offered B.W.'s Curriculum Vitae. Pros. Ex. 1. While the Defense initially objected on hearsay and relevance, and later for improper bolstering, the military judge overruled all three objections and admitted B.W.'s CV. R. at 382, 383. The Government also admitted Mr. White's DC3CFL Lab Report. R. at 380; Pros. Ex. 2. The Defense did not object. R. at 384. The Government then sought to admit Prosecution Exhibit 3. R. at 385. According to the Government, Prosecution Exhibit 3 contained six video files, which the Government identified as contraband. *Id*.

The Defense objected based upon Mil. R. Evid. 403. *Id*. In articulating his objection, the defense counsel argued:

> So, we believe that it would be more prejudicial than probative for you to view this simply because the videos are not going to show you any touching whatsoever. It's just the video set up and what was filmed in the bathroom, for which our client has already been successfully prosecuted for and which he's already, you know, been punished for. And we think this just unfairly prejudices him under the circumstances, especially since there's no actual touching or attempted touching in any way, shape, or form that is notated in those videos.

R. at 386.

The Government argued the videos demonstrated Appellant's intent and noted the videos "have already been introduced in a court-martial." R. at 387. They also argued the military judge "has already ruled that these acts come in under 414. And 414 can basically be relevant for any purpose that the factfinder believes it to be relevant to. And so, that is why the government believes that the extent of the accused's conduct in these videos is important for the court to see." R. at 388.

The Defense countered the Government's argument, underscoring:

> [G]overnment counsel hasn't really provided the court with a nexus that you can draw from the videos themselves and what's depicted in the videos to the current charge sheet. Sure, it's part of the overall facts and circumstances how things were reported, but everything that the counsel has elicited goes directly to the probative value of the first, you know, the first evidence that [was] used in the first court-martial. The defense fails to see how that is any way, shape, [or] form probative to the charges that are now today.

R. at 389. The Government responded, arguing that the end of the charged timeframe is on or about 20 April 2016, the date E.S. found the camcorder. R. at 390. According to the Government, "[t]his is the exact same victim during the exact same charged time frame." *Id*.

After reviewing the six videos, the military judge overruled the Defense's objection. R. at 435. He found the probative value of the evidence was high. *Id*. He noted "the prejudicial value is also high," however he found it did not substantially outweigh its probative value. *Id*.

2. The Government's Findings Argument

> But more than having heard about the convictions, Your Honor, you've seen the videos that he was making. You're seen the extent that he went through to set that video camera up. You've seen it in the way he positions a camera on the counter and covers it with a towel for minutes. To ensure that that that towel is not falling down in front of the camera he places a little bottle of cream or something. I don't know what it is, but it's something there to hold that edge of that towel up. You've seen him go back into the bathroom when the camera is in the water closet portion of the closet, the water closet door that [E.S.] closes in one of those videos as she undresses. And you've seen the accused come in claiming that he had to use the bathroom when there are other bathrooms available in the home and reopen that

> water closet door. And that's simply to ensure that camera the angel he wants when Emilee gets out of that shower. And that's in video PI2AD6, that particular portion, Your Honor.
>
> And in those videos, you've seen a number of other occasions where the accused comes into that bathroom. A time when he comes in while [E.S.] is in the shower saying, "Oh, I just want to make sure you have a towel." As if a 12-year-old girl doesn't know how to ensure she has a towel before she gets in the bathroom in the shower where she takes her showers. An accused who was so desirous to brush his teeth that he comes in to brush his teeth while his stepdaughter is in the shower.

R. at 439-40.

Law*[20] *& Analysis

Here, in arguing for the admission of the evidence, the Government claimed the evidence demonstrated Appellant's intent and highlighted that the videos "have already been introduced in a court-martial." R. at 387. However, in his prior court-martial, Appellant was charged with having made indecent recordings of E.S. Pros. Ex. 4. Thus, the recordings would have been offered by the Government to prove Appellant made the recordings alleged in the specification. Notably, the Government did not have to prove Appellant's intent to convict him of having made an indecent recording, as intent is not an element under Article 120c, UCMJ. *See* 2019 *MCM*, Appendix 22, ¶ 45c.b.(2). Furthermore, as the Defense emphasized, Appellant had already been prosecuted and punished for having made the videos. R. at 386.

The Government also asserted the military judge had ruled that these acts were coming in under Mil. R. Evid. 414. R. at 388. While Appellant does not concede the military judge correctly admitted his Article 120c, UCMJ, conviction under Mil. R. Evid. 414,[21] because this evidence was admitted pursuant to Mil. R. Evid. 414, and the Government sought to admit the *actual* recordings upon which his Article 120c, UCMJ, conviction was based, the military judge was

[20] Appellant incorporates the law from Issue II and III, *supra*.
[21] *See* Issue II, *supra*.

"constitutionally required to also apply a balancing test under M.R.E. 403." *Solomon*, 72 M.J. at 179-80. In conducting this balancing test, the military judge should have considered the *Wright* factors and placed his findings on the record. "Where the military judge is required to do a balancing test under M.R.E. 403 and does not sufficiently articulate his balancing on the record, his evidentiary ruling will receive less deference from this court." *Berry*, 61 M.J. at 96 (quoting *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001)) (other citations omitted).

The military judge failed to address the majority of the *Wright* factors, discussing only the probative value of the videos, and not conducting any balancing of the factors on the record. R. at 435. Furthermore, when the military judge discussed the probative value of the videos, he failed to discuss how dissimilar the facts of Appellant's conviction for indecent recording were compared with E.S.'s other allegations. As the defense counsel contended, "there's no actual touching or attempted touching in any way, shape, or form that is notated in those videos." R. at 386.

Moreover, the military judge failed to discuss the temporal proximity of Appellant's conviction for indecent recording in relation to her other allegations. At his 2022 court-martial, the Government alleged Appellant had been inappropriately touching E.S. as early as 2010, when she would have been 7. ROT, Vol. 2, Charge Sheet. Yet, he did not make indecent recordings of E.S. until she was a preteen. R. at 232; Pros. Ex. 4. He was charged with making these indecent recordings between on or about 1 January 2016 and on or about 30 April 2016. Pros. Ex. 4. As discussed in Issue III, *supra*, it is common knowledge that a child's 7-year-old body is very different from a preteen's almost 13-year-old body. Furthermore, while the Government charged Appellant with touching E.S. until on or about 16 April 2016, and argued the evidence should be admitted because "[t]his is the exact same victim during the exact same charged time frame,"[22] the

[22] R. at 390.

Government failed to elicit any evidence that Appellant touched E.S. between 1 January 2016 and 20 April 2016. E.S. testified she took showers in her mom and Appellant's bedroom in their second Mississippi house. R. at 306. She found the camera in the bathroom of the second house. R. at 320. However, for every other alleged sexual touching in Mississippi, E.S. claimed it happened in the first house, the Van Buren house. As argued in Issue I, *supra*, it is entirely unclear when E.S. and M.A. moved from the Van Buren house to the second Mississippi house. What is clear is that E.S. never claimed any sexual touching occurred in the second house. As such, the Government's argument concerning Appellant's intent is more attenuated than it initially argued and than the military judge found given that he did not discuss this lack of evidence.

Nor did the military judge address the potential to present less prejudicial evidence. *Berry*, 61 M.J. at 95. In this case, the less prejudicial evidence would have been to limit the Government's evidence to E.S.'s testimony. In *James*, the CAAF concluded that "the military judge was concerned with undue prejudice, was meticulous in his application of the balancing required by M.R.E. 403, and limited the scope of the admissible propensity evidence." 63 M.J. at 222. According to the CAAF, the court-martial was "properly focused on what Appellant allegedly did with MC. The trial did not become sidetracked by a consideration of what Appellant might or might not have done, with SB." *Id*. Here, the trial counsel referenced these recordings throughout his closing argument. He specifically highlighted segments from the videos throughout his argument. R. at 439-440, 446, 450, 453, 471-72. Rather than the focus being on E.S., her credibility, and whether the current allegations were supported by the evidence, the trial counsel used evidence for which Appellant had already been held accountable to argue Appellant's propensity to sexually abuse E.S. CAAF admonished military judges to be "mindful of the dangers inherent in admitting propensity evidence," and emphasized Mil. R. Evid. 403 is meant to keep

those dangers in check. *James*, 63 M.J. at 222. The military judge failed to conduct "a careful M.R.E. 403 balancing [test]," and Appellant was materially prejudiced as a result.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

V.

APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS INCOMPLETE.

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Additional Facts

Appellant was alleged to have committed three charges with 14 specifications. ROT, Vol. 2, Charge Sheet. On 28 March 2022, the Government withdrew and dismissed without prejudice Specification 1 of Charge I. *Id*. The remaining specifications were renumbered. *Id*. Thus, at trial, Appellant was left to defend against three charges with 13 specifications. Charge I and its four specifications alleged Appellant committed sexual offenses against E.S. from between on or about 1 June 2010 to on or about 27 June 2012. *Id*. Likewise, Charge II alleged the same time frame. For Charge III, two specifications alleged a charged time frame between on or about 28 June 2012 and on or about 6 May 2015, four specifications alleged a charged time frame between on or about 28 June 2012 and on or about 20 April 2016, and two specifications alleged a charged time frame between 7 May 2015 and on or about 20 April 2016. *Id*.

On 15 December 2021, the Defense filed a motion for appropriate relief alleging an unreasonable multiplication of charges (UMC). Appellate Exhibit (App. Ex.) VIII. The exhibit references three attachments: (1) DD Form 458, *Referred Charge Sheet,* dated 23 June 2021 (3

pages); (2) Defense's Request for Bill of Particulars, dated 1 December 2021 (2 pages); (3) Gov't's response to Defense's Request for Bill of Particulars, dated 8 December 2021 (4 pages). These attachments are absent from Appellant's record of trial. According to the Exhibit Index in Appellant's record of trial, the Defense's UMC motion was 19 pages. ROT, Vol. 2, Exhibit Index. On 21 December 2021, the Government filed its response to the Defense's motion for appropriate relief alleging an unreasonable multiplication of charges. App. Ex. IX. The Government's response was 6 pages and did not include any attachments. *Id*.

During their findings arguments, neither the Government nor the Defense discussed the elements required to convict Appellant of the 13 charged offenses. R. at 438-457, 459-468, 468-472. The military judge returned mixed findings: acquitting Appellant of two specifications under Charge I, Charge II and its specification, and two specifications under Charge III. R. at 474. Additionally, he found Appellant guilty of Specification 8 of Charge III by excepting the words "on divers occasions." *Id*.

Law and Analysis

A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). The record of trial in each court-martial is separate, complete, and "independent of any other document." R.C.M. 1112(a). A complete record shall include "[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits." R.C.M. 1112(b)(6).

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977).

A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut. *Id.* (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981); *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *McCullah*, 11 M.J. at 237. In *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000), the CAAF held that the absence of three defense exhibits from appellant's record constituted a substantial omission. Finding that the Government "has failed to overcome the presumption of prejudice from the exhibits' absence or show their omission to be harmless error," the CAAF stated, "appellant may not receive a sentence that includes a BCD." *Id.*

R.C.M. 1112(b)(6) requires that a complete record includes "any appellate exhibits." Appellant's record of trial is incomplete, as his record does not contain Appellate Exhibit VIII's three attachments. These attachments are critical to a review of Appellant's record of trial, as they contain the Defense's request for a Bill of Particulars and the Government's response to the Defense's Request for a Bill of Particulars. The Government's response led the Defense to file a motion for appropriate relief, alleging an unreasonable multiplication of charges.

These documents are essential to Appellant counsel's review of the sufficiency of the evidence presented by the Government at Appellant's trial, given the sheer number of charges in Appellant's case, the complexity of his charges, the changes to Article 120, UCMJ (i.e., the creation of Article 120b, UCMJ), which occurred during these charged time frames, the length of time covered by the charged offenses and the fact that all the charges are alleged to have occurred in the continental United States, rather than in any specific state or location. Furthermore, as

discussed in Issue I *supra*, because trial counsel misstated the charged offenses and did not specifically argue how the evidence presented proved the elements of the charged offenses, it is unclear how the military judge arrived at findings of guilt given the evidentiary shortcomings in the case. The Government's response to the Defense Request for a Bill of Particulars is necessary for Appellant's counsel and this Court to understand what offenses the Government believed they charged Appellant with violating.

WHEREFORE, because Appellant's record of trial is incomplete, corrective action pursuant to R.C.M. 1112 should be taken to remedy this substantial omission.

VI.

THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT WHEN HE VOUCHED FOR THE VERACITY OF E.S., THE COMPLAINING WITNESS.

Standard of Review

If an accused objects to an improper argument, this Court reviews the issue *de novo*. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)). If there is no objection, this Court reviews for plain error. *Norwood*, 81 M.J. at 19. Plain error occurs when "(1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id*. (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)). "[M]aterial prejudice to the substantial rights of the accused occurs when an error creates an unfair prejudicial impact on the court members' deliberations. In other words, the appellant must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

In assessing prejudice, the Court will look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Erickson*, 65 M.J. 221 at 224 (citing *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Indicators of severity of misconduct include:

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

Fletcher, 62 M.J. at 184.

Additional Facts

During his closing argument, the trial counsel told the military judge that the Government's case rested on E.S.'s believability. R. at 441. The trial counsel highlighted, "But this really boils down to one thing, and it boils down to this court's duty to determine [E.S.'s] credibility. She's either believable or she's not. The testimony that she provided is believable or it's not." *Id.*

Later in urging the military judge to find E.S. credible, the trial counsel stated:

> And of course, there is -- there is this theme here, right? Is the "no" truthful or is what she's saying now truthful? That will be something that the court has to decide. But when you look at those two things and you say for someone who has been raised her entire life to tell the truth, to know the importance of telling the truth, someone who has exhibited to her parents that she is a truthful child, the most honest kid I know, which one seems to be something that *little child* would lie about? Saying no to keep that secret or to *fabricate probably the most despicable lie someone could ever tell about someone*? That really is these two things the court has to weigh here. One, a no because she is trying not to let that shame, that embarrassment, her own self guilt out or *the most disgusting and despicable lie that you can make up about someone. The lie that you almost have to be the spawn of Satan to make up about someone*.

R. at 455-56 (emphasis added).

In discussing Appellant's actions to ensure E.S. continued to allow him to abuse her, the trial counsel claimed that Appellant would ignore her as "a way to bring her back into the fold, to keep her quiet, to keep abusing her. It's emotional abuse is what it is, Your Honor. It's emotional abuse to effectuate the sexual abuse that he wants to continue happening. He even bribed her. She tells you about that. That's her word, 'He bribed me.' It's almost like a sexual abuse Stockholm's Syndrome, almost." R. at 447.

Finally, in rebuttal, the trial counsel noted, "Mr. [J.] said something, 'She wasn't very obedient. She didn't obey the court's rules to tell the truth. She lacks character for truthfulness.' . . . So, now we're going from victim blaming for the way you dress, or the way you dance, or how many drinks you've had, to victim blaming for not divulging the abuse when you could have, when everything else points to the credibility of that young lady." R. at 471.

Law & Analysis

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Fletcher*, 62 M.J. at 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88) (additional citation omitted).

A trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. Trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). However, a trial counsel may not "inject his personal opinion into the

panel's deliberations." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations omitted). To this end, a trial counsel may not express "a personal belief or opinion as to the truth or falsity of any testimony or evidence." *Fletcher*, 62 M.J. at 179 (quotation omitted). "This 'can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed.'" *Sewell*, 76 M.J. at 20 (Ohlson, J., dissenting) (quoting *Fletcher*, 62 M.J. at 180). Phrases such as "we know" and "I think it is clear" in connection with evidence represents improper vouching. *Fletcher*, 62 M.J. at 180. Additionally, "it is improper for counsel to seek unduly to inflame the passions or prejudices of the court members." *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) (citation omitted).

After telling the military judge that the Government's case came down to E.S.'s believability (R. at 441), the trial counsel bolstered E.S.'s credibility by characterizing her as "a little child," and by discussing her truthfulness using personal pronouns. R. at 455. Specifically, he emphasized that her parents believed E.S. to be "a truthful child, *the most honest kid I know*," before querying, "which one seems to be something that *little child* would lie about?" R. at 455 (emphasis added). Notably, when she testified at Appellant's 2017 court-martial, E.S. was 14 years old. R. at 354. She was a teenager, *not* a little child. The trial counsel then repeatedly suggested that E.S.'s claims, if they were not true, were "the most despicable lies someone could ever tell about someone[.]" R. at 455. However, he did not end his argument there. Instead, he went further, asserting that E.S. would "almost have to be *the spawn of Satan* to make that up about someone." R. at 456 (emphasis added). A trial counsel is expressly prohibited from expressing "a personal belief or opinion as to the truth or falsity of any testimony or evidence." *Fletcher*, 62 M.J. at 179 (quotation omitted). Despite the CAAF's clear prohibition on this type of argument, the trial counsel essentially told the military judge he needed to believe E.S. because she would

have to be "the spawn of Satan" to lie about the very allegations the military judge was duty-bound to decide. In so arguing, the trial counsel "place[d] the prestige of the government behind [E.S.] through personal assurances of [E.S.'s] veracity." *Fletcher*, 62 M.J. at 180 (citation omitted).

Prior to his "spawn of Satan" argument, the trial counsel argued Appellant had emotionally abused E.S. by ignoring her when she would tell him no. R. at 447. He then claimed Appellant's actions were "almost like a sexual abuse Stockholm's Syndrome, almost." *Id*. Notably, the Government called Dr. S.P., a licensed clinical psychologist, to discuss research relating to external and internal barriers to the reporting of child sexual abuse. R. at 393-94, 399-400. The Government did not seek Dr. S.P.'s expertise on whether Appellant's alleged actions amounted to emotional abuse. R. at 393-402, 409. Nor did the Government ask Dr. S.P. to explain Stockholm syndrome or opine on whether Appellant's actions could have impacted E.S. such that she would have been likely to experience symptoms associated with Stockholm's syndrome. R. at 393-402, 409. As such, these comments did not relate to any "evidence of the record" nor were they "reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. 237. Considering the Government called an expert to explain external and internal barriers to reporting, it is apparent that an expert's opinion would have been needed to characterize Appellant's alleged actions as amounting to emotional abuse and to discuss Stockholm's syndrome. Rather than asking Dr. S.P. these questions, the trial counsel improperly bolstered E.S.'s credibility by arguing facts not in evidence, and he did so by invoking terms—"emotional abuse" and "sexual abuse Stockholm's syndrome"—that were meant to inflame the passions and prejudices of the factfinder. *Clifton*, 15 M.J. at 30.

Finally, in rebuttal, after the Defense responded to the trial counsel's claim that E.S. was obedient by highlighting her lack of obedience during Appellant's 2017 court-martial (R. at 464), the trial counsel claimed, "we've gone from victim blaming for the way you dress, or the way you dance,

or how many drinks you're had, to victim blaming for not divulging the abuse when you could have, when everything else points to the credibility of that young lady." R. at 471. Here, the trial counsel utilized an improper analogy to reinforce to the military judge that E.S. was credible. While the Defense was properly commenting on evidence before the Court, the trial counsel impermissibly suggested Defense was victim blaming and then he highlighted ways in which sexual assault victims have previously been unfairly judged based upon their conduct and appearance. R. at 471. Given that the Defense never suggested, implied, or argued E.S. was to blame because of her actions toward Appellant or her manner of dress, the trial counsel's argument brought in facts not in evidence which were irrelevant to the allegations at issue. *Baer*, 53 M.J. 237. Additionally, his improper analogy was made to appeal to the factfinder's passions and prejudices, as our society, in general, and the military, in particular, have come a long way since the time a victim was blamed for being assaulted because of her appearance or conduct. The trial counsel's argument placed the Government, specifically E.S., in a favorable light while simultaneously suggesting the defense counsel's commentary on the evidence was somehow inappropriate and "should not be trusted." *Fletcher*, 62 M.J. at 181 (citations omitted).

In terms of prejudice, trial counsel's misconduct was varied and spread throughout his 23-page argument.[23] R. at 455-56, 447 (initial), 471 (rebuttal). Additionally, his misconduct was severe because all of his comments sought to improperly bolster E.S.'s credibility. Considering he acknowledged the Government's case hinged on her credibility, his attempts to bolster her credibility were all the more significant. Additionally, trial counsel's conduct was clearly prohibited by the CAAF's prior case law. *See Baer*, 53 M.J. at 237; *Fletcher*, 62 M.J. at 179, 180,

[23] Trial counsel's initial argument is found at R. at 438-57, while his rebuttal is found at R. at 468-72.

181, 182; *Clifton*, 15 M.J. at 30. As such, trial counsel's errors were plain and obvious. While the military judge served as Appellant's factfinder, he did not address these specific comments by the trial counsel. He did, however, note that the trial counsel's reference to religion during argument and the defense counsel's reference to religion during his cross-examination of E.S. would not be considered. R. at 472. Therefore, it is unclear what weight the military judge attributed to trial counsel's improper arguments.

Notably, the weight of the evidence supporting Appellant's convictions was far from overwhelming. The military judge acquitted him of five specifications. R. at 474. Moreover, the facts of Appellant's case are unique as E.S. had previously testified, under oath, that Appellant had never touched her, and she had never touched him. R. at 349-50. Therefore, as trial counsel recognized at the outset of his argument, E.S.'s credibility was critical. R. at 441. As such, his attempts to improperly bolster her credibility were particularly damaging. He suggested that the military judge would have to consider her the spawn of Satan to not believe her (R. at 456), he argued Appellant had emotionally abused her such that it was almost like she was suffering from a psychological syndrome (R. at 447), and he implied Appellant's defense counsel was engaging in victim blaming, thereby suggesting the military judge would be engaging in similar conduct if he did not find her credible. R. at 471.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

Respectfully submitted,

[redacted]
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Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 on 28 June 2023.

Respectfully submitted,

[redacted]F

Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

APPENDIX A

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

VII.

APPELLANT'S SENTENCE—WHICH INCLUDES 14 YEARS OF CONFINEMENT—IS INAPPROPRIATELY SEVERE.

Standard of Review

The standard of review for sentence appropriateness is *de novo*. *United States v. Lane*, 64 M.J.1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

Additional Facts

At his sentencing proceeding, Appellant's mother, C.S., testified about how integral Appellant was to their family. R. at 503-05. After being released from confinement, Appellant had returned home to his family. C.S. explained that he acted as a handy-man around the house, and helped her take care of his grandparents. R. at 504, 505. He was also available to support his brother, D.B., who suffered from post-traumatic stress disorder (PSTD). R. at 503. According to C.S., D.B. "calls [Appellant] his brother and his best friend." R. at 503. Additionally, Appellant would help care for his younger brother, D. S-D., acting as a surrogate father toward him. *Id*.

Appellant's brothers and his grandmother, M.S., all wrote heart-felt character letters on his behalf, discussing his impact in their lives since his release from confinement. Defense Exhibit (Def. Ex.) B, C, D, E, F. In his written unsworn statement, Appellant discussed how important his family and brothers were to him. Def. Ex. G. He discussed spending as much time as possible with his family as he knows "their time is fleeting." *Id*.

Law

Appellate courts have not only the power but also the independent duty to consider the appropriateness of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."[1] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Sentence appropriateness is assessed by considering the appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim App. 2006), *aff'd* 65 M.J. 35 (2007).

Analysis

In 2017, Appellant was court-martialed for offenses involving E.S. Pros. Ex. 4. He was convicted and sentenced to 5 years confinement and a BCD. *Id*. He served his time in confinement and was paroled. Upon being released, he has had a powerful impact on every member of his family. Def. Ex. B, C, D, E, F. His family members discussed his demonstrated commitment to following all his conditions of his parole. Def. Ex. B, C, E. Additionally, his brother D.B.

[1] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825.

discussed observing Appellant's remorse for his actions. Def. Ex. B. His mother, C.S., discussed how he cares for his entire family and is there for everyone, essentially acting as the backbone of the family. R. at 503-03. In considering the facts and circumstances of the offenses Appellant was convicted of, and the evidence of Appellant's rehabilitative potential and positive impact on his family in the short time following his release, 14 years of confinement is inappropriately severe.

WHEREFORE, Appellant requests this Honorable Court exercise its authority under Article 66, UCMJ to modify his sentence.

VIII.

APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). "An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

On 25 July 2022, the Court of Appeals for the Armed Forces (CAAF) granted review on the issue of whether unanimous verdicts are constitutionally required for servicemembers in *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul. 2022).

Additional Facts

Prior to trial, Appellant filed a Motion for Appropriate Relief for Unanimous Verdict, dated 15 February 2022. App. Ex. VIII. At trial, Appellant requested to be tried by a miliary judge

alone. App. Ex. II. In his declaration, Appellant explains his reasons for not being tried by a panel of members. *See* Motion to Attach, Appendix B, Declaration of AB Jason Blackburn, dated 27 June 2023. His reasons were two-fold. He was previously court-martialed in 2017 and he was tried by a panel of officer members. Appendix B. During voir dire, his defense counsel exercised a peremptory challenge (after having a challenge for cause denied) on the then-panel president because that member supervised two other panel members. *Id*. After evidence had been presented, the military judge excused another panel member after the member's leadership sent an email to the legal office implying the military judge had been unprofessional toward the panel member during voir dire. *Id*. As a result of this member's excusal, Appellant was tried, and convicted, by five officer panel members. *Id*. There was no requirement for a unanimous verdict at his 2017 court-martial; at least two-thirds of his panel needed to concur to render a finding of guilt. Article 52(a), UCMJ. Whether all the members concurred in the guilty findings is unknown.

Prior to his 2022 court-martial, the Supreme Court decided *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). While Appellant's defense counsel advised him that being tried before a unanimous panel would be his best option, they also advised him that his request to have a unanimous verdict would likely be denied. Appendix B. Rather than risking another non-unanimous panel, Appellant requested to be tried by a judge alone. *Id*. Following his March 2022 court-martial, on 25 July 2022, the Court of Appeals for the Armed Forces (CAAF) granted review in *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. 25 Mar. 25, 2022) (unpub. op.), *rev. granted*, 82 M.J. 440 (C.A.A.F. 2022).

If Appellant has been guaranteed a unanimous panel at his court-martial, he would have requested to be tried by members.

Law and Analysis

In the military justice system, a panel may return a finding of guilt with at least three-fourths concurrence of the members. Article 52(a)(3), UCMJ, 10 U.S.C. 852(a)(3). However, the Supreme Court's landmark decision in *Ramos* broke "momentous and consequential" ground in holding the Fourteenth Amendment's Due Process Clause required the same unanimity rule of state convictions as was already in place for federal civilian convictions. *See Edwards,* 141 S. Ct. at 1559. The defining hallmarks of the *Ramos* decision solidified: first, it is the Sixth Amendment's right to an *impartial* jury which requires unanimity; and second, unanimity is inextricably tied to the fundamental *fairness* of a verdict. And regardless of the direct application of *Ramos* and the Sixth Amendment jury-trial right, this Court has long held "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001).

Appellant has timely preserved his issue with this Court. *Cf. United States v. Rorie*, 58 M.J. 399, 407 (C.A.A.F. 2003) (in the context of abatement *ab initio*, identifying an appeal to the CCA as an appeal of right). If a conviction is not final until affirmed by a CCA (or three years has passed after the date of the entry of judgment in accordance with Article 73, UCMJ, 10 U.S.C. § 873), and appellants can take advantage of case law developments during their appeal (*Tovarchavez*, 78 M.J. at 462), it follows that a legal issue preserved before this Court is sufficient for continued appellate review. Appellant filed a timely motion requesting to be tried by a unanimous panel only choosing to forego being tried by members because he understood, based upon his attorney's advice, his request for a unanimous verdict would be denied. Appendix B. Additionally, Appellant had previously been tried in 2017 by at a court-martial where the panel was not required to be unanimous. *Id*. He had the unique experience of having a panel member

excused in the middle of his trial, such that only five members were responsible for deciding whether the Government had proven its case beyond a reasonable doubt. *Id*.

There is a reasonable possibility the outcome of Appellant's case would have been different if Appellant had been tried by a panel where all members were required to concur in any finding of guilty. As detailed in Issue I, *supra*, E.S. had significant credibility issues, and the Government's case suffered from a variety of defects.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

IX.

THE GOVERNMENT'S REPROSECUTION OF APPELLANT FOLLOWING THE MILITARY JUDGE'S R.C.M. 917 FINDING OF NOT GUILTY AT HIS 2017 COURT-MARIAL VIOLATES THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITIONS AGAINST DOUBLE JEOPARDY.

Standard of Review

"Whether a prosecution violates double jeopardy is a question of law" reviewed de novo. *United States v. Rice*, 80 M.J. 35, 40 (C.A.A.F. 2020).

Additional Facts

On 24 March 2020, the Defense filed a motion to dismiss Appellant's charges and specifications based upon former jeopardy and *res judicata*. App. Ex. XXV. On 25 March 2020, the Government filed its response to the Defense's motion to dismiss. App. Ex. XXVI. During the motions hearing, the Defense argued, "We have adjudicated facts on the issue of the gravamen of the offense that sits before the bar today which is touching, the unwanted touching of a minor." R. at 97. The Defense then quoted from Appellant's 2017 court-martial transcript in which E.S. was asked the following questions:

Q: And he never touched in any way?

A: No.

Q: And you never touched him?

A: No.

R. at 98 (quoting App. Ex. XXV at 10).

The Defense argued the military judge (at Appellant's 2017 court-martial) "had to consider everything that was presented when making a finding of not guilty [pursuant to R.C.M. 917] on Charge III and its specification, which was an Article 134 offense, 'knowingly persuade, induce, or entice the alleged victim,' and here's the key, 'to engage in sexually explicit conduct.'" R. at 98. The Defense next emphasized that the panel considered the following argument by the Defense in reaching a sentence: "Let me start that there's not physical contact in this case, no inappropriate touching. You heard that multiple times from [E.S.]." R. at 99.

On 28 March 2022, the military judge issued his ruling, denying the Defense's request. App. Ex. XXX.

Law and Analysis

The Fifth Amendment provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The prohibition against double jeopardy provides protection against multiple punishments and successive prosecutions for the same misconduct. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). Another purpose is to ensure that the Government, "with all its resources and power," is not "allowed to make repeated attempts to convict an individual" for an offense, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as

enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187–88 (1957).

The general bar on successive prosecutions is applied in the military through Article 44, UCMJ, 10 U.S.C. § 844 (2019) and R.C.M. 907(b)(2)(C). Article 44, UCMJ, provides that "[n]o person may, without his consent, be tried a second time for the same offense." Unlike those tried in the civilian courts, jeopardy attaches in courts-martial upon the introduction of evidence. *United States v. Easton,* 71 M.J. 168, 172 (C.A.A.F. 2012); Article 44, UCMJ.

The Supreme Court has recognized "two venerable principles of double jeopardy jurisprudence." *United States v. Scott*, 437 U.S. 82, 90 (1978). First, there is no prohibition on reprosecution following the "successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict." *Id.* at 90-91. Second, a "judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, *may not be appealed* and terminates the prosecution when a second trial would be necessitated by a reversal." *Id.* at 91 (emphasis added). A defendant is acquitted when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Scott*, 437 U.S. at 94 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). Appeal of such an acquittal is barred when "it is plain" that the Court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.*

"Issue preclusion 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in a future lawsuit." *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019). To prevail under this doctrine, an Appellant must satisfy a two-pronged test:

> (1) the appellant must first demonstrate from evidence in the record that the panel's acquittal at the first court-martial necessarily determined an issue of ultimate fact in his favor; and (2) the appellant must then demonstrate that in order to obtain a conviction at the second court-martial, the government was required to prove beyond a reasonable doubt the existence of that same issue of ultimate fact.

Id. at 444-45.

Here, the Defense elicited evidence from E.S., under oath at Appellant's 2017 court-martial, that Appellant had never touched E.S. in any way, nor had she ever touched him. App. Ex. XV at 10. This evidence was elicited after the Defense asked E.S. several questions about whether she had been persuaded, enticed, or tempted to send Appellant nude pictures. *Id*. Therefore, the Defense brought this evidence forward within the context of Charge III. *See* Pros. Ex. 4. Following the presentation of evidence, the Defense made a R.C.M. 917 motion for a finding of not guilty, which the military judge granted. 2021 CCA LEXIS 212, at *1 n.2.

This finding of not guilty "represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Scott*, 437 U.S. at 94 (citation omitted). In deciding to find Appellant not guilty of this offense, the military judge would have considered E.S.'s testimony that Appellant had never touched her, nor had she ever touched him. This evidence would have been considered in the context of whether he had ever "knowingly persuaded, induced, or enticed" E.S. to engage in sexually explicit conduct, including the types of sexual touching at issue in Appellant's 2022 court-martial. As such, the military judge decided "an issue of ultimate fact in [Appellant's] favor." *Hutchinson*, 78 M.J. at 444-45. The second prong of the issue preclusion test is also satisfied because during Appellant's 2022 court-martial, the Government was "required to prove beyond a reasonable doubt the existence of the same issue of ultimate fact." *Id*. at 445. The Government did so by calling E.S. to testify, under oath, that Appellant had repeatedly raped and touched her over several years and across two different states. She testified to these facts, under oath,

despite her testimony, under oath, at Appellant's 2017 court-martial that no touching had ever occurred. App. Ex. XXV at 10. Because the military judge found Appellant not guilty of Charge III, after considering all the evidence presented, including E.S.'s denials of any inappropriate touching, the Government was barred from reprosecuting Appellant for three charges with 13 specifications of doing the very thing E.S. had previously disavowed under oath.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence.

X.

APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT AT HIS 2017 COURT-MARTIAL.

Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). "An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

Additional Facts

On 20 April 2020, the Supreme Court decided *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020). At the time *Ramos* was decided, Appellant's 2017 conviction was on direct appeal. The Government certified his case to the CAAF on 17 December 2019,[2] oral arguments were heard on

[2] *See* United States Court of Appeals for the Armed Forces Daily Journal, at https://www.armfor.uscourts.gov/journal/2019Jrnl/2019Dec.htm.

3 June 2020,[3] and the CAAF decided his case on 24 July 2020. *United States v. Blackburn*, 80 M.J. 205 (C.A.A.F. 2020).

Law and Analysis

In *United States v. Briggs*, the CAAF held that a statute of limitations defense could be raised for the first time on appeal, because the precedents in effect at the time of trial held there was no statute of limitations for rape. 78 M.J. 289, 295 (C.A.A.F. 2019).[4] Therefore, it would have been futile to raise the defense. *Id*. Similarly, it would have been futile for Appellant to argue at the time of his court-martial that a unanimous verdict was constitutionally required, because, until the Supreme Court decided *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020), Oregon and Louisiana still allowed for 10-to-2 verdicts. *See Apodoca v. Oregon*, 406 U.S. 404.

However, with the advent of *Ramos*, all federal and state defendants are guaranteed the right to a unanimous verdict. 140 S. Ct. at 1397. In *Edwards*, the Supreme Court clarified *Ramos*' "momentous and consequential nature," placing it on par with the Supreme Court's holdings in "*Mapp*, *Miranda*, *Duncan*, *Crawford*, [and] *Batson*," and available on direct appeal. 141 S. Ct. at 1559, 1561. Appellant's case is currently on direct appeal.

At the time of Appellant's trial, Article 52, UCMJ, required only two-thirds concurrence (66%) for a finding of guilty. Article 52(a)(3), UCMJ (1998 ed.) However, the Supreme Court's landmark decision in *Ramos*, 140 S. Ct. 1390, broke "momentous and consequential" ground in holding that the Fourteenth Amendment's Due Process Clause required the same unanimity rule of state convictions as was already in place for federal civilian convictions. *See Edward*, 141 S.

[3] *See* Hearing Calendar Archive, at https://www.armfor.uscourts.gov/calendar/202006.htm.
[4] In *United States v. McPherson*, 81 M.J. 372, 377 n.2 (C.A.A.F. 2021), the CAAF recognized that *Briggs*, 78 M.J. 289, was no longer precedent, but further stated that because the Supreme Court's holding in *Briggs*, 141 S. Ct. 467, did not concern the standard of review, "we continue to believe that this Court's reasoning in *Briggs* concerning the standard of review was correct."

Ct. at 1559. The defining hallmarks of the *Ramos* decision solidified that first, it is the Sixth Amendment's right to an *impartial* jury which requires unanimity; and second, unanimity is inextricably tied to the fundamental *fairness* of a verdict. And regardless of the direct application of *Ramos* and the Sixth Amendment jury-trial right, this Court has long held that, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001).

The unanimity requirement is even more important in jurisdictions, like courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (noting that "the risk of convicting an innocent person [] rises as the size of the jury diminishes."). In his concurring opinion in *Ramos*, Justice Kavanaugh highlighted the "racist origins of the non-unanimous jury":

> [I]t is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving back defendants, victims, or jurors. . . . Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [other] jurors can simply ignore the views of their fellow panel members of a different race or class.

140 S. Ct. at 1417-18 (Kavanaugh, J., concurring) (citation omitted).

Justice Kavanaugh's concerns about the use of non-unanimous verdicts to increase the possibility of unfair or unjust verdicts appear equally applicable to the military justice system. *United States v. Causey*, 82 M.J. 574, 591 (N-M., Ct. Crim. App. 2022) (Gaston, S.J., concurring), *rev. denied*, 2022 CAAF LEXIS 618 (C.A.A.F. Aug. 26, 2022). According to a Department of Defense [DoD] report published in December 2020, "the active-duty component officer population is less diverse that the eligible civilian population." [5] Additionally, "the officer corps is

[5] Department of Defense Board on Diversity and Inclusion Report: Recommendations to Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military, Executive Summary at viii,

significantly less racially and ethnically diverse than the enlisted population, for both active and Reserve Components."[6]

In 2017, Appellant was convicted by 5 officer members when all that was required was for two-thirds of his panel to concur in any finding of guilty. His appeal was ongoing in 2020 when *Ramos* was decided. As such, if the CAAF decides servicemembers are entitled to a unanimous verdict based upon the Supreme Court's holding in *Ramos*, this Court should find that he is entitled to relief.

WHEREFORE, Appellant respectfully requests this Court set aside his findings and sentence of his 2017 court-martial.

available at https://media.defense.gov/2020/Dec/18/2002554852/-1/-1/0/DOD-DIVERSITY-AND-INCLUSION-FINAL-BOARD-REPORT.PDF (last accessed Aug. 11, 2022) (emphasis added).

[6] *Id*.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR LEAVE TO FILE UNDER SEAL**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN**, United States Air Force *Appellant*	)	Case No. ACM 40303 28 June 2023

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

Pursuant to Rule 13(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file page 8 of the Statement of Facts in his Assignments of Error (AOE) under seal. Page 8 of the Statement of Facts cites to Appellate Exhibit XXXV, which is a 1-page excerpt from E.S.'s sealed mental health record, which was released by the military judge to the parties at trial. Appellate Exhibit XXXV was ordered sealed by the military judge. The notes from this released mental health record are discussed on page 8 of Appellant's Statement of Facts and have been redacted in his AOE. The inclusion of this information is necessary for this Court's consideration of the case. Page 8 of Appellant's is filed under seal.

WHEREFORE, Appellant respectfully requests this motion be granted.

GRANTED

6 JULY 2023

Respectfully Submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 28 June 2023.

[redacted]

Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN,** United States Air Force *Appellant*	)	No. ACM 40303 28 June 2023

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman Basic Jason M. Blackburn, moves hereby to attach the following document to the Record of Trial:

1. Declaration of AB Jason M. Blackburn, dated 27 June 2023, 1 page (Appendix B).

Appendix B is relevant to this Court's decision regarding Appellant's *Grostefon* Assignment of Error relating to his right to a unanimous verdict. In his declaration, Appellant explains his two reasons behind requesting a military judge for his 2022 court-martial, rather than a panel. He had concerns based on his previous court-martial in 2017, which involved members, and he was advised his request for a unanimous verdict would likely be denied. Appellant explains he would have requested a panel if the panel was required to be unanimous.

Appendix B is relevant and necessary to this Court's resolution of Appellant's *Grostefon* issue. This Court can consider Appellant's declaration in accordance with *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), as it pertains to evidence in the record, specifically Appellant's request to be tried by a military judge. However, his decision was not made in a

GRANTED
6 JULY 2023

vacuum, and his declaration provides information necessary for this Court's resolution of his Assignment of Error that is not fully resolvable by the record.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 28 June 2023.

[redacted]

Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman Basic (E-1) JASON M. BLACKBURN, USAF *Appellant.*	))))))))	MOTION TO EXCEED PAGE LIMIT Before Panel No. 1 No. ACM 40303

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his Assignments of Error brief. Appellant raises a total of ten issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

GRANTED
10 AUG 2023

[redacted]
G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
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MARY ELLEN PAYNE
Associate Chief, Government Trial and
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 7 August 2023 via electronic filing.

[redacted]

G. MATT OSBORN, Lt Col, USAF
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7 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN**, USAF *Appellant.*	)	No. ACM 40303

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee	)	**ANSWER TO ASSIGNMENTS**
	)	**OF ERROR**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1)	)	
JASON M. BLACKBURN, USAF	)	No. ACM 40303
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR RAPE OF A CHILD, AGGRAVATED SEXUAL CONTACT OF A CHILD, AND SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY INSUFFICIENT[?]

II.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR INDECENT RECORDING IN VIOLATION OF ARTICLE 120c, UCMJ, AS AN OFFENSE OF CHILD MOLESTATION UNDER MIL. R. EVID. 414[?]

III.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD UNDER MIL. R. EVID. 414[?]

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE VIDEOS OF E.S.

WHICH FORMED THE BASIS FOR APPELLANT'S INDECENT RECORDING CONVICTION IN VIOLATION OF ARTICLE 120c, UCMJ[?]

V.

WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS INCOMPLETE[?]

VI.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT WHEN HE VOUCHED FOR THE VERACITY OF E.S., THE COMPLAINING WITNESS[?]

VII.[1]

WHETHER APPELLANT'S SENTENCE – WHICH INCLUDED 14 YEARS' CONFINEMENT – IS INAPPROPRIATELY SEVERE[?]

VIII.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT[?]

IX.

WHETHER THE GOVERNMENT'S PROSECUTION OF APPELLANT FOLLOWING THE MILITARY JUDGE'S R.C.M. 917 FINDINGS OF NOT GUILTY AT HIS 2017 COURT MARTIAL VIOLATES THE FIFTH AMENDMENT AND ARTICLE 44'S PROHIBITION AGAINST DOUBLE JEOPARDY[?]

[1] Appellant raised Issues VII – X under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

X.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT AT HIS 2017 COURT-MARTIAL[?]

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant was the victim, E.S.'s step-father, having dated and then married E.S.'s mother, M.A. (R. at 235.) E.S. was born in May 2003. (Id. at 280.) Appellant had a younger brother on the same soccer team as E.S. and met M.A. through the soccer team and eventually started dating M.A. in 2010, after M.A.'s divorce from J.S. in 2009. (Id. at 233, 234, 280, 413.) Appellant lived in Cabot, Arkansas with M.A. and E.S. starting in late April 2011, and lived with them until around November 2011. (Id. at 234, 276.) Appellant and M.A. had a breakup and then got back together, marrying in August 2012. (Id. at 235.) Appellant moved to Biloxi, Mississippi by himself, and then M.A. and E.S. joined him in January 2013. (Id. at 235-236, 238-239.) M.A. and Appellant had two children together, one born in 2012 and one born in 2015. (Id. at 240.) In Biloxi, the family lived in two houses. (Id. at 240, 241.) In the second home, Appellant's family also lived with them for a few months. (Id.) M.A., Appellant, and E.S. often watched movies in M.A.'s and Appellant's bedroom, on their bed. (Id. at 243, 291). Appellant would insist that E.S. lay in the middle during those movie nights. (Id.) M.A. would often go to bed before Appellant and on several occasions went to find Appellant and would find him coming out of E.S.'s bedroom. (Id. at 242, 260.) M.A. never saw Appellant coming out of the younger kids' bedroom. (Id. at 242.)

Appellant was often in E.S.'s room because he went there to touch her chest, butt and vagina. (Id. at 283-320.) Appellant first began touching E.S. in Arkansas during nap times. (Id. at 283.) During those naps, Appellant would have E.S. on top of him, holding her hips to move her around on top of his waist area. (Id. at 283-285.) Appellant removed E.S.'s pants and underwear and touched E.S. skin to skin. (Id. at 289.) During those times, E.S. could feel Appellant's hard penis. (Id. at 290.) Appellant told E.S. often what he was doing to her was "our little secret." (Id. at 290.)

When the family moved to Mississippi, the conduct continued and "more things would happen." (Id. at 295.) Appellant continued to touch E.S.'s butt, chest and vagina over and under her clothes. (Id. at 296.) Appellant started coming to E.S.'s bedroom almost every night. (Id. at 297.) Appellant called E.S. "babe," "baby," and "sweetheart." (Id. at 300.) Appellant's sexual acts included performing oral sex on her and penetrating her vagina with his fingers, causing discomfort due to his long fingernails. (Id. at 302, 304.) On occasion, Appellant would be on top of E.S. with his penis touching her vagina while both of them had their pants pulled down. (Id. at 308, 311.) One time, Appellant did this while moving back and forth and left a wet spot on the bed, which they cleaned up with M.A.'s purple hair dryer. (Id. at 313, 315.)

Appellant was preparing to leave for a training, and prior to his departure, he asked E.S. for pictures of her without clothes. (Id. at 320.) Appellant ended up creating his own recordings of E.S., which she discovered when she found a recording device in the bathroom as she was undressing. (Id. at 320.) E.S. gave the recording device back to Appellant and then she called her father to report what she found. (Id. at 321.) The discovery of the recording device led to an investigation and ultimately Appellant's conviction for violating Article 120b, UCMJ, for asking E.S. to send nude pictures of herself, and Article 120c, UCMJ, for indecent recording. (App. Ex.

XII at 19-20.) E.S. did not disclose all of the abuse she experienced at the hands of Appellant when the indecent recording case was being investigated. (R. at 349.) During Appellant's second court-martial, that is the subject of this appeal, the military judge heard evidence from a licensed clinical psychologist regarding delayed disclosures. (Id. at 394 – 412.) E.S. did not initially disclose the abuse because she was scared, embarrassed, and worried she would have angered her parents for not revealing sooner that it was happening. (Id. at 355, 357.) E.S. never had any intention of telling anyone about the abuse. (Id. at 373). She just blurted it out one day to her therapist, who ultimately reported it to law enforcement leading to the charged offenses. (Id.)

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR RAPE OF A CHILD, AGGRAVATED SEXUAL CONTACT WITH A CHILD, AND SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

On 1 December 2021, the trial defense counsel (TDC) filed a motion in *limine* to exclude evidence under Mil. R. Evid. 414. (App. Ex. X.) In that motion, TDC wrote,

> AB Blackburn is charged with the following: one specification of aggravated assault, three specifications of aggravated sexual contact, and one specification of indecent liberty with a child, in violation of Article 120 Uniform Code of Military Justice (October 2007); one specification of attempted aggravated sexual contact, in violation of Article 80 Uniform Code of Military Justice (October 2007); *two specifications of sexual assault of a child*, two specifications of rape of a child, and four specifications of sexual abuse of a child, in violation of Article 120b Uniform Code of Military Justice (June 2012).

(App. Ex. X at 1.) (Emphasis added).

On 1 December 2021, TDC also filed a motion in *limine* to exclude evidence under Mil. R. Evid. 404(b). (App. Ex. XII.) In that motion, TDC included the same summary of the charges, again writing Appellant had been charged with two specifications of *sexual assault of a child*. (Id. at 1.)

At an Article 39(a) session on 1 March 2022, trial counsel (TC) stated that the general nature of the charges included "four specifications of sexual assault of a child" in violation of Article 120b, UCMJ. (R. at 8.) During this same Article 39(a) session, Appellant was arraigned on the charges and when asked if he wanted the charges read aloud, Appellant opted to waive the reading of the charges. (R. at 12.) The military judge then heard arguments on the defense motions in *limine* to exclude evidence under Mil. R. Evid. 414 and 404(b), respectively. (R. at 16, 20 – 27 and 27 – 59.)

On 18 March 2022, the military judge issued his rulings on both defense motions in *limine*. (App. Ex.s XX (404(b) and XXI (414).) In the "Findings of Fact" sections for both rulings, the military judge wrote that Appellant had been charged with "two specifications of sexual assault of a child … in violation of Article 120b UCMJ (Jun 2012)." (App. Ex. XX, XXI.)[2]

There were no other discussions about the charges and specifications, nor any discussion of the elements of any of the offenses. Despite TDC, TC, and the military judge stating Appellant had been charged with sexual assault of a child, Appellant was actually charged with four specifications of rape of a child – two specifications for when E.S. was less than twelve years of age; and two specifications alleging force when E.S. was between the ages of twelve and

[2] In fact, the military judge's Finding of Fact Sections were almost verbatim to TDC's Summary of the charges and specifications in both motions in *limine*.

sixteen years. (ROT, Vol. 2, Charge Sheet.) On 30 March 2022, the military judge announced his findings for each charge and specification on the Charge Sheet. (R. at 474.)

Standard of Review

Issues of legal and factual sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citing Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of

record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) (quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991)). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

Analysis

The Military Judge's Findings of Fact relating to Specifications 1 – 4 of Charge III

The military judge's findings at the court martial were factually and legally sufficient and not impacted by his prior misstatement of the description of the charged offenses. The military judge's written rulings on both the Mil. R. Evid. 414 and 404(b) motions in limine use the incorrect description of the offense. (App. Ex. XX, XXI.) When the military judge made his

findings, though, he did so based on the Charge Sheet. The military judge would have used the charging instrument only to make his findings.

It is not clear from the record if the military judge merely made his findings of facts in his written motions rulings by borrowing from the "Summary" section of the TDC's motions in *limine*, or by borrowing the language used by TC when announcing the general nature of the charges during the 1 March 2022 Article 39(a) session. Both the TDC and the TC were wrong regarding the description of the offenses under Article 120b. It was TDC who introduced the incorrect information into the record, and it is possible the military judge simply took that phrasing and used it in his ruling. While the military judge did use that phrase in his 18 March 2022 ruling, there is no evidence in the record to establish that the military judge did not know the elements of the offenses he ultimately found Appellant guilty of at the trial on the merits 28 – 30 March 2022. In fact, the evidence supports that the military judge scrupulously paid attention to the charge sheet as evidence by his finding Appellant guilty of one of the specifications of Charge III by exceptions and substitutions. (R. at 474; Entry of Judgement, ROT Vol. I.)

Appellant's case was tried before a military judge sitting alone. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). While Appellant argues there is clear evidence to the contrary (App. Br. at 18.), the evidence Appellant is relying on to make that assertion – the military judge's reference to sexual assault in the motions in *limine* rulings – is far from clear. Appellant has not alleged that TDC was laboring under a misunderstanding about the charges when TDC made the same statement about the offenses; but has leveled that accusation against the government and military judge (despite having been the first to introduce the inaccurate description of the offense into the record). Appellant has not raised ineffective assistance of

counsel by TDC, which, had TDC not understood the nature of the charges, certainly would have been an issue raised on appeal. But Appellant now wants to allege that the military judge was not aware of what charges he actually found Appellant guilty. Appellant has failed to establish the military judge was operating under a misunderstanding of the offenses, as opposed to a scrivener's error, and has further failed to establish the military judge was not clear on what he was being called upon to answer during the judge-alone findings, which was separated in time from his written ruling by almost two weeks.

Further, Appellant has cited no authority that would permit this Court to determine that a mischaracterized offense in a written ruling automatically invalidates or transfers over to the findings portion of the court martial. Appellant ignores two important things: 1) there is a lesser the burden of proof required for the motion in *limine* than what is required for the trial; and 2) during trial on the merits, the military judge was making his findings based on the charge sheet. The burden of proof for the motions in *limine* is preponderance of the evidence. United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013). The military judge is patently aware of the government's burden to prove a case beyond a reasonable doubt during trial. The military judge's findings should be considered as having been made by a cautious and diligent fact-finder. Indeed, the fact that the military judge found Appellant not guilty of some of the offenses, to include by excepting specific language on the Charge Sheet, indicates he was being discerning about the charges and specifications and the proof in support of them.

Appellant also argues "TC did not explain how the Government had proven Appellant had committed a sexual act against E.S. by using force." (App. Br. at 19.) To prove the offense beyond a reasonable doubt, TC was not required to explicitly state during findings argument each and every fact that supported Appellant committed the acts with force. A parent or other

authority figure can commit rape by exerting moral, psychological, or intellectual force over a child. *See* United States v. Rangel, 64 M.J. 678, 685 (A.F. Ct. Crim. App 2007); United States v. Dejonge, 16 M.J. 974 (A.F.C.M.R. 1983); United States v. Palmer, 29 M.J. 929 (A.F.C.M.R. 1989); United States v. Torres, 27 M.J. 867 (A.F.C.M.R. 1989). "Force" in the case of a parent-child or similar relationship, means the use or abuse of parental or similar authority. MCM, Appendix 22, para. 45b(h)(2)(C). The military judge had ample evidence to find force: the nature of the offenses; E.S.'s age relative to Appellant; the relation of E.S. to Appellant, where Appellant was in a clear position of authority over E.S.; and Appellant repeatedly telling E.S. the conduct was their little secret. The military judge made his findings based on the Charge Sheet, and there was legal and factual sufficiency for his findings on Specifications 1 – 4 of Charge III.

E.S.'s Credibility and Reasonable Doubt

Appellant next attacks the legal and factual sufficiency of Appellant's convictions based on E.S.'s credibility. (App. Br. at 19, 21.) The fact finder was in the best position to weigh and evaluate the credibility of witnesses and testimony. United States v. Peterson, 48 M.J. 81, 83 (C.A.A.F. 1998); *see* Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The fact finder may also "believe one part of a witness testimony and disbelieve another. United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979). While Appellant can point to a few discrepant statements from E.S.'s testimony, E.S.'s testimony was found to be credible by the fact finder in this case. The military judge observed E.S.'s demeanor as she testified and heard, in highly specific details, about the acts Appellant committed with E.S. These acts included touching E.S.'s butt (R. at 286.), having E.S. sit on top of Appellant's penis while he grabbed her hips and pushed her around (R. at 285 – 286.), touching E.S.'s chest under her shirt (R. at 288.), touching E.S.'s vagina with his hands (R. at 289.), taking off E.S.'s pants so she could feel his

penis on her skin (R. at 289.), and performing oral sex on E.S. (R. at 303.) The level of detail regarding the oral sex was quite remarkable as E.S. described:

> [o]ne instance he was kind of just – he – he went to the bottom of the bed and started massaging my feet, and then he started making his way up massaging my legs and thighs. And then eventually he would pull down my pants and my underwear, and he would kind of massage with his hands like around my vagina. And then he would start lifting up my shirt and kind of kissing on my stomach and trailing down, and then he would – he would start doing that. … Oral sex. … He was kissing and licking my vagina, and sometimes he would even use his fingers.

(R. at 303 – 304.)

The questions about what Appellant was doing with his tongue and his fingers continued. E.S. also described for the military judge how she could feel Appellant's fingernails while they were inside of her.[3] E.S. described a time when there was a wet spot on the bed after one incident (R. at 315), and that Appellant had used a liquid or spat on his hand on one occasion. (R. at 316.) E.S. described a time when Appellant was behind her rubbing his penis back and forth between her butt cheeks. (R. at 317.) The military judge was able to listen to this level of detail and observe E.S. while she testified to it. While E.S. may not have been able to recall when the abuse first started as a six- or seven-year-old child, there was ample evidence for the military judge to have found E.S. credible. Considering the evidence in the light most favorable to the prosecution and that the military judge personally observed the witnesses, there was factually and legally sufficient evidence to support Appellant's convictions.

Appellant's focuses on E.S.'s prior testimony in the 2017 court-martial to point to her lack of credibility in the 2022 court-martial. Appellant also attacks E.S.'s credibility because she

[3] TC also drew the military judge's attention to the length of Appellant's fingernails in the video in Prosecution Exhibit 3, noting they were long. (R. at 450.)

had "multiple opportunities to report Appellant's sexual touching." (App. Br. at 21.) E.S. undeniably said at a prior hearing that Appellant had not touched her. (R. at 349.) The government, however, presented evidence to the military judge that explained the reasons E.S. did not disclose in 2017 or later. E.S. herself testified she was worried people would be disappointed in her and mad at her because she did not put a stop to it. (R. at 357.) E.S. said she felt as though Appellant bribed her. (R. at 360.) E.S. was scared to tell because she was afraid Appellant would find her and get back at her. (R. at 367.) Importantly, E.S. said she never intended to tell anyone about the abuse and she blurted it out to her therapist. (R. at 373.)

The military judge also heard evidence from SP, a licensed clinical psychologist (R. at 393-394.) Dr. SP testified regarding factors that impact a victim's ability or willingness to disclose abuse. (R. at 398-402). The military judge was presented with evidence during the trial to show that many of the barriers to disclosure existed for E.S. The Appellant's most significant attack on E.S.'s credibility – that she failed to disclose sooner and while under oath – then was squarely addressed with evidence for the military judge to conclude E.S. was credible.

E.S.'s Motive to Fabricate

Appellant asks this Court to find that E.S. had a motive to fabricate the years of abuse because she was not pleased to learn Appellant was going to be paroled after his conviction from his 2017 court martial. (App. Br. at 23.) This argument ignores a key fact – that E.S. was never going to tell anyone about the abuse. E.S. testified she never intended to tell anyone about the abuse after the court-martial in 2017, and she "just kind of blurted it out" to her therapist. (R. at 368, 373.) To be persuaded by Appellant's motive to fabricate argument, there would have to be evidence that E.S. knew a disclosure to her therapist would lead to the offenses being reported to law enforcement. There is nothing in the record to support E.S. was aware of what her therapist

would do with the information. E.S. also never discussed the abuse with her parents. (R. at 425, 257.) E.S. had spoken to her former step-mom, L.B., about the abuse; but at the time L.B. testified, she had been divorced from E.S.'s father and testified she would not lie for E.S. or her ex-husband. (R. at 221, 225.) Appellant's argument that the conviction is factually or legally flawed based on E.S.'s purported motive to fabricate is simply not supported by the evidence.

Charged Time Frame

Appellant attacks the legal and factually sufficiency of the convictions arguing that there was not evidence presented for the full span of time for the charged offenses and that during the time frames, E.S. never disclosed the abuse to anyone. (App. Br. at 24-26.) The time frames charged are based on the charging schemes in place at the time of the offenses and E.S.'s age. The dates track with the punitive articles for offenses 12 June 2012 – 31 December 2018 and the dates when E.S. would have been less than twelve years of age (6 May 2015). The military judge heard from A.B., L.B., and E.S., regarding time frames that were relevant and associated with the charged conduct. Most of the temporal facts were established based on M.A.'s relationship with Appellant – when they met, when they moved in together and when they moved from Arkansas to Mississippi. There was sufficient evidence presented for the military judge to find that the offenses occurred within the associated time frames for the offenses and to convict Appellant of them.

Issues Raised by Appellant in Specification 2 of Charge I, Specification 6 of Charge III, and Specifications 3, 5 and 8 of Charge III

Appellant raises several issues with the Charges and Specifications. (App. Br. at 26-30.) This brief will combine each of those issues, as they generally allege factual and legal sufficiency arguments. For the reasons stated above relating to the military judge, who is presumed to know the law, operating from a Charge Sheet, which specifically identified the

offenses, being in the best position to judge the credibility of the witnesses, and given the level of detail of those offenses, Appellant's arguments fail. There was evidence to support each of the offenses Appellant was convicted of. The ability to point to an issue – such as E.S. not giving a detailed description of what Appellant's penis felt like or saying that Appellant touched her chest and left his hand there not "making sense" – does not overcome the military judge finding there was evidence beyond a reasonable doubt to convict Appellant. "The term reasonable doubt does not mean the evidence must be free from conflict." King, 78 M.J. at 221. Similarly, the evidence necessary to support a verdict does not have to exclude every other reasonable hypothesis and negate all possibilities. Wilson, 182 F.3d at 742. The points raised by Appellant may raise some conflict, but not enough to disturb the military judge's findings.

Conclusion

After analyzing Appellant's convictions for factual sufficiency, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. After analyzing Appellant's convictions for legal sufficiency, considering the evidence in the light most favorable to the prosecution, this Court should find a reasonable fact finder could have found all of the essential elements beyond a reasonable doubt. For all of the foregoing reasons, Appellant's convictions were both factually and legally sufficient and this Court should deny Appellant's request for relief.

II.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING APPELLANT'S CONVICTION FOR INDECENT RECORDING IN VIOLATION OF ARTICLE 120c, UCMJ.

Additional Facts

On 10 September 2021, TC provided TDC with a Notice of its intent to admit evidence under Mil. R. Evid. 414 (hereinafter MRE 414 Notice). Specifically, the MRE 414 Notice provided:

> 1. Pursuant to Military Rules of Evidence (M.R.E.) 414(b) and the Military Judge's Scheduling Order, the Government provides notice of the government's intent to offer evidence that the Accused … committed any other offense of child molestation against victim (E.S.), a child at the time of the charged offenses. The Accused is currently charged with multiple acts of child molestation as defined in M.R.E. 414(d)(2).
>
> 2. The government intends to offer the following in the findings and/or sentencing phases of the trial. To the extent such other acts include statements by the Accused, the prosecution provides notices of those statements under 404(b).
>
> a. Between approximately 1 January 2016 and 30 April 2016, Accused committed a lewd act upon E.S., a child who had not attained the ae of 16 years, by intentionally asking E.S. to "Send me nude pictures of yourself," or words to that effect, with an intent to arouse the sexual desire of Accused. On 27 December 2017, Accused was charged and convicted of this offense under Article 120b of the Uniform Code of Military Justice. … the government offers the above as propensity evidence of Accused's character trait for child molestation.

(App. Ex. X at 13.) On 1 December 2021, TDC filed a motion in *limine* to exclude the evidence under Mil. R. Evid. 414, but objected only to the portion of the MRE 414 Notice which stated "any other offense of child molestation" in paragraph one, claiming the notice was insufficient because it lacked particularization. (Id. at 1-3.) Appellant's motion did not address and provided

no objection to the Government offering Appellant's lewd act of asking E.S. to send him nude photos.

Also on 10 September 2021, TC provided TDC with a notice if its intent to introduce evidence under Mil. R. Evid. 404(b) (hereinafter MRE 404(b) Notice). (App. Ex. XII at 16.) The MRE 404(b) notice had four items noticed in paragraphs a – d. (Id. at 16-17.) Paragraph "a" stated:

> Between approximately 1 January 2016 and 30 April 2016, Accused knowingly made a recording of the private area of E.S., without her consent and under circumstances in which E.S. had a reasonable expectation of privacy. On 27 December 2017, Accused was charged and convicted of this offense under Article 120c of the Uniform Code of Military Justice. … The government offers the above evidence of the Accused's knowledge, absence of mistake and consciousness of guilt.

Paragraph "b" related to enticement of a minor and the government withdrew that evidence. (App. Ex. XII at 16; R. at 27.) Paragraph "c" related to Appellant taking E.S.'s phone after E.S. discovered the recording device and the government withdrew that evidence. (App. Ex. XII at 16; R. at 57.) Paragraph "d" related to E.S. telling Appellant she wanted the sex acts to stop. (Id. at 17.)

On 1 December 2021, TDC filed a motion in *limine* to exclude the evidence in the government's MRE 404(b) Notice. (App. Ex. XII.) In the motion, TDC objected to the items in paragraphs a – d of the MRE 404(b) Notice. (App. Ex. XII.) TDC also objected to the lewd act from the MRE 414 Notice, arguing the evidence was inadmissible under Mil. R. Evid. 404(b) because it was being offered as propensity evidence, which is an improper purpose under Mil. R. Evid. 404(b). TDC did not address the admissibility of the lewd act evidence under Mil. R. Evid. 414, or provide any analysis of a theory of why it would be inadmissible under Mil. R. Evid. 414.

In the its response to this Mil. R. Evid. 404(b) motion to exclude, the Government stated, "Alternatively, while the Government has not given notice of this conduct under M.R.E. 414, [Appellant's] Article 120c conviction is admissible under Rule 414 as well. The response argued Appellant's sexual abuse of the victim fell within the Mil. R. Evid. 414 definition of "child molestation" because the conduct constituted "a production of child pornography under 18 U.S.C. Chapter 10, as defined by M.R.E. 414." (App. Ex. XIII at 5, *citing* United States v. Sturm, 673 F.3d 1274, 1283 (10th Cir. 2012).)

At the motions hearing at trial on 1 March 2022, the military judge attempted to clarify what pieces of evidence were at issue for Mil. R. Evid. 414 purposes. (R. at 20.) TDC stated there was no objection to what was noticed in the initial Mil. R. Evid. 414 notice (i.e., the lewd act evidence). The Circuit Trial Counsel (CTC) then stated that in addition to the lewd act evidence noted in the Government's original notice, the Government also sought to introduce the Article 120c conviction as Mil. R. Evid. 414 evidence and stated that notice was provided to the Defense when it filed its Mil. R. Evid. 404(b) motion response on 8 December 2021, which was nearly three months earlier. (R. at 20.) CTC argued this placed the Defense "on fair notice of the conduct that the government seeks to admit under 414 and has had ample time and will have further additional ample time to prepare for that evidence to be presented at trial." (R. at 21.)

CTC further noted it was the government's understanding, "…absent the notice piece of this particular item of evidence, there is no 414 argument from the defense, but we do believe this qualifies under 414 as a crime under 18 USC 2252A, and also 2251." (R. at 22.) The military judge clarified with TDC what specific objection he was making under Mil. R. Evid. 414:

> MJ: All right, so defense counsel, in their original notice, which is 10 September 2021, and just so it is clear for the record, that is

attachment 3 to your 414 motion. So, that would be Appellate Exhibit X. So, in there, they noticed one item. And I guess what they are doing now is they are saying, "hey, under 404b, we also noticed a different item."

TDC: Yes, Your Honor.

MJ: Just so I understand your argument, and understanding having read your pleading that their initial response could be vague in the sense of it can be anything else. And I will ask about that right now, or here in just a second rate[.]

TDC: Yes, Your Honor.

MJ: But if its only these two items, ***what was noticed in their 414***, the original one, and ***then under 404b*** as well, ***do you have any objection to that under MRE 414***?

TDC: ***No, Your Honor***.

MJ: Okay, so your only objection then is to the second item we will call it, under the MRE 404b, and that is the notice saying that you did not receive proper notice for that, is that right?

TDC: Correct, Your Honor.

…

MJ: Okay. Alright, so in my, just so it is clear, in my MRE 414 ruling that I will have to issue, ***all I need to concentrate on is whether or not you have had proper notice***? Is that what you are saying?

TDC: Yes, Your honor.

MJ: Okay.

(R. at 23-24.)[4] (emphasis added)

[4] While Appellant's brief notes that he objected to the lack of notice for the Article 120c conviction, Appellant omits that his TDC affirmatively stated that the Defense had no other objection under Mil. R. Evid. 414 for the evidence. (*See* App. Br. at 32.) Further, Appellant's brief is silent on his TDC's affirmative agreement that the military judge's ruling only needed to concentrate on whether or not Appellant had received proper notice as it related to the Article 120c conviction.

Later, in a discussion with CTC, the military judge stated, "Well and understanding, I mean, the defense has affirmatively said they have no objection to the actual 414 evidence," and "[their] only objection is to notice . . . ." (R. at 26.) Later, in summing up the motions hearing and what needed to be ruled upon, the military judge stated, "For the 414, I have notice to rule on." (R. at 72.)

When the military judge turned to the motion in *limine* to exclude evidence under Mil. R. Evid. 404(b), the discussion surrounding paragraph "a" established that the information noticed in paragraph "a" could have been noticed also under Mil. R. Evid. 414(d). (R. at 26-27.) The TC informed the military judge, "We did notice [a] under 404b, and we believe it is appropriate under that one, but it's also appropriate under 414, which is what we originally intended it to be." (Id. at 27.) Because the military judge had already confirmed with TDC that their only objection to 414 evidence was as to improper notice and to the broad language of "any other offense," TC noted that "…based on the discussion we just had with Your Honor, that we intend really to put that one into 414 … So, I believe that one would be a moot point at this time…" (Id.) The military judge responded, "Assuming that I disagree with the defense's argument on notice, yes, it would be a moot point. So, I think you are safe to go to part ["b"]." (Id.)

The military judge also mentioned at two other points that there was no objection or argument with the admissibility of the evidence in paragraph "a" of the MRE 404(b) Notice. When discussing what purpose the MRE 404(b) was being offered for, the military judge noted, "Well, just so it is clear, they are only throwing on intent for part ["d"]. They had it under part ["c"] already. … My understanding is that there is no argument over ["a"] and ["b"]. They have withdrawn ["b"]. ***["a"], there is no objection***." (Id. at 42.) (emphasis added). Later as the hearing continued on the MRE 404(b) Notice, the military judge said, "… So ["c"] is gone. ["a"]

has no argument. ["b"] is gone. So, let's talk about ["d"]." (Id. at 57.) At no point during these discussions did TDC object, interject, correct or contradict that "a" was not an issue up for discussion for admissibility under either Mil. R. Evid. 404(b) or 414.

In his ruling on this issue, the military judge stated, "The defense is concerned the government will attempt to introduce other evidence under MRE 414, of which the government has not given notice . . . ." (App. Ex. XXI at 3.) The military judge then stated that the "government has unequivocally stated the only evidence it intends to admit under MRE 414" was the lewd act evidence contained in the Government's original Mil. R. Evid. 414 notice and that the "defense has not objected to this evidence." (Id. at 4.)

Though the military judge's ruling did not address the Article 120c conviction which had been thoroughly discussed previously during the motions hearing, the record shows evidence that Appellant's Article 120c conviction was elicited without objection from Appellant. Ms. LB testified that E.S. in April 2016 "told us she found [a] camera in the bathroom that was recording her while she was getting a shower." (R. at 186.) When Appellant's TDC made a hearsay objection, CTC responded, "Your Honor, this related to the MRE 414 evidence. It's relevant in that aspect. That's where we're going with this line of questioning." (Id.) The military judge overruled the objection. Ms. LB continued to testify about the investigation that commenced after finding the camera and specifically described what occurred in the video that was found, stating, "[E.S] was getting undressed to get in the shower. (R. at 187-91.) Ms. LB also stated that she testified in Appellant's first court-martial and that Appellant "was found guilty of recording her." (R. at 192.) Throughout this testimony, neither Appellant nor his TDC objected to this evidence as improper under Mil. R. Evid. 414.

Later, the Government sought to admit the videos which led to Appellant's Article 120c conviction in his first court-martial. (R. at 385.) Appellant's only objection to the video was based on Mil. R. Evid. 403. (Id.) Appellant's TDC stated, "It's just the video set up and what was filmed in the bathroom, for which our client has already been successfully prosecuted for and which he's already, you know, been punished for." (R. at 386.) The CTC would later state, "They are videos that, as defense said, have already been introduced in a court-martial." (R. at 387.) After mentioning E.S.'s earlier testimony about moving away from Mississippi in April 2016 after finding the camcorder in the bathroom, the CTC stated, "Additionally, Your Honor, the court has already ruled that these acts come in under 414. And 414 can basically be relevant for any purpose that the factfinder believes it to be relevant to. And so, that is why the government believes that the extent of the accused's conduct in these videos is important for the court to see." (R. at 388.)

Finally, in his closing argument, the CTC told the military judge, who was sitting alone, "And, sir, what we are dealing with here is the truth of propensity. This 414 evidence that's come in, you've watched the videos." (R. at 471.)

Standard of Review

Whether an appellant has waived an issue is a legal question reviewed *de novo*. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." Id. (quoting United States v. Gladue, 67 M.J. 311, 313, (C.A.A.F. 2009)). Consequently, while this Honorable Court can review forfeited issues for plain error, our superior Court has held "we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." Id. (*quoting* United States v. Campos,

67 M.J. 330, 332 (C.A.A.F. 2009)). "[U]nder the ordinary rules of waiver, [an a]ppellant's affirmative statements that he had no objection" to the admission of evidence "operate[s] to extinguish his right to complain about their admission on appeal." United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017) (*citing* United States v. Campos, 67 M.J. 330, 332-33 (C.A.A.F. 2009).

Under the plain error standard of review, the appellant bears the burden of establishing 1) there is error; 2) the error is clear or obvious; and 3) the error materially prejudiced a substantial right. United States v. King, 83 M.J. 115, 123 (C.A.A.F. 2023).

Analysis of the admissibility of evidence under Mil. R. Evid. 413 is indistinguishable from Mil. R. Evid. 414. United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006). Therefore, this Answer will apply law applicable to Mil. R. Evid. 413 to discuss the Mil. R. Evid. 414 issue.

Law

Mil. R. Evid. 414(a) provides in a court-martial proceeding, in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. Mil. R. Evid. 414(d)(2) defines an offense of "child molestation" as including (A) any conduct prohibited by Article 120 and committed with a child, or prohibited by Article 120b. The remaining applicable law for this assignment of error is the same as the law on Mil. R. Evid. 414 in Section II, above.

Prior to the admission of evidence under Mil. R. Evid. 413, the military judge must find that the proffered facts show that the factfinder "could find by preponderance of the evidence that the offense occurred." United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000) (citing Huddleston v. United States, 485 U.S. 681, 689-90 (1988)). Further, CAAF has held "that three threshold findings are required" prior to admission of the evidence: (1) the accused is charged

with an offense of sexual assault; (2) the proffered evidence shows the accused committed another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. Id. at 482 (citations omitted). And in addition to being "logically" relevant under Mil. R. Evid. 401 and 402, the evidence must also be "legally" relevant under Mil. R. Evid. 403. Bailey, 55 M.J. at 40 (citations omitted).

To guide how the Mil. R. Evid. 403 balancing test should be conducted, CAAF set out a non-exhaustive list of factors that military judges should consider: (1) "strength of proof of prior act – conviction versus gossip"; (2) "probative weight of evidence"; (3); "potential for less prejudicial evidence"; (4) "distraction of the factfinder"; (5) "time needed for proof of prior conduct"; (6) "temporal proximity"; (7) "frequency of the acts"; and (8) "presence or lack of intervening circumstances"; and (9) "relationship between the parties." Wright, 53 M.J. at 482 (citations omitted). But when conducting the balancing test, the military judge should do so "in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." Id.; *see also* United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (finding an inherent "general presumption in favor of admission" for Mil. R. Evid. 414 evidence) (citations omitted).

The erroneous admission of testimony of uncharged allegations of sexual assault under Mil. R. Evid. 413 is nonconstitutional in nature; therefore, courts test for harmlessness. United States v. Berry, 61 M.J. 91, 97-98 (C.A.A.F. 2005). The government has the burden of showing "the error did not have a substantial influence on the findings." United States v. Berry, 61 M.J. at 97 (quoting citation and other citation omitted). This is demonstrated through a weighing of

four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Id. at 98.

Analysis

Here, Appellant claims the military judge erred in admitting Appellant's conviction for indecent recording in violation of Article 120c, UCMJ as evidence of an offense of child molestation under Mil. R. Evid. 414. However, at trial, Appellant never objected or claimed that his Article 120c conviction was not proper Mil. R. Evid. 414 evidence as an offense of child molestation. Instead, Appellant only complained about receiving proper notice of the Government's intent to introduce the conviction as Mil. R. Evid. 414.

However, Appellant's TDC went a step further and affirmatively stated that he had no objection to the Article 120c conviction coming in under Mil. R. Evid. 414 other than the notice issue. Further, when the military judge specifically asked Appellant's TDC if he only needed to concentrate on proper notice in his ruling, Appellant's TDC stated plainly, "Yes, Your honor." Such comments would lead the military judge to later declare that "the defense has affirmatively said they have no objection to the actual 414 evidence," and "[their] only objection is to notice." (R. at 26.)

This is a clear case of waiver. Here, Appellant's TDC did not simply fail to object or remain silent as to the issue at hand. Instead, Appellant's TDC affirmatively and repeatedly stated the only issue Appellant had with the introduction of the Article 120c conviction as Mil. R. Evid. 414 evidence was their claimed lack of notice on the issue.

Here, the military judge gave Appellant's TDC numerous opportunities to correct him as the military judge repeatedly noted the defense's only objection was about notice and nothing

else. Despite having multiple opportunities to voice this newfound concern and being repeatedly asked by the military judge if there were any other objections to the Article 120c conviction, Appellant's TDC repeatedly stated the only objection was to notice and then affirmatively told the military judge "no" when asked if there were any other objections. Thus, while Appellant now claims the military judge erred by admitting the conviction "as an offense of child molestation under Mil. R. Evid. 414," Appellant waived this issue at trial when his TDC repeatedly and affirmatively stated the only issue on this evidence related to notice.

Yet, even if this Court finds Appellant merely forfeited the issue by not presenting his newfound objection about his conviction did not meet the requirements of Mil. R. Evid. 414 at trial, Appellant has still failed to show plain error. Appellant seems to stake his entire claim on error on the fact that the military judge did not "discuss, or even mention, Appellant's conviction for indecent recording in his Mil. R. Evid. 414 ruling," and that he did not make the three threshold findings pursuant to Wright. However, such claims ignore the fact that Appellant's TDC narrowed the issue for the military judge to decide during the Article 39(a) session on the Mil. R. Evid. 414 motion in *limine* to only whether or not Appellant was on proper notice. In other words, the TDC's repeated assurances that the only thing at issue was notice rendered the military judge addressing the Wright factors or a Mil. R. Evid. 403 balancing test moot since Appellant took issue with none of them.

Still, under Wright, the military judge would have had to find by a preponderance of the evidence that the offense occurred. Wright, 53 M.J at 483. Here, a reasonable factfinder could find by a preponderance of the evidence that Appellant's Article 112c conviction was an offense under 18 U.S.C. 110. Further, the additional threshold findings required under Wright, 53 M.J. 476, 482, are likewise met as Appellant was charged with an offense of child molestation, the

proffered evidence shows the accused committed another offense of child molestation, and the evidence was relevant under Mil. R. Evid. 401 and 402. Specifically, as shown in Prosecution Exhibit 3, the videos at issue focus on the genitals and pubic area of E.S. Further, the camera is angled so that the focal point is on E.S's buttocks and genital area, many times cutting off her head from the shot completely. Considering these circumstances, it was neither clear nor obvious error to consider these recordings as child pornography prohibited by 18 U.S.C. chapter 110. *See* Mil. R. Evid. 414(d)(2)(C); *see also* United States v. Sturm, 673 F.3d 1274, 1283 (10th Cir. 2012) (a prior offense involving possession of child pornography is considered an offense involving child molestation for purposes of Rule 414); United States v. Holmes, 814 F.3d 1246, 1252 (11th Cir. 2016) ("Today, we join the Eighth, Ninth, and Tenth Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently."); United States v. Ward, 686 F.3d 879, 882-84 (8th Cir.2012) (reasonable jury could conclude that video taken with hidden camera depicting 12-year-old girl undress, step into and out of shower, and dry off constituted a lascivious exhibition of the pubic area).

As to a Mil. R. Evid. 403 balancing test, this case was before a military judge sitting alone. Thus, the risk of undue prejudicial was minimal. Moreover, as the United States Court of Appeals for the Armed Forces (CAAF) has explained:

> When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. . . . As a result, "plain error before a military judge sitting alone is rare indeed."

United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000) (citations omitted). Furthermore, this Court can look to the military judge's Mil. R. Evid. 403 ruling to the video which gave rise to this conviction and see that he provided a well-reasoned analysis on the record before finding that the probative value was not substantially outweighed by a danger of unfair prejudice. (R. at 436.)

Here, TDC repeatedly and affirmatively stated Appellant's only objection to the Mil. R. Evid. 414 evidence was notice. Neither Appellant nor his counsel ever stated an objection to the evidence with regards to whether it qualified as a "child molestation" offense and Appellant's counsel affirmatively told the military judge "no" when asked if there were any other objections to the evidence. This was not a case of a simple failure to object or Appellant's counsel passively missing this issue. Instead, the record shows a repeated and affirmative assurance by Appellant's counsel that it had no issue with this Mil. R. Evid. 414 evidence besides waiver. As a result, Appellant waived his issue. Accordingly, this Court should deny this assignment of error.

III.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD IN VIOLATION OF ARTICLE 120b, UCMJ, UNDER MIL. R. EVID. 414.

Additional Facts

The additional facts outlined in Issue II above are relevant for this assignment of error.

Standard of Review and Law

The standard of review and law for this assignment of error is the same as Issue II above.

Analysis

For the same reasons detailed in Issue II above, Appellant waived this issue at trial when his TDC affirmatively stated that the defense did not have any objection to his prior conviction under Article 120b being admitted as Mil. R. Evid. 414 evidence. Here, Appellant's TDC specifically stated on the record that "we are not objecting to what was noticed in their initial actual notice." (R. at 20.) The Government's initial Mil. R. Evid. 414 notice dealt with Appellant's Article 120b conviction. Then, when the military judge specifically asked Appellant's TDC if he had "any objection" to the Article 120b conviction in the initial Government notice, Appellant's TDC replied, "No, Your Honor." (R. at 24.) These statements are not mere failures to object to evidence but are instead affirmative declarations that Appellant had no objections to this evidence. This constitutes waiver.

Still, even if this Court reviews under a plain error standard, Appellant does not prevail. Here, TDC affirmatively stated there was no objection to this evidence likely because under Mil. R. Evid. 414(d)(2)(A), an offense under Article 120b is one of the specifically enumerated offenses that is admissible for propensity purposes. Under a plain error analysis, the military judge properly admitted the Article 120b conviction. The military judge would have had to find by a preponderance of the evidence that the offense occurred. Wright, 53 M.J at 483. In this case, Appellant was convicted of the Article 120b offense, so the government readily met that burden. The additional threshold findings required under Wright, 53 M.J. 476, 482, are likewise easily met. (1) The accused was charged with an offense of sexual assault; (2) the proffered evidence shows the accused committed another offense of sexual assault as it was an offense; and (3) the evidence was relevant under Mil. R. Evid. 401 and 402, and legally relevant under 403.

To guide the Mil. R. Evid. 403 balancing test, the military judge would have analyzed the list of factors outlined in Wright: (1) "strength of proof of prior act – conviction versus gossip"; (2) "probative weight of evidence"; (3); "potential for less prejudicial evidence"; (4) "distraction of the factfinder"; (5) "time needed for proof of prior conduct"; (6) "temporal proximity"; (7) "frequency of the acts"; and (8) "presence or lack of intervening circumstances"; and (9) "relationship between the parties." Wright, 53 M.J. at 482. Factors 1, 2, 3, 4, 5, and 9 weigh heavily in the favor of the government and require minimal discussion. The first factor weighs in favor of admissibility as this was a prior conviction. Regarding factors 2 through 5, and 9, the military judge as the fact finder would be able to identify that the evidence was probative as it went to Appellant's intent to gratify his sexual desires. Seeking nude photos of E.S., the very same victim he was charged with abusing was highly probative. The military judge would be well positioned to give the evidence the weight he deemed appropriate and would not require less prejudicial evidence as he would not use it improperly. Similarly, the presentation of that evidence would take little time.

Factors 6, 7, and 8, while not as strong as the others, do not tip the balance in favor of inadmissibility. Regarding factor 6, the conviction of the Article 120b offense was during the same time frame, although narrower, as the time frame for the charged offense. The risk of the military judge finding that because Appellant had been convicted of the offense during a certain time, would therefore find that he committed all of the charged offenses was minimal (and one that did not occur in light of the military judge's acquitting Appellant of some of the offenses). With respect to factor 7, the act of asking E.S. for nude pictures was infrequent. Nevertheless, the infrequency does not negate the strength of the other factors. Regarding factor 8, the government presented evidence at the court-martial explaining barriers to disclosure and E.S.

herself offered testimony about why she did not report the years of abuse. While Appellant may want to characterize her delayed disclosure as an intervening circumstance, the military judge could have found based on the evidence, that factor did not tip the scale toward unfair prejudice.

In a judge alone case, the risk of unfair prejudice was minimized. It is very unlikely that the admission of the MRE 414 evidence caused the military judge to decide the case on an improper emotional basis. The 403 balancing test does not demand exclusion of the evidence, and it was properly admitted.

Conclusion

Appellant did not object to the admissibility of the conviction under Article 120b and therefore, he forfeited the issue on appeal. Under a plain error analysis, the military judge properly admitted the evidence, and this Court should deny Appellant's assignment of error.

IV.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING THE VIDEOS OF E.S., WHICH FORMED THE BASIS FOR APPELLANT'S INDECENT RECORDING CONVICTION, IN VIOLATION OF ARTICLE 120c, UCMJ.

Additional Facts

The Government sought to introduce the video which gave rise to Appellant's Article 120c conviction in his first court-martial. (R. at 385.) Appellant objected to the evidence solely for Mil. R. Evid. 403 purposes. (Id.) Appellant's TDC stated, "So, we believe that it would be more prejudicial than probative for you to view this simply because the videos are not going to show you any touching whatsoever. It's just the video set up and what was filmed in the bathroom, for which our client has already been successfully prosecuted for and which he's already, you know, been punished for. And we think this just unfairly prejudices him under the

circumstances, especially since there's no actual touching or attempted touching in any way, shape, of form that is notated in those videos. And further, we think that it unnecessarily revictimizes the victim on this particular charge for which he was convicted." (R. at 386.)

The military judge overruled Appellant's objection, stating as follows:

> Regarding the defense's objection under MRE 403 as to the videos probative value being substantially outweighed by the danger of unfair prejudice, the court finds that the videos' probative value is not substantially outweighed by a danger of unfair prejudice. The probative value is high. It shows the accused planning and placing the video camera in different places in the bathroom, as well as it goes to the accused's gratification of his sexual desires in which the government must prove for the specifications that are Charge III. While the prejudicial value is also high. It does not outweigh, let alone, substantially outweigh the probative value of the evidence. As military appellate courts have said many times, evidence of this nature is prejudicial, but just being prejudicial is not enough. It must substantially outweigh the probative value of the evidence.
>
> Regarding the defense counsel's concern about re-victimization of [E.S] based upon the court admitting the evidence -- the videos into evidence, [E.S.] -- this court appreciates the defense's concern, but will state that the videos were never played in open court and were only viewed by the military judge after the proceedings. In addition, the contents of the videos have been discussed multiple times throughout this trial, and Prosecution Exhibit 4 is the result of those videos. The defense's objection to Prosecution Exhibit 3 under MRE 403 and a cause for re-victimizing Ms. Sword are overruled. Prosecution Exhibit 3 for identification is 22 entered into evidence as Prosecution Exhibit 3.

(R. at 436.)

Standard of Review

A military judge's ruling under M.R.E. 403 will not be disturbed except for a clear abuse of discretion. United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999).

Law and Analysis

Here, Appellant's affirmatively stated he was objecting to the video evidence only for Mil. R. Evid. 403 purposes. Neither Appellant nor his counsel ever mentioned Mil. R. Evid. 414. Thus, for the same reasons as in Issue II, the Court should view this issue as waived for purposes of Appellant's instant Mil. R. Evid. 414 complaints about this evidence.

As to Mil. R. Evid. 403, the military judge did not abuse his discretion in overruling Appellant's objection. As shown above, the military judge conducted a proper Mil. R. Evid. 403 balancing test and explained his rationale on the record. This balancing test was well-reasoned, and was well within the range of choices available to the military judge to determine that the videos were not unfairly prejudicial – especially with a military judge sitting as the factfinder. The military judges MRE 403 ruling was not an abuse of discretion. Therefore, this assignment of error should be denied.

V.

APPELLANT IS NOT ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL WAS COMPLETE.

Additional Facts

Appellant filed a Motion for Appropriate Relief for the Unreasonable Multiplication of Charges (UMC), dated 15 December 2021. (App. Ex. VIII.) The motion included three attachments: (1) Appellant's charge sheet; (2) a two-page Defense Request for Bill of Particulars; and (3) a 4 page Government Response to the Defense Request for Bill of Particulars. (Id. at 9.) All together, the motion consisted of 19 pages. (R. at 15.)

When addressing the various pending motions, the parties discussed the defense motion for unreasonable multiplication of charges, which also included a discussion about the defense

motion for a unanimous verdict. (R. at 59.) The military judge asked TDC if they withdrew their motion, stating:

> MJ: I do want to get on the record as far as your argument for multiplicity and unreasonable multiplication of charges. My understanding is that you are withdrawing your unreasonable multiplication, multiplicitous for findings purposes. The only argument that you have is that if the accused is found guilty of these offenses, then it would be multiplicitous for sentencing.
>
> TDC: Correct, Your Honor.
>
> MJ: So, do you concur at this point it is not ripe?
>
> TDC: We do, Your Honor.
>
> MJ: Okay, so therefore I will not be issuing a ruling on this, however if we were to get to this, to that stage, then you can bring it up in oral argument and we can discuss it at that time.
>
> TDC: Yes, Your Honor.

(R. at 60.)

In the sentencing portion of Appellant's court-martial, the military judge and counsel held an R.C.M. 802 hearing where they "discussed the defense's pretrial motion for merger of some of the specifications for sentencing purposes." (R. at 479.) The military judge then stated he intended to "merge Specification 1 of Charge I with Specification 5 of Charge III" and to "merge Specification 1 of Charge III with Specification 3 of Charge III." (Id.) The military judge asked Appellant's trial defense counsel if anything else should be merged. Appellant's counsel replied, "Nothing else, Your Honor." (R. at 480.)

Standard of Review

Whether a record of trial is complete is a question of law that is reviewed de novo. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial where a sentence of "death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months" is adjudged. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (*citing* United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. This Court approaches the question of what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted).

Analysis

Here, Appellant claims his "record of trial is incomplete," as it "does not contain Appellate Exhibit VIII's three attachments." (App. Br. at 51.) Appellant argues the documents, particularly the Government's response to the Defense Request for a Bill of Particulars, are "necessary for Appellant's counsel and this Court to understand what offenses the Government believed they charged Appellant with violating." (App. Br. at 52.)

The Government acknowledges that App. Ex. VIII's three attachments are missing from the ROT. The Government has obtained these records from the Trial Counsel and has filed a separate motion seeking to attach these three documents to the record. With the inclusion of these three attachments. Appellate Exhibit VIII will now be a complete 19-page document for

this Honorable Court to review in order to perform its responsibilities under Article 66, UCMJ. *See*, e.g., United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *29-30 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.) (considering a military judge's ruling which was missing from the record but was provided during appellate processing in order to assess whether the appellant was prejudiced by the ruling's omission from the record).

Further, when reviewing the procedural history related to this motion, the lack of inclusion of these three attachments in the ROT does not amount to a substantial omission. First, Appellant abandoned its UMC motion for the findings portion of his court-martial and then had no objection to how the military judge merged various specifications in sentencing. Moreover, the motion itself has always been a part of the record. Thus, from a motion standpoint, there is no substantial omission as the missing attachments did not "affect Appellant's rights at trial." *See* King, unpub. op. at *22.

Yet, even if these documents affected Appellant's rights at trial, Appellant has faced no prejudice. At trial, Appellant was clearly in possession of these documents as he and his counsel filed them. (R. at 15.) Further, Appellant did not raise any error related to this motion or the omission of its attachments in any post-trial submissions to the convening authority so he can claim no prejudice there.

As for his appeal, Appellant argues both he and this Court require these documents at the appellate level to "review of the sufficiency of the evidence presented by the Government at Appellant's trial, given the sheer number of charges in Appellant's case, the complexity of his charges, the changes to Article 120, UCMJ (i.e., the creation of Article 120b, UCMJ), which occurred during these charged time frames, the length of time covered by the charged offenses and the fact that all the charges are alleged to have occurred in the continental United States,

rather than in any specific state or location," as well as to understand "what offenses the Government believed they charged Appellant with violating." (App. Br. at 51-52.)

To start, as mentioned above, the missing documents are now before both Appellant and this Honorable Court. Thus, this Court should be satisfied that there are "no impediments to [its] performance of [its] Article 66, UCMJ, responsibilities" or to "Appellant's ability to challenge" the evidentiary sufficiency of his convictions.[5] *See* King, unpub. op. at *29-30.

Moreover, Appellant makes no argument as to why either his Charge Sheet or the Defense Request for a Bill of Particulars are pertinent to either this or this Court's ability to review this case.

As to the Government's Response to the Defense's Request for a Bill of Particulars, a review of this document shows the pertinent information contained within it was incorporated into Appellant's original UMC motion, which has always been included in the ROT and available to both Appellant and this Honorable Court. Section 1, entitled *Background*, of the document merely recounts what the Defense's Request for a Bill of Particular asked. Section 2, entitled *Law*, involves legal cites pertinent to a Bill of Particulars. Section 4, entitled *Conclusion*, is a brief summation of the document.

Section 3, entitled *Facts*, contains three paragraphs and is essentially the only substantive response to Appellant's original request. However, the majority of this information is cited and discussed extensively in Appellant's UMC motion. In other words, after a review of the Government's Response to the Defense's Request for a Bill of Particulars, this Court should be convinced there is no pertinent information contained in the document that was not already

[5] Notably, even without these documents, Appellant raised legal and factual sufficiency claims regarding his rape and sexual abuse convictions. (*See* App. Br. at 12.)

incorporated, discussed, and cited in Appellant's UMC motion, which has been available to both Appellant and this Court throughout the appellate processing of this case.

All told, the omission of these documents was not substantial as Appellant's rights at trial were not affected three missing attachments to a motion Appellant himself filed at trial. Furthermore, even if this Court finds the omission was substantial, the Government has rebutted any presumption of prejudice as they have all now been provided to both this Honorable Court and Appellant. *See* King, unpub. op. at *29-30. Accordingly, this Court should deny Appellant's assignment of error.

VI.

TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT BECAUSE HE DID NOT VOUCH FOR E.S.

Standard of Review

Improper argument is reviewed under a de novo standard. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When there is no objection, this Court reviews for plain error. Id. The burden of proof under plain error is on the appellant, who must show: (1) that there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused. Id. (*quoting* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Law

Prosecutorial misconduct is behavior that oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is defined as an action or inaction taken by a trial counsel in violation of a legal norm or standard. United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

A trial counsel is charged "with being a zealous advocate for the government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003). He may argue not only the evidence within the record, but also "all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In determining whether an argument is improper, the Court is to view it in its entire context. Id. at 239. The Court reviews a comment not in isolation, but rather the entire argument "viewed in context." United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilty of the accused pose two dangers: such comments can convey the impression that evidence not presented at to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgement rather than its own view of the evidence.

Young, 470 U.S. at 18-19.

Analysis

Appellant alleges that TC bolstered E.S.'s credibility by characterizing her as "a little child," and by discussing her truthfulness using personal pronouns. (App. Br. at 55.) Appellant also alleges that TC's comment about E.S. having to be the "spawn of Satan" was expressing a personal belief about the truthfulness of E.S.'s testimony; that TC made statements that were not related to any evidence in the record or reasonable inferences derived from the evidence; and introduced facts not in evidence by arguing TDC engaged in victim blaming. (App. Br. at 55-57.) Because TDC failed to object to these arguments that he now claims were improper, Appellant has the burden to show clear or obvious error that led to material prejudice to a substantial right. Appellant has failed to meet that burden.

Appellant first takes issue with TC's reference to E.S. as being a truthful and little child. TC was simply arguing from testimony presented at trial from witnesses with opinions that E.S. was truthful. E.S.'s father and step mother said she was truthful. (R. at 225, 421.) TC is permitted to argue inferences fairly derived from the evidence. Baer, 53 M.J. at 237. Given the focus on E.S.'s credibility during the trial, it was appropriate for TC to directly argue evidence relevant to E.S.'s credibility. This was not vouching as TC did not express personal opinions or argue that based on TC's own experience or knowledge, that E.S. was truthful. Instead, T.C. was remarking upon testimony properly provided during the trial about E.S.'s character for truthfulness. The reference to E.S. being a little child was also a fair inference given that E.S. was just a child of less than 12 years during some of the charged offenses. E.S. was a young teenager during the 2017 court-martial and had just recently turned 18 years old during the 2022 court-martial. The TC did not take efforts to infantilize E.S., and his comment about her being a little child was not clear or obvious error and it did not prejudice Appellant.

Appellant next takes issue with T.C.'s use of the phrase "spawn of Satan." That is strong language, but T.C. was using such strong language to express, in the context of E.S.'s credibility, how abhorrent it would be to make a false allegation of years of sexual abuse. T.C. did not express his personal belief or opinion as to E.S.'s veracity by making this comment. Appellant argues this comment implicated the military judge's ability to understand his role in the court-martial and placed the prestige of the government behind E.S. This argument is similar to the argument of the appellant in Erickson, where the trial counsel compared the accused to Hitler, Saddam Hussein, or Osama bin Laden. Erickson, 65 M.J. at 223. There CAAF noted how important it is for the military judge to take swift, corrective action for improper arguments before a panel. Id. at 225. When there is no panel, however, there is no need for curative

instructions and the military judge is presumed to able to distinguish between proper and improper argument. Id. The same is true of the case before this Court. The military judge knew the law and was not hoodwinked into forgetting it was his duty to determine whether the government met its burden of proof just because of the use of a strongly worded, perhaps evocative phrase. In a military judge alone case, the risks warned of in Young, 470 U.S. at 18-19, don't exist. The military judge would not be bamboozled into believing there was evidence not presented to him, but known to the prosecutor, that supported the charge against Appellant; and he also would not be swayed by the prosecutor's opinion carrying the imprimatur of the Government to induce him to trust their judgement rather than his own view of the evidence.

Appellant next argues that TC's statements relating to emotional abuse and Stockholm syndrome did not relate to any evidence in the record nor were they reasonable inferences fairly derived from such evidence. (App. Br. at 56.) TC made those comments in the context of the years of abuse that T.C. suffered at the hands of Appellant. E.S. testified that she told Appellant she did not want to continue doing things with Appellant and described the way Appellant treated her after, stating he would try to hurt her feelings and wouldn't come to her room to say goodnight, he wouldn't talk to her and wouldn't play games with her. (R. at 301.) E.S. testified she knew in her mind what was happening was wrong, but Appellant told her it was their "little secret." (R. at 334.) E.S. also said she was scared to report and what was going on because Appellant would find out that she had share "more of our little secret than I was supposed to." (R. at 354.). E.S. also said she was embarrassed and afraid she would be in trouble or people would be mad at her for not reporting the abuse sooner. (R. at 355, 357.) E.S. also stated Appellant would attempt to bribe her. (R. at 360.) TC had ample evidence to argue that Appellant's conduct toward E.S. was akin to emotional abuse and that E.S.'s response was

almost Stockholm syndrome-like. The military judge did not need expert evidence on those topics for TC to make the statements during argument, and they were not improper.

Appellant lastly alleges that TC was improper for impermissibly suggesting TDC was victim blaming. (App. Br. at 57.) TC was responding to TDC's arguments about E.S. failure to disclose the abuse sooner than she did. Appellant states TDC never suggested or implied or argued E.S. was to blame for her actions toward Appellant or her manner of dress and therefore, TC brought in facts not in evidence. (Id.) TC was rebutting TDC's arguments regarding E.S.'s delayed disclosure, a central issue of the trial, and did not introduce facts into the trial. The military judge is well aware that arguments of counsel are not evidence, and TC was not arguing any facts, but drawing a comparison with TDC's argument about delayed disclosure to other well-known arguments brought forth for victims of sexual abuse. It was not plain and obvious error for TC to characterize TDC's arguments the way he did.

Appellant did not Suffer Prejudice

Even if this Court finds TC's statements to be plain error, Appellant was not prejudiced. In judge-alone trials, when applying the plain error standard, it has been recognized that because a military judge has been presumed to know the law, "an appellant faces a particularly high hurdle" and "[a]s a result, 'plain error before a military judge sitting alone is rare indeed.'" United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000) (*quoting* United States v. Cacy, 43 M.J. 214, 218 (C.A.A.F. 1995)). "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." Fletcher, 62 M.J. at 184. Three factors are weighed to determine whether trial counsel's improper arguments were prejudicial: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the

conviction. Andrews, 77 M.J. 393, 402 (C.A.A.F. 2018). Here each of those factors weigh in favor of a finding of no substantial prejudice to Appellant. TC's misconduct was not severe. The United States acknowledges that use of the phrase "spawn of Satan" may evoke strong reactions, but the military judge also noted that mention of issues related to religion had bearing on his decision making. (R. at. 472.) No measures were taken to cure the misconduct other than the military judge stating the issue of religion had no bearing on his decision making. The weight of the evidence supporting the conviction was strong. Appellant argues the military judge finding Appellant not guilty of five specifications supports a theory the evidence was far from overwhelming. (App. Br. at 58.) The military judge acquitting Appellant of some of the offenses supports his scrupulous review of the evidence and supports his findings on the specifications Appellant was convicted of. The military judge heard testimony from the victim herself and that was strengthened by Appellant's prior conduct involving recording E.S. and asking E.S. to send him nude photos. This Court can be confident that this military judge rendered his verdict on the basis of this evidence alone, and not based on any improper argument by trial counsel.

Conclusion

TC's arguments at sentencing were not improper, Appellant suffered no prejudice, and Appellant's assignment of error should be denied.

VII.[6]

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Standard of Review

This court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). The Court may only affirm the sentence if it finds the sentence to be "correct in law and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Analysis

Appellant was sentenced to fourteen years confinement. (R. at 521.) Appellant notes that he was helpful to his family upon release from confinement after his 2017 court-martial and that he been remorseful for his actions. (App. Br. Appx. at 2-3.) It is meaningful that Appellant is good to his family, has support from them and gives them support and that he has expressed remorse for his conduct. Appellant still should be held accountable for his conduct beyond

[6] Appellant raised this issue under Grostefon, 12 M.J. 431.

remorse. The nature and seriousness of the offense is one of the most significant sentencing principles in Appellant's case. Appellant's conduct with E.S. went on for a number of years and was some of the most serious misconduct. Appellant violated E.S.'s physical space and body over and over and also violated her trust. Appellant touched just about every part of E.S.' body – touching her butt, her chest, and her vagina. Appellant did these acts under the guise of being a caring, protective father-figure. In truth, he was exploiting E.S. for his own sexual gratification. . Considering the nature and seriousness of the offense, Appellant's record of service, and all of the matters in the record of trial, a sentence of 14 years confinement is not inappropriately severe. This Court should deny this assignment of error.

VIII.[7]

APPELLANT WAS NOT ENTITLED TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

Standard of Review

The constitutionality of a statute is a question of law that is reviewed *de novo*. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction.

In Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal

[7] Appellant raised this issue under Grostefon, 12 M.J. 431.

proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

CAAF recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, No. 22-0193/AF (C.A.A.F. 29 June 2023). CAAF rejected the same claims Appellant raises now:

> We agree with Appellant that Ramos held that unanimity is an essential element of a Sixth Amendment jury trial, but we disagree that it further held that it is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.
>
> …
>
> The Supreme Court's incorporation of the right to a unanimous verdict to the states in Ramos made that right applicable to the states; it did not convert unanimous verdicts into a procedural due process right.
>
> … [N]unanimous verdicts do not run afoul of the Due Process Clause's requirement that the government prove the defendant's guilt beyond a reasonable doubt.

The court ultimately held appellant did not have a right to a unanimous verdict at his court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. Id.

Analysis

Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection require a unanimous verdict by a court-martial panel. (App. Br. Appx. at 5) Appellant also posits through his declaration that he would have opted to proceed before a panel of members if unanimity was required. (App. Br. Appx. at 4) As a threshold matter, Appellant

elected to proceed judge alone, therefore this Court should find his argument is moot. (R. at 15.) If, however, this Court does decide the issue, Appellant's argument is now foreclosed by the decision in Anderson. Appellant was not entitled to a unanimous verdict and this Court should deny Appellant's requested relief.

IX.[8]

APPELLANT WAS NOT PROSECUTED IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Standard of Review

The question of whether a prosecution violates the Double Jeopardy Clause of the Fifth Amendment or the doctrine of issue preclusion is an issue of law is reviewed de novo. United States v. Hutchins, 78 M.J. 437, 444 (C.A.A.F. 2019) (citations omitted).

Law

The Double Jeopardy Clause of the Fifth Amendment protects an accused from being "subject, for the same offence, to be twice put in jeopardy of life or limb[.]" U.S. Constitution, Amendment V. This clause "embodies" the principle of "issue preclusion," which is "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" Hutchins, 78 M.J. at 444 (*quoting* Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). "An ultimate fact is an issue that was 'necessary to the [initial] judgment.'" Id. (*quoting* Bobby v. Bies, 556 U.S. 825, 835, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009)) (alteration in original). "A 'determination ranks as necessary . . . only when the final outcome hinge[d] on it.'" Id. (*quoting* Bobby, 556 U.S. at 835) (alterations in original).

[8] Appellant raised this issue under Grostefon, 12 M.J. 431.

The appellant bears the burden to demonstrate that litigation of an issue was foreclosed by a prior proceeding. Id. (*citing* Dowling v. United States, 493 U.S. 342, 350-51, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)).

"Ashe forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." Hutchins, 78 M.J. at 444 (*quoting* Currier v. Virginia, 138 S. Ct. 2144, 2150, 201 L. Ed. 2d 650 (2018)). An appellant can prevail under the doctrine of issue preclusion only if he can satisfy both prongs of the following test: (1) the appellant first must demonstrate from evidence in the record that the panel's acquittal at the first court-martial necessarily determined an issue of ultimate fact in his favor; and (2) the appellant then must demonstrate that in order to obtain a conviction at the second court-martial, the government was required to prove beyond a reasonable doubt the existence of that same issue of ultimate fact. Hutchins, 78 M.J. at 444-45 (*citing* Currier, 138 S. Ct. at 2150; Yeager v. United States, 557 U.S. 110, 123, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009).

Additional Facts

At his second court-martial, Appellant moved to dismiss all charges and specifications on the grounds of double jeopardy. (App. Ex. XXV at 1.) Appellant argued that he was previously tried at his first court-martial with allegations from the same victim, E.S, and that E.S. had responded, "No," when asked during cross-examination at his first trial whether Appellant had ever touched her or if E.S. had touched Appellant. (Id. at 2.)

However, Appellant acknowledged he was "currently charged with additional allegations from E.S. covering the time period directly prior to the previously convicted charges." (Id. at 1.)

(emphasis added.) Appellant also conceded multiple times in his motion that "no allegations of sexual assault or sexual contact were made or given" at his first court-martial. (Id. at 1-2.)

At his first court-martial in 2017, Appellant was found guilty of sexual abuse of a child (via communicating indecent language), in violation of Article 120b, UCMJ, and indecent visual recording, in violation of Article 120c, UCMJ. (Id. at 2.) Appellant was found not guilty of an Article 134, enticing a minor to engage in sexually explicit conduct offense. (Id.) The charged timeframe for all offenses in Appellant's first court-martial was between on or about 1 January 2016 and on or about 30 April 2016. (Id. at 11.)

In his current court-martial, Appellant is charged with the followed: (1) engaging in sexual acts, sexual contacts, and indecent liberties upon a child, in violation of Article 120, UCMJ; (2) attempted sexual contact, in violation of Article 80; and (3) committing sexual acts and lewd acts upon a child, in violation of Article 120b, UCMJ. (Id. at 21-23.) The charged timeframe for the Article 120 and 80 offenses was between on or about 1 June 2010 and on or about 27 June 2012. The charged timeframe for the Article 120b offenses varied because of E.S. age at the time of the offense but encompassed from on or about 28 June 2012 and on or about 20 April 2016. (Id.)

The military judge denied Appellant's motion. (App. Ex. XXX.) The military judge found as fact that, as Appellant admitted in his own motion, "No allegations of sexual assault or contact were made" in Appellant's first court-martial. (Id. at 2.) The military judge also found as fact that at Appellant's first court-martial, the military judge defined "sexually explicit conduct" as "actual or simulated lascivious exhibition of the genitals or pubic area of any person." (Id. at 2-3.)

The military judge then noted that Appellant in his first court-martial was "accused of communicating indecent language, indecent visual recording, and enticing a minor to engage in sexually explicit conduct," adding, "The defense stated as fact there were no allegations of sexual assault or contact at the accused's first court-martial and the Court had adopted that as fact." (Id. at 5.) In contrast, the military judge stated, "All of [Appellant's] current Charges and Specifications are penetrative or physically touching offenses," and that "None of the statutes [Appellant] faced at his first court-martial are the same as the statutes [Appellant] faces at this court-martial." (Id.)

As to issue preclusion, the military judge cited to our superior Court's decision in Hutchins before ruling that the "current Charges and Specifications [Appellant] faces have never been litigated" and that they were "never decided at [Appellant's] first court-martial." (Id. at 6.) The military judge further held, "The Court agrees the defense counsel asked E.S. if that ever happened, but that does not mean the issue was decided in the first proceedings," adding, "the defense agrees there were no allegations of sexual assault or contact made at [Appellant's] first court-martial." (Id.) The military judge also highlighted that it was the defense in Appellant's first court-martial who "ask[ed] E.S. if [Appellant] had touched her" and had argued to the members that "there's no physical contact in this case, no inappropriate touching." Based on this, the military judge concluded, "The defense in the prior case knew [Appellant] was not charged with a penetrative or touching offense." (Id. at 7.)

Analysis

Here, Appellant argues that his not guilty verdict for wrongful solicitation in his first court-martial "barred" the Government from "reprosecuting" Appellant for his current charges. (App. Br., Appendix A at 10.) Appellant is mistaken.

First, the Government did not "reprosecute" Appellant for anything in his second court-martial. As the military judge found as fact in his ruling, Appellant's current court-martial involves penetrative and physical touching offenses. As Appellant has conceded multiple times, his first court-martial did not involve allegations of sexual assault or contact. Appellant's current charges are separate and apart of his former charges and were based on a report made to the Government after Appellant's first court-martial.

Still, Appellant argues he meets the issue preclusion test because E.S's testimony that Appellant did not touch her "would have been considered in the context of whether he had ever 'knowingly persuaded, induced, or enticed' E.S. to engage in sexually explicit conduct, including the types of sexual touching at issue in Appellant's 2022 court-martial." (App. Br., Appendix A at 9.) However, the sexual touching at issue in his present court-martial had nothing to do with his solicitation charge at his first court-martial. Instead, Appellant's solicitation charge in his first court-martial dealt with "sexually explicit conduct for the purpose of producing a visual depiction" and the military judge defined "sexually explicit conduct "as involving the "exhibition of the genitals and pubic area." Again, as Appellant has readily conceded, no acts of touching were involved in that offense or at issue in Appellant's first court-martial.

Here, since E.S.'s testimony on whether or not Appellant touched her was wholly unrelated to whether or not Appellant persuaded, tempted or enticed E.S. to send her explicit pictures, a not guilty finding to that solicitation charge does not equate to the military judge also ultimately deciding that Appellant did not touch E.S. Here, Appellant was acquitted of soliciting explicit images from E.S. – whether or not he ever touched her had no bearing on that determination. Thus, no issue of ultimate fact as to touching can be deduced from Appellant's

solicitation acquittal and Appellant has failed to meet his burden. As a result, this issue must fail.

X.[9]

APPELLANT WAS NOT DENIED A RIGHT TO A UNANIMOUS VERDICT AT HIS 2017 COURT-MARTIAL.

Appellant's 2017 conviction was final when the Supreme Court denied his petition for writ of certiorari on 7 December 2020.[10] *See* R.C.M. 1209; Article 76. It is not the subject of this appeal. Regardless, with the decision in Anderson, Appellant was not entitled to a unanimous verdict. This court should deny Appellant's requested relief.

CONCLUSION

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

[redacted]
LECIA E. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
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[redacted]

[9] Appellant raised this issue under Grostefon, 12 M.J. 431.
[10] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-526.html

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 7 August 2023 via electronic filing.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME**
	)	**FOR REPLY BRIEF**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1)	)	
JASON M. BLACKBURN	)	No. ACM 40303
United States Air Force	)	
Appellant	)	7 August 2023

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

Pursuant to Rules 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a reply brief to the Government's answer, filed 7 August 2023. Appellant's reply is currently due on 14 August 2023. Appellant respectfully requests an enlargement of time for a period of 7 days, which will end on 21 August 2023. The record of trial was docketed with this Court on 12 July 2022. From the date of docketing to the present date, 391 days have elapsed. On the date requested, 405 days will have elapsed.

There is good cause for this extension of time. Through no fault of Appellant, Appellant's appellate defense counsel, Major Jenna Arroyo, received orders for a permanent change of station. Undersigned counsel was detailed in Maj Arroyo's place on 25 July 2023 when she was drafting a brief on behalf of the Appellant for the granted issue in *United States v. Cole*, USCA Dkt. No 23-0162/AF, before the United States Court of Appeals for the Armed Forces. That brief was filed on Friday, 4 August 2023. Today, 7 August 2023, was the f ty for undersigned counsel to begin reviewing the record of trial and brief f Arroyo in this case. Maj Arroyo is no longer detailed to Appellant's case; t ersigned counsel needs to become familiar with the record, issues raised, and r n hi s answer. Appellant raised 10 issues and the substantive portion of the

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Government's answer totals 52 pages. Moreover, while Appellant's reply brief is undersigned counsel's first priority,[1] undersigned counsel will be on pre-authorized leave for four days during this time-period, from Friday, 11 August 2023 until Monday, 14 August 2023. Counsel has purchased airline travel for this leave and is using use or lose leave during this time.

On 1 March, and 28-30 March 2022, contrary to his pleas, Appellant was convicted at a general court-martial convened at Little Rock Air Force Base, Arkansas, of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of sexual assault of a child and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ.[2] R. at 474. A military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 14 years, and a dishonorable discharge. R. at 521. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, *Decision on Action*, dated 6 June 2022. The convening authority suspended the adjudged forfeitures for six months from the date of entry of judgment and waived the automatic forfeitures for a period of six months from the date of the entry of judgment for the benefit of Appellant's dependents. *Id*. The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 43 appellate exhibits. The transcript is 519 pages. Appellant is currently confined, is aware of his right to a timely appeal, and agrees with

[1] Undersigned counsel currently represents 23 clients and is presently assigned 13 cases pending brief before this Court in addition to Appellant's reply brief.

[2] One charge and specification of rape of a child was withdrawn and dismissed without prejudice. ROT, Vol. 1, Entry of Judgment (EOJ), dated 21 June 2022. Appellant was acquitted of one specification of aggravated sexual contact of a child and one specification of indecent liberties with a child in violation of Article 120, UCMJ. *Id*. Appellant was also acquitted of one charge and one specification of attempted aggravated sexual contact with a child in violation of Article 80, UCMJ, and two specifications of sexual assault of a child in violation of Article 120b, UCMJ. *Id*. He was found guilty of one specification of sexual abuse of a child by exceptions. The military judge excepted the words "on divers occasions," finding Appellant not guilty of the excepted words. *Id*.

this necessary request for an extension of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

8 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JASON M. BLACKBURN, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40303 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to File a Reply Brief.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* *v.* Airman Basic (E-1) **JASON M. BLACKBURN**, United States Air Force, *Appellant*	**APPELLANT'S REPLY BRIEF** Before Panel 1 No. ACM 40303 Filed on: 21 August 2023

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

Appellant, Airman Basic (AB) Jason M. Blackburn, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 7 August 2023 [hereinafter Answer]. AB Blackburn stands on the arguments in his initial brief, filed on 28 June 2023 [hereinafter AOE], and submits arguments for the issues listed below.

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR RAPE OF A CHILD, AGGRAVATED SEXUAL CONTACT WITH A CHILD, AND SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY INSUFFICIENT.

This Court should reject the Government's unsupported assertion that the military judge was simultaneously diligent in his trial findings (Answer at 10) but haphazard in what the Government agrees were never-corrected and erroneous findings of fact in motions (Answer at 9) as to the nature—and therefore, the elements—of the charged offenses in Specifications 1-4 of Charge III. The Government posits that the military judge was "a cautious and diligent fact-

finder," (Answer at 10), yet, the military judge *twice* found as fact that AB Blackburn had been charged with "two specifications of sexual assault of a child . . . in violation of Article 120b, [Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b, *Manual for Courts-Martial, United States* (2012 ed.) (*2012 MCM*)]".[1] App. Ex. XX, XXI. AB Blackburn was not charged with these offenses and the Government agrees the military judge's findings of fact are incorrect because "Appellant was actually charged with four specifications of rape of a child—two specifications for when E.S. was less than twelve years of age; and two specifications alleging force when E.S. was between the ages of twelve and sixteen years." Answer at 6-7.

The Government asserts, however, the military judge's court-martial findings were not impacted by his misstatement of the description of the charged offenses (Answer at 8) and "there is no evidence in the record to establish the military judge did not know the elements of the offenses he ultimately found Appellant guilty of" (Answer at 9). The Government is incorrect. When the military judge made his findings of fact, erroneously determining AB Blackburn was charged with "two specifications of sexual assault of a child … in violation of Article 120b, UCMJ," he demonstrated in the record his misunderstanding of the charged offenses. App. Ex. XX, XXI.

The Government postulates that it is important to consider that the "there is a lesser the [sic] burden of proof required for the motion in *limine* than what was required for the trial." Answer at 10. This argument is a red herring. The standard of proof at motions does not relieve the military judge of understanding what the charged offenses are. Further, the military judge's finding of fact as to the charged offenses was a basic factual determination which is based on the charge sheet alone. *Cf. United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (finding

[1] References to the punitive articles are identified by year. References to the Rules for Court-Martial and Military Rules of Evidence are to the *2019 MCM*, unless otherwise noted.

"the charge sheet provides the accused notice that he or she will have to defend against any charged offense and specification"). Beyond the military judge clearly demonstrating his undisputed misapprehension of what the charged offenses were in his findings of fact, there were "no other discussions about the charges and specifications, nor any discussion of the elements of any of the offenses" (Answer at 6) that might point to a correction and demonstrate a correct understanding of the charged offenses to this Court.

The Government's brief fails to resolve this problem by seeking to read between the lines of what happened rather than just taking the record at face value, inferring propriety by pointing to the finding of an offense that was never erroneously labeled. The Government asserts "the military judge paid scrupulous attention to the charge sheet" because he found AB Blackburn guilty of another specification by exceptions and substitutions. Answer at 9. But this finding was for an entirely different offense (Specification 8 of Charge III). Specification 8 of Charge III alleged AB Blackburn committed sexual abuse of a child by intentionally exposing his genitalia to E.S. ROT, Vol. 2, Charge Sheet, dated 22 June 2021. However, the military judge had not earlier misapprehended this offense. *See* App. Ex. XX, XXI. His understanding of this offense which he did not misapprehend fails to demonstrate that he applied the correct elements to the entirely separate offenses in Specifications 1-4, which he had wrong, twice, from the outset and never explicitly corrected.

Moreover, when the military judge or a party err on the record and the error is recognized, the military judge will correct the error on the record to ensure the record is clear and the accused is not operating under any misapprehension. *Cf. United States v. Trew*, 68 M.J. 364, 367 (C.A.A.F. 2010) (citation omitted) (finding, "If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement"). Had the military judge

recognized his misapprehension of the offenses, this Court should expect the military judge would have corrected his prior findings of fact on the record and ensured that the trial parties' previous misapprehension, where they too misapprehended the offenses (R. at 8, App. Ex. X, XII), were also corrected.[2] But that did not happen, and this Court should find the military judge's own words and lack of correction are the best evidence of his continuing misapprehension. The military judge's incorrect finding that AB Blackburn was charged with "two specifications of sexual assault of a child" clearly rebuts the presumption that the military judge knew the law and applied it correctly. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). And even if the military judge did know the law—in other words, the elements that drive *how* a judge assesses the facts presented, *see United States v. Baker*, 57 M.J. 330, 333 (C.A.A.F. 2002) ("An intelligent or rational decision on a person's guilt requires consideration of the elements of a charged offense, the evidence pertaining to those elements, and applicable principles of law necessary to decide the case")—that knowledge does little if, as here, the record fails to show the military judge properly identified *what offense's* law should be applied.

Furthermore, in a different context, but like *United States v. Walters*, this Court cannot affirm AB Blackburn's convictions for Specifications 1 and 3 of Charge III when it cannot be sure what offenses the factfinder actually found AB Blackburn guilty of (the offense he thought was charged, sexual assault, or the actual charged offense, rape). *See* 58 M.J. 391, 395-397 (C.A.A.F. 2003) (finding "the Court of Criminal Appeals is required to weigh the evidence and be themselves

[2] The Government agrees trial counsel incorrectly stated AB Blackburn was charged with "four specifications of sexual assault of a child" referring to Charge III, when AB Blackburn was charged with four specifications of rape of a child. Answer at 9; *compare* R. at 8 *with* ROT, Vol. 2, Charge Sheet, dated 22 June 2021. As articulated in AB Blackburn's AOE at 19, trial counsel did not prove nor explain how the Government proved the additional element of "by using force," and it's possible the Government did not think it needed to prove this element because of its own misapprehension of the offenses.

convinced beyond a reasonable doubt of Appellant's guilt" and "that task is impossible" when the findings are ambiguous). Here, this Court cannot know whether the military judge understood and applied the correct elements of the charged offenses or whether based on his misapprehensions, he found Appellant guilty of the offenses that he incorrectly believed were charged.

Finally, the Government asserts "E.S.'s testimony was found to be credible by the fact finder in this case," and it highlights via a block quote the "quite remarkable" detail in which E.S. described alleged oral sex. Answer at 12. However, the Government fails to mention that despite this detail, AB Blackburn was acquitted of both specifications alleging oral sex (Specification 2 and 4 of Charge III). R. at 474.

WHEREFORE, AB Blackburn respectfully requests this Court set aside his findings and sentence.

II.

THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO ADMIT APPELLANT'S CONVICTION FOR INDECENT RECORDING IN VIOLATION OF ARTICLE 120c, UCMJ, AS AN OFFENSE OF CHILD MOLESTATION UNDER MIL. R. EVID. 414.

It is unjust to admit evidence of a conviction that does not qualify as an offense of child molestation under Mil. R. Evid. 414(a) (*see United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000)) and is not legally relevant under Mil. R. Evid. 403. Should this Court find that AB Blackburn waived this issue, it has the authority to pierce that waiver and should do exactly that in this case. The Government argues AB Blackburn waived this issue at trial when his trial defense counsel "affirmatively stated the only issue on this evidence related to notice." Answer at 25. However, it admits, "Still, under *Wright*, [53 M.J. at 483], the military judge would have had to find by a preponderance of the evidence that [another] offense occurred." Answer at 26. Under Mil. R. Evid. 414(a), this offense had to be an offense of child molestation. As explained in

AB Blackburn's AOE, the military judge did not make this determination[3] and AB Blackburn's conviction for indecent recording under Article 120c, UCMJ, is not an offense of child molestation. AOE at 35-39.

The Government controlled the charge sheet in AB Blackburn's prior court-martial (*United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021)) and in admitting this conviction at his present court-martial, it wrongly contorted AB Blackburn's prior conviction into an offense that was never charged or presented. On appeal, the Government asks this Court to do the same by looking to the recordings themselves, arguing "it was neither clear nor obvious error to consider these recordings as child pornography" (Answer at 27), as opposed to focusing on the evidence at issue – which was what offense AB Blackburn was actually convicted of in his previous court-martial. Neither the military judge, nor this Court, should attempt to determine whether the facts of AB Blackburn's previous conviction could support the uncharged offenses of possession or production of child pornography, and this Court should reject the Government's invitation to do so. *See* Answer at 27.

This Court's Article 66, UCMJ, review is a mandate "carte blanche to do justice." *See United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citation omitted). Given the prejudicial and improper nature of this evidence, this case demands justice. Should this Court find waiver, it should pierce it under its Article 66(d), UCMJ, authority and review the issues *de novo*. *See United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 140 at *10 (A.F. Ct. Crim. App. 7 Apr. 2015) (unpub. op.) (concluding *de novo* review was appropriate to rectify a waived unreasonable

[3] The military judge found the Government had "unequivocally stated the *only* evidence it intend[ed] to admit under MRE 414" was AB Blackburn's conviction for sexual abuse of a child based upon Appellant's request for nude pictures of E.S. App. Ex. XXI (emphasis added). The plain language of his ruling indicates he did not make findings on the admissibility of AB Blackburn's conviction. *See* App. Ex. XXI.

multiplication of charges issue in a guilty plea context), *affirmed by United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016)). AB Blackburn's conviction should never have been admitted under Mil. R. Evid. 414(a) and Mil. R. Evid. 403, and this error materially prejudiced him because it allowed the factfinder to consider the highly prejudicial evidence of his previous conviction as propensity evidence, which the Government argued repeatedly. R. at 439-440, 446, 450, 453, 471-72.

WHEREFORE, AB Blackburn respectfully requests this Court set aside his findings and sentence.

V.

APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS INCOMPLETE.

The Government acknowledged App. Ex. VIII's three attachments are missing from the record and filed a motion to attach the missing documents to the record. *United States v. Blackburn*, No. ACM 40303, *Motion to Attach Documents*, dated 7 August 2023. The Government asserts with the attachment of its documents, this Court should be satisfied that there are "no impediments to [its] performance of [its] Article 66, UCMJ, responsibilities" or to "Appellant's ability to challenge" the evidentiary sufficiency of his convictions. Answer at 37 (citation omitted). However, attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) (unpub. op.) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, *2 (A.F. Ct. Crim. App. 26 Oct. 2022) (unpub. op.) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *United States v. Mardis*, No. ACM

39980, 2022 CCA LEXIS 10, *7 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, […]; we did not consider the exhibits as a means to complete the record.").

The Rules for Court-Martial (R.C.M.) provide the correct means for addressing a substantial omission. R.C.M. 1112 (d)(2) states "[a] superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

WHEREFORE, AB Blackburn respectfully requests this Court take corrective action pursuant to R.C.M. 1112 to remedy this substantial omission.

VI.

THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT WHEN HE VOUCHED FOR THE VERACITY OF E.S., THE COMPLAINING WITNESS.

Trial counsel's argument that E.S. would have to be the "spawn of Satan" to be lying is an expression of trial counsel's opinion that E.S. was not lying at Appellant's second court-martial and was made to bolster the complaining witness's credibility, despite this form of argument being explicitly prohibited,[4] and it went well beyond the bounds of fair comment.[5] The Government

[4] *United States v. Voorhees*, 79 M.J. 5, 11-12 (C.A.A.F. 2019); *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005).

[5] When a similar argument was made in *United States v. Erickson* (wherein trial counsel compared the accused to "Adolph Hitler, Saddam Hussein, Osama bin Laden" and stated he was a demon who belonged in hell), this Court found trial counsel's argument "went well outside the bounds of fair comment and amounted to plain and obvious error." 63 M.J. 504, 510 (A.F. Ct. Crim. App.

admits trial counsel's "use of the phrase 'spawn of Satan'" is "strong language" (Answer at 40), which "may evoke strong reactions" (Answer at 43), but attempts to justify it stating, "[trial counsel] was using such strong language to express, in the context of E.S.'s credibility, how abhorrent it would be to make a false allegation of years of sexual abuse" (Answer at 40). However, this does not justify trial counsel's argument. It was "in the context of E.S.'s credibility" because trial counsel was seeking to bolster it.

In *United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021), the Court of Appeals for the Armed Forces held trial counsel "clearly committed misconduct" by vouching for the victim but that there was no material prejudice to the appellant because the victim testified credibly and "the defense failed to offer a plausible reason as to why [the alleged victim] would have fabricated [the] allegations. Here, E.S.'s credibility was low to begin with. Unlike in *Norwood*, where "no one would expect [the victim's] family not to believe her" (81 M.J. at 20), here, trial counsel's bolstering was especially problematic because the Court had reason to question her credibility. First, E.S. had previously testified under oath that AB Blackburn never touched her, and she never touched him, reporting the same to OSI and her family. R. at 340, 343, 349-50, 352. When E.S. told OSI and her family that AB Blackburn had never touched her, she was reporting misconduct by him that they otherwise would not have known about then and in her interview with OSI, she further disclosed facts concerning a new allegation when she told OSI that AB Blackburn had asked her to send him nude photographs. *See* R. at 348, 416-17. She did this despite the fact that she knew the allegations would break up their family, and that she had not told anyone about his request for messages earlier which also could have made "people mad at her." *See* R. at 352, 355.

2006). Upon review, the Court of Appeals for the Armed Forces further stated it did not condone the argument, however, the only issue before the Court was whether the argument materially prejudiced the appellant. *Erickson*, 65 M.J. at 224.

Moreover, E.S. had been assured prior to meeting with OSI, she would not get in trouble and that she should not lie for AB Blackburn. R. at 342, 358. Finally, unlike *Norwood*, E.S. did have a strong motive to fabricate because she was disappointed by his previous sentence, knew AB Blackburn was up for parole and his minimum release date was approaching, and he would likely be returning to Arkansas where she was living. R. at 203, 329, 360, 418, 423, 428-30. It is common knowledge that a counselor/therapist will explain the limits to their confidentiality with their patient/client at the outset, therefore E.S. very likely knew that by reporting her new allegations to her therapist, her therapist would have to disclose them to law enforcement, and she wanted this outcome because she wanted to keep AB Blackburn away. *See* R. at 487. Moreover, with experience from AB Blackburn's previous court-martial, E.S. would have understood that by revealing her allegations to her therapist, there would be someone would had to take action and could corroborate her statements, like how her father and stepmother had in regard to her earlier allegations and that she could save face with her family for not having revealed these allegations before when they appeared to arise in the context of counseling. *See* R. at 186, 190, 203, 417.

Finally, the Government argues it was not plain and obvious error for trial counsel to compare trial defense counsel's "argument about delayed disclosure to other well-known arguments brought forth for victims of sexual abuse." Answer at 42. However, trial counsel's comparison was not as innocuous as the Government suggests, as trial counsel equated trial defense counsel's argument with disavowed and inflammatory arguments: "we've gone from victim blaming for the way you dress, or the way you dance, or how many drinks you're had, to victim blaming for not divulging the abuse when you could have." R. at 471. His inflammatory comparison had no basis in the evidence and served no purpose other than to inflame the passions of the factfinder.

WHEREFORE, AB Blackburn respectfully requests this Court set aside his findings and sentence.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 21 August 2023.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' NOTICE OF STATUS OF COMPLIANCE**
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN**, USAF *Appellant.*	)	No. ACM 40303

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

Pursuant to this Court's 11 September 2023 order, the United States hereby provides notice of its status of compliance.

On 11 September 2023, this Court remanded the record of trial in the above captioned case for correction. This Court ordered the record of trial be returned to this Court not later than 28 September 2023. (Order, dated 11 Sep 23.) This Court further ordered a status update by 21 September 2023, if the record had not already been returned to the Court (Id.)

As of the date of this notice, the three missing attachments to Appellate VIII have been forwarded to JAJM. A certificate of correction for the military judge is in process. The legal office anticipates it will meet the Court's 28 September 2023 deadline.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's compliance with its 11 September 2023 order.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
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for MARY ELLEN PAYNE
Associate Chief, Government Trial and
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Air Force Legal Operations Agency
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[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 21 September 2023 via electronic filing.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	) **MOTION FOR LEAVE TO FILE**) **UNITED STATES' SECOND NOTICE**) **OF STATUS OF COMPLIANCE**
v.	)
	) Before Panel No. 1
Airman Basic (E-1) **JASON M. BLACKBURN**, USAF *Appellant.*	)) No. ACM 40303)

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

Pursuant to this Court's 11 September 2023 order, the United States hereby provides a second notice of its status of compliance.

On 11 September 2023, this Court remanded the record of trial in the above captioned case for correction. This Court ordered the record of trial be returned to this Court not later than 28 September 2023 unless a military judge or this court grants an enlargement of time for good cause shown. (Order, dated 11 Sep 23.) This Court further ordered a status update by 21 September 2023, if the record had not already been returned to the Court. (Id.) On 21 September 2023, the Government provided its first status update as required by the order.

The Government provides the following additional status update in its continuing compliance with this Court's 11 September 2023 order. The three missing attachments to Appellate VIII have been forwarded to JAJM. On 11 September 2023, JAJM notified the Air Force Trial Judiciary that this Court had ordered the record of trial returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record in accordance with RCM 1112(d) and provided the order's suspense date of 28 September 2023.

[illegible] September 2023, the assigned military judge found good cause to grant a 30-day [illegible] of time and asked undersigned counsel to inform this Court of the enlargement.

GRANTED
2 Oct 2023

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's continuing compliance with its 11 September 2023 order.

[redacted]

G. MATT OSBORN, Lt Col, USAF
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MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 28 September 2023 via electronic filing.

[redacted]

G. MATT OSBORN, Lt Col, USAF
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