IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)	No. ACM 40479 27 July 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **7 October 2023**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 27 July 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

28 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40479 28 September 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **6 November 2023**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is six volumes consisting of eight prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and one court exhibit; the transcript is 455 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 28 September 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)	No. ACM 40479 23 October 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **6 December 2023**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 23 October 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

25 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40479 21 November 2023

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **5 January 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 165 days have elapsed. On the date requested, 210 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is currently confined.

Undersigned counsel currently represents 22 clients and is presently assigned 15 cases pending brief before this Court. This case is counsel's eighth priority case, behind:

1. *In re Banker*, Misc. Dkt. No. 2022-01. The transcript of the *DuBay* hearing is 311 pages and the record is two volumes. Mr. Banker's writ-appeal petition is due to the Court of Appeals for the Armed Forces (C.A.A.F.) on 14 December 2023. Undersigned counsel was not the original counsel who filed a brief with the Air Force Court of Criminal Appeals, therefore undersigned counsel must review Mr. Banker's *DuBay* hearing transcript and record, as well as previous written filings, prior to filing Mr. Banker's writ-appeal petition with C.A.A.F.
2. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, 3 defense exhibits, 151 appellate exhibits, and 2 court exhibits. Undersigned counsel has completed her review of the record of trial.
3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of 7 volumes containing 9 prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and 1 court exhibit. Undersigned counsel has completed her review of the record of trial.
4. *United States v. Byrne*, No. ACM 40391. The trial transcript is 945 pages long and the record of trial is comprised of 8 volumes consisting of 5 prosecution exhibits, 6 defense exhibits, 74 appellate exhibits, and 1 court exhibit. Counsel has not reviewed the record of trial.

5. *United States v. McCartney*, No. ACM. 40414. The record of trial is 4 volumes consisting of 21 prosecution exhibits, 7 defense exhibits, and 3 appellate exhibits; the transcript is 123 pages. Undersigned counsel has not yet completed a review of the record of trial.
6. *United States v. Souchek*, No ACM. 40465. The record of trial is 5 volumes consisting of 4 prosecution exhibits, 17 defense exhibits, 7 appellate exhibits, and 1 court exhibit; the transcript is 165 pages. Undersigned counsel has not yet completed a review of the record of trial.
7. *United States v. Howard*, No. ACM. 40478. The record of trial is 7 volumes consisting of 13 prosecution exhibits, 5 defense exhibits, and 37 appellate exhibits; the transcript is 913 pages. Undersigned counsel has not yet completed a review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the records of trial for *United States v. Doroteo* and *United States v. Csiti*. She attended the University of North Carolina (UNC) Appellate Advocacy Training in Chapel Hill, NC, from . Upon returning from the UNC training, counsel immediately took leave . Counsel then attended the Appellate Judges Education Institute 2023 Summit from . From 6-15 November 2023, counsel prepared for, and participated in, an oral argument ordered by this Court for *United States v. Davis*, No. ACM 40370, in Chicago, IL. Finally, counsel prepared for, and participated in, two moot oral arguments for her colleagues for *United States v. Cole*, USCA Dkt. No. 23-0162/AF, and *In re H.V.Z.*, USCA Dkt. No. 23-0250/AF.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed

of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 21 November 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

22 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)	ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)	No. ACM 40479 27 December 2023

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **4 February 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is currently confined.

Undersigned counsel currently represents 20 clients and is presently assigned 15 cases pending brief before this Court. This case is counsel's sixth priority case, behind:

1. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of 7 volumes containing 9 prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and 1 court exhibit. Undersigned counsel has completed her review of the record of trial and is beginning to draft SSgt Csiti's AOE brief. SSgt Csiti's AOE brief is due to this Court on 24 January 2024.
2. *United States v. Byrne*, No. ACM 40391. The trial transcript is 945 pages long and the record of trial is comprised of 8 volumes consisting of 5 prosecution exhibits, 6 defense exhibits, 74 appellate exhibits, and 1 court exhibit. Undersigned counsel has not reviewed the record of trial. Mr. Phil Cave is the lead counsel for this case.
3. *United States v. McCartney*, No. ACM. 40414. The record of trial is 4 volumes consisting of 21 prosecution exhibits, 7 defense exhibits, and 3 appellate exhibits; the transcript is 123 pages. Undersigned counsel has not yet completed a review of the record of trial.
4. *United States v. Souchek*, No ACM. 40465. The record of trial is 5 volumes consisting of 4 prosecution exhibits, 17 defense exhibits, 7 appellate exhibits, and 1 court exhibit; the transcript is 165 pages. Undersigned counsel has not yet completed a review of the record of trial.
5. *United States v. Howard*, No. ACM. 40478. The record of trial is 7 volumes consisting of 13 prosecution exhibits, 5 defense exhibits, and 37 appellate exhibits; the transcript is 913 pages. Undersigned counsel has not yet completed a review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a Writ-Appeal Petition for *In re Banker*, Misc. Dkt. No. 2022-01, with the Court of Appeals for the Armed Forces, and filed an AOE brief, consisting of 11 issues, for *United States v. Doroteo*, No. ACM 40363, with this Court. She also prepared for, and participated in, six moot oral arguments for her colleagues for *United States v. Cole*, USCA Dkt. No. 23-0162/AF, *In re H.V.Z.*, USCA Dkt. No. 23-0250/AF, *United States v. Palik*, USCA Dkt. No. 23-0206/AF, and *In re R.W.*, Misc. Dkt. 2023-08. Finally, counsel advised one member regarding his opportunity to appeal directly to this Court.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 27 December 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

28 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)	No. ACM 40479 25 January 2024

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 March 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is no longer confined.

Undersigned counsel currently represents 19 clients and is presently assigned 14 cases pending brief before this Court. This case is counsel's fifth priority case, behind:

1. *United States v. Byrne*, No. ACM 40391. The trial transcript is 945 pages long and the record of trial is comprised of 8 volumes consisting of 5 prosecution exhibits, 6 defense exhibits, 74 appellate exhibits, and 1 court exhibit. Undersigned counsel is currently reviewing the record of trial. Mr. Phil Cave is the lead counsel for this case.
2. *United States v. McCartney*, No. ACM. 40414. The record of trial is 4 volumes consisting of 21 prosecution exhibits, 7 defense exhibits, and 3 appellate exhibits; the transcript is 123 pages. TSgt McCartney filed a motion to withdraw from appellate review on 24 January 2024. This motion is pending action by this Court.
3. *United States v. Souchek*, No ACM. 40465. The record of trial is 5 volumes consisting of 4 prosecution exhibits, 17 defense exhibits, 7 appellate exhibits, and 1 court exhibit; the transcript is 165 pages. Undersigned counsel has not yet completed a review of the record of trial.
4. *United States v. Howard*, No. ACM. 40478. The record of trial is 7 volumes consisting of 13 prosecution exhibits, 5 defense exhibits, and 37 appellate exhibits; the transcript is 913 pages. Undersigned counsel has not yet completed a review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel reviewed the record of trial for *United States v. McCartney*, No. ACM 40414. She also filed an AOE brief, consisting of three issues, for *United States v. Csiti*, No. ACM 40386, with this Court. Finally, she

prepared for, and pa1iicipated in, four moot oral arguments for her colleagues for *United States v. Smith*, USCA Dkt. No. 23-0207/AF, and *United States v. Leipart*, USCA Dkt. No. 23-0163/AF.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessaiy to allow undersigned counsel to folly review Appellant's case and advise Appellant regarding potential enors. Appellant was infonned of his right to a timely appeal and this request for an enlai·gement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfolly submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 25 January 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)	ACM 40479 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40479 23 February 2024

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 April 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 259 days have elapsed. On the date requested, 300 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is no longer confined.

Undersigned counsel currently represents 16 clients and is presently assigned 12 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. Byrne*, No. ACM 40391. The trial transcript is 945 pages long and the record of trial is comprised of 8 volumes consisting of 5 prosecution exhibits, 6 defense exhibits, 74 appellate exhibits, and 1 court exhibit. Undersigned counsel has reviewed the record of trial. Undersigned counsel is working with the lead counsel, Mr. Phil Cave, to finalize the A1C Byrne's AOE brief, due to this Court on 14 March 2024.
2. *United States v. Davis*, No. ACM 40370. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 26 March 2024.
3. *United States v. Howard*, No. ACM. 40478. The record of trial is 7 volumes consisting of 13 prosecution exhibits, 5 defense exhibits, and 37 appellate exhibits; the transcript is 913 pages. Undersigned counsel has not yet completed a review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the record of trial for *United States v. Byrne*, No. ACM 40391, conducted legal research for potential issues, and assisted the lead counsel in drafting and editing A1C Byrne's AOE brief. She also filed a motion for withdrawal from appellate review in *United States v. McCartney*, No. ACM 40414 and completed a draft supplement to a petition for grant of review for *United States v. Davis*, No. ACM 40370. Finally, she prepared for, and participated in, three moot oral arguments for her colleagues for *United States v. Stradtmann*, USCA Dkt. No. 23-0223/AF, and *United States v. Wells*, USCA Dkt. No. 23-0219/AF.

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 23 February 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

23 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)	ACM 40479 Panel No. 2

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

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

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 a year long delay practically ensures this Court will not be able to issue a decision that complies with out 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 the 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 404 79**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathan L. BRIERLY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel2**

On 23 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) 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 26th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED.** Appellant shall file any assignments of error not later than **4 April 2024.**

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR 'l'HF. <;OTTR'l'

FLEMINq/E. roEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 2 No. ACM 40479 25 March 2024

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 May 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is no longer confined.

Undersigned counsel currently represents 15 clients and is presently assigned 10 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. Doroteo,* No. ACM 40363. The trial transcript is 945 pages long and the record of trial is comprised of 8 volumes consisting of 5 prosecution exhibits, 6 defense exhibits, 74 appellate exhibits, and 1 court exhibit. SrA Doroteo's Reply Brief is due to this Court on 27 March 2024.
2. *United States v. Williams*, No. ACM 40485. The record of trial is 5 volumes consisting of 10 prosecution exhibits, 3 defense exhibits, and 5 appellate exhibits; the transcript is 116 pages. Airman Williams' Reply Brief is due to this Court on 29 March 2024.
3. *United States v. Howard*, No. ACM. 40478. The record of trial is 7 volumes consisting of 13 prosecution exhibits, 5 defense exhibits, and 37 appellate exhibits; the transcript is 913 pages. Undersigned counsel has completed her review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the record of trial for *United States v. Howard*, No. ACM 40478. She also filed a reply brief in *United States v. Csiti*, No. ACM 40386, filed a petition and supplement for grant of review for *United States v. Davis*, No. ACM 40370, and filed an AOE brief in *United States v. Williams*, No. ACM 40485. She prepared for, and participated in, two moot oral arguments for her colleague for *United States v. Wells*, USCA Dkt. No. 23-0219/AF. Finally, undersigned counsel was on leave from

Through no fault of Appellant, undersigned counsel has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully

review Appellant's case and advise Appellant regarding potential eITors. Appellant was infonned of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 25 March 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

25 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40479 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with out 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 the 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 404 79**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathan L. BRIERLY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel2**

On 25 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of e1Tor. 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 26th day of March 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED.** Appellant shall file any assignments of e1Tor not later than **4 May2024.**

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

FLEMINq/E. :IDEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant.*	))))))))))	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40479 18 April 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Preliminary Hearing Officer (PHO) Exhibits 2, 3, 4, and 7.

Facts

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

During A1C Brierly's preliminary hearing, the PHO sealed exhibits 2, 3, 4, and 7. PHO Report, Continuation of Item 13a, DD Form 457, at 1. PHO Exhibit 2 is the Office of Special Investigations (OSI) Report of Investigation (ROI), dated 26 March 2020 (105 pgs); PHO Exhibit 3 is the OSI Interview of L.B. (the named victim), dated 17 September 2019 (5 DVDs); PHO Exhibit 4 is a one page document titled Time Hacks for PHO Exhibit 3, dated 11 May 2022; and PHO Exhibit 7 is the audio recording of the closed session hearing from the preliminary hearing. *Id.* PHO Exhibits 2, 3, and 4 were considered by the PHO during A1C Brierly's Article 32, UCMJ, hearing in preparing the PHO Report and recommendations for the convening authority, and PHO Exhibit 7 is the audio recording of the closed session for potential Military Rule of Evidence (M.R.E.) 412 evidence. *Id.*

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the *Manual for Courts-Martial*, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[1] perform "reasonable diligence,"[2] and to "give a client his or her best professional evaluation of the questions

[1] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[2] *Id*. at Rule 1.3.

that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[3] These requirements are consistent with those imposed by the state bar to which counsel belong.[4]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

PHO Exhibits 2, 3, and 4 are exhibits introduced during A1C Brierly's preliminary hearing and were considered by the PHO in preparation of the PHO Report. PHO Exhibit 7 is the audio recording of the closed session for potential M.R.E. 412 evidence, of which the PHO made a ruling on which evidence he considered M.R.E. 412, which evidence he did not consider M.R.E. 412, and which evidence he would and would not consider. Thus, it is evident the parties "presented" and "reviewed" the sealed materials during the preliminary hearing and at trial.

It is reasonably necessary for Appellant's counsel to review the sealed exhibits for counsel to competently conduct a professional evaluation of Appellant's case and to uncover all issues

[3] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[4] Undersigned counsel is licensed to practice law in Maryland.

which might afford him relief. Because examination of the materials in question is reasonably necessa1y to the fulfillment of counsel's Aliicle 70, UCMJ, duties, and because the materials were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to pe1mit his counsel's examination of sealed materials and has shown good cause to grant this motion.

The Government consents to both parties viewing the sealed materials detailed above.

WHEREFORE, Appellant respectfully requests this Honorable Comi grant this consent motion.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 18 April 2024.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40479**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathan L. BRIERLY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 18 April 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Preliminary Hearing Officer (PHO) Exhibits 2, 3, 4, and 7, which were reviewed by trial and defense counsel at Appellant's court-martial preliminary hearing.

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

After its review of the requested PHO exhibits, the court discovered that PHO Exhibit 7 is not sealed and therefore not subject to this order.*

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

Accordingly, it is by the court on this 24th day of April, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Preliminary Hearing Officer Exhibits 2, 3, and 4** subject to the following conditions:

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* In a memorandum for record dated 4 May 2023, one of the military justice paralegals confirms that due to equipment malfunction only the first 22 minutes of the preliminary hearing were recorded by the equipment. Thus, the portions of the preliminary hearing ordered sealed were never captured.

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

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

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	)	No. ACM 40479 24 April 2024

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

Pursuant to Rule 23.3(m)(4) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 June 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15 months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is no longer confined.

Undersigned counsel currently represents 14 clients and is presently assigned 8 cases pending brief before this Court. This case is counsel's first priority case. She completed her review of Appellant's unsealed record of trial; she has not yet reviewed the sealed materials in Appellant's record of trial. Counsel filed a Consent Motion to View Sealed Materials for this case on 18 April 2024. On 24 April 2024, this Court granted the motion. Counsel anticipates reviewing the sealed materials the week of 29 April 2024.

Undersigned counsel has multiple medical appointments scheduled over the next five weeks, the Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education Training on

With that in mind, barring any unforeseen circumstances, undersigned counsel anticipates finishing her legal research, as well as drafting and filing Appellant's AOE brief, by the requested deadline (3 June 2024). Appellant was advised of undersigned counsel's status regarding his case, the potential issues counsel has identified but still needs to research, and when counsel anticipates completing and filing Appellant's AOE brief. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the record of trial for *United States v. Howard*, No. ACM 40478 and filed a Motion for Remand. While waiting for this Court's action on the Motion for Remand for *United States v. Howard*, counsel completed her review of the record of trial for *United States v. Cayabyab*, No. ACM 30513 and filed a Motion for Withdrawal from Appellate Review for that client. She also

filed Reply Briefs in *United States v. Doroteo*, No. ACM 40363, and *United States v. Williams*, No. ACM 40485. She prepared for, and participated in, one moot oral argument for her colleague for *United States v. Arroyo*, No. ACM 40321. Finally, undersigned counsel was on leave on

.

Through no fault of Appellant, undersigned counsel is unable to file Appellant's AOE brief by the current deadline. This enlargement of time is necessary to allow undersigned counsel to finish researching the legal issues and potential errors in Appellant's case, and to prepare Appellant's AOE brief.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Comi and served on the Appellate Government Division on 24 April 2024.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)	ACM 40479 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with out 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 the Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 April 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman First Class (E-3) **JONATHAN L. BRIERLY** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40479 21 May 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER AIRMAN FIRST CLASS BRIERLY'S CONVICTIONS ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE LB WAS NOT A CREDIBLE WITNESS, AND AIRMAN FIRST CLASS BRIERLY HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

II.

WHETHER AIRMAN FIRST CLASS BRIERLY IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE.

STATEMENT OF THE CASE

On 16-17 January 2023, at a general court-martial convened at Scott Air Force Base (AFB), Illinois, a military judge convicted Airman First Class (A1C) Jonathan Brierly, contrary to his pleas, of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice[1] (UCMJ), 10 U.S.C. § 920, and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C.

[1] Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial, United States* (2019 ed.).

§ 928.[2] The military judge sentenced A1C Brierly to a dishonorable discharge, 15 months' confinement, and reduction to the lowest enlisted grade.[3] The convening authority took no action on the findings and sentence of the court-martial.[4]

STATEMENT OF FACTS

A. LB and A1C Brierly were assigned a TDY to Germany together.

LB and A1C Brierly were members of the Air National Guard and assigned to the in Louisville, Kentucky.[5] They interacted nearly every drill weekend working on the flightline.[6] LB and A1C Brierly both became temporary technicians and began interacting every day.[7]

In September 2019, LB and A1C Brierly were assigned a temporary duty assignment (TDY) to Germany.[8] LB was approximately 20 years old.[9] A1C Brierly had recently gotten married prior to the TDY.[10]

The first night they arrived in Germany, LB, A1C Brierly, and other coworkers went out to dinner.[11] A1C Brierly and the coworkers drank at dinner; LB did not.[12] While at dinner, LB flirted with A1C Brierly.[13] After dinner, LB went with A1C Brierly and the coworkers to the hotel

[2] R. at 413; Entry of Judgment (EOJ), 22 February 2023.
[3] R. at 454; EOJ.
[4] Convening Authority Decision on Action Memorandum – *United States v. Airman First Class Jonathan L. Brierly*, 14 February 2023.
[5] R. at 42-43, 48.
[6] R. at 48.
[7] R. at 46, 48.
[8] R. at 49, 53.
[9] *See* R. at 44 (LB was 17 years when she joined the Air National Guard in January 2017).
[10] R. at 113.
[11] R. at 61.
[12] *Id.*
[13] R. at 289.

patio to hang out.[14] A1C Brierly and the coworkers continued drinking.[15] LB estimated that A1C Brierly had approximately six beers and a couple shots over the course of the night.[16]

B. LB went into A1C Brierly's hotel room, alone, at midnight.

At around midnight, LB went with A1C Brierly back to his hotel room, just the two of them.[17] A1C Brierly was so intoxicated that LB wanted to make sure he was okay and had a trash can near him in case he got sick.[18] A1C Brierly laid down on his bed and rolled his face into his pillow.[19] He made comments about fixing the television, but LB could not make out anything else he was saying.[20] LB offered to pull up a show on her phone and then laid down on A1C Brierly's bed next to him, close enough so they could watch the show on her phone together.[21] After roughly 10 to 15 minutes, A1C Brierly put his head into his pillow, clearly getting tired and starting to fall asleep.[22] LB tried to talk to A1C Brierly, but A1C Brierly stopped responding.[23] She told him she was going back to her room, asked if he was okay, and asked if he wanted the lights on or

[14] R. at 63.
[15] R. at 64.
[16] R. at 117-18. LB testified on direct that she did not know how much A1C Brierly had to drink that night. R. at 62, 64. However, on cross, she admitted that she told OSI that she saw A1C Brierly have approximately six beers. R. at 117-18. LB's interview with OSI was two days after her sexual interactions with A1C Brierly; her testimony at trial was over three years later. LB was impeached no less than 17 times by trial defense counsel contrasting what she testified to on direct versus what she told OSI. Each time, she agreed with trial defense counsel that she had told OSI something different than what she testified to on direct. As such, the facts section of this brief uses the facts that LB admitted, during her testimony, that she told OSI, since that description of facts was closer in time to the sexual activity with A1C Brierly.
[17] R. at 66.
[18] R. at 67.
[19] R. at 68.
[20] *Id.*
[21] R. at 68, 75.
[22] R. at 76, 124.
[23] R. at 124-25.

off.[24] A1C Brierly did not respond to any of her comments or questions.[25] LB turned off the lights in the room and went back to her hotel room.[26] Once she got back to her hotel room, she sent A1C Brierly a message that said, "I'm going to be up for a bit, so if you need anything let me know. Don't throw up in your bed, and drink water."[27]

C. LB again went into A1C Brierly's hotel room, alone, after midnight.

Not long after getting to her hotel room, LB went back over to A1C Brierly's hotel room, by herself, after midnight, to "play games."[28] They had both poked their heads out into the hotel hallway after hearing noises nearby, and when A1C Brierly asked her if she wanted to come over to his room to play games, she agreed.[29] Even though she knew he was married, very intoxicated, and had nearly fallen asleep the last time she was in his room, she went back over to his room, by herself, after midnight, and sat down on his bed with him in the dark to "play cards" or "continue watching the show."[30]

However, LB did not play games with A1C Brierly; instead she and A1C Brierly laid down on his bed, in the dark, and talked about their "biggest fears."[31] Even though LB knew she "shouldn't have been in his room," she stayed nonetheless.[32] At one point, A1C Brierly got up to use the bathroom and peed with the door open.[33] LB believed A1C Brierly was still drunk because he was peeing with the bathroom door open.[34] When he came back to the bed, LB could tell he

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[24] *Id.*
[25] R. at 124-25.
[26] R. at 126.
[27] *Id.*
[28] R. at 77.
[29] *Id.*
[30] R. at 78.
[31] R. at 129.
[32] R. at 130.
[33] R. at 132.
[34] *Id.*

was getting tired.[35] LB knew it "did not look okay" for her to be in his room, but she agreed to stay with him in his bed until he fell asleep.[36]

D. LB and A1C Brierly engaged in sexual activity.

While LB and A1C Brierly were lying in his hotel room bed together in the dark, next to one another, after midnight, A1C Brierly put LB's hand on his shorts over his penis.[37] LB said to A1C Brierly, "I know where you're going, you're married, you have a wife" and "it's not okay."[38] She also told him that he will "regret this in the morning."[39] LB told him she needed to leave, but she continued to stay in his room, on his bed.[40]

According to LB, A1C Brierly began kissing her.[41] As A1C Brierly kissed LB's neck, LB said to him, "Jon, you're married, we can't do this, you're going to hate yourself tomorrow for this."[42] LB testified that it appeared A1C Brierly did not hear her.[43] She also testified that she pulled away and told him "no" multiple times.[44]

According to LB, A1C Brierly kissed her breasts, performed oral sex on her, put his penis in her mouth, and had vaginal sex with her.[45] LB testified that throughout this sexual encounter, she felt "frozen and trapped," started crying, and told him "no," "stop," "[he is] married," "this isn't what [he wants] to do," and "this isn't what [she wants] to do."[46]

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[35] R. at 133.
[36] *Id.*
[37] *Id.*
[38] R. at 134.
[39] *Id.*
[40] *Id.*
[41] R. at 82.
[42] R. at 135.
[43] *Id.*
[44] R. at 82-83.
[45] R. at 83, 86-88, 136.
[46] R. at 84, 86.

LB testified that after A1C Brierly had vaginal sex with her, he put his penis in her mouth again and ejaculated in her mouth.[47] LB then went to the bathroom and spit out his ejaculate in the sink.[48] LB did not leave right away; she went back to A1C Brierly's bed. LB testified on direct that she told A1C Brierly she had asked him to stop during the encounter.[49] She also told him, "You have a fucking wife, I feel disgusting."[50] A1C Brierly responded, "we fucked up."[51] LB was afraid A1C Brierly's wife would yell at her.[52] LB then sat on the bed with A1C Brierly and "zoned out for five minutes."[53]

E. LB was upset because she and her girlfriend broke up.

Once LB left A1C Brierly's room, she grabbed her cigarettes from her room and went downstairs to the hotel patio.[54] On the patio, she saw then-TSgts JD and WL; she told them she was upset because she and her girlfriend had gotten into a fight and broke up.[55] LB told them either she was moving out, or her girlfriend was moving out, while LB was TDY.[56] She did not say anything to either of them about the sexual activity that had just occurred between her and A1C Brierly.[57]

F. LB and A1C Brierly agreed not to tell anyone about the sexual affair.

A1C Brierly joined LB, JD, and WL on the patio.[58] A1C Brierly was still drunk.[59]

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[47] R. at 89, 140.
[48] R. at 90, 140.
[49] R. at 90.
[50] R. at 141-42.
[51] R. at 142.
[52] *Id.*
[53] R. at 144-45.
[54] R. at 92.
[55] R. at 92, 145-46.
[56] R. at 182.
[57] R. at 146.
[58] *Id.*
[59] R. at 183.

A1C Brierly "smelled like alcohol" and was "acting in a manner [as if he had] drank a lot."[60] After being on the patio for some time, LB and A1C Brierly both left to go back up to their rooms. A1C Brierly "fell up the stairs."[61] On the way to their rooms, they stopped to talk.[62] A1C Brierly again told LB, "[w]e fucked up" and "we don't have to tell anyone."[63] It was LB's impression that A1C Brierly thought they "had just hooked up."[64]

G. LB's mother demanded LB go to the hospital and report her sexual interactions with A1C Brierly as a sexual assault.

At some point after the sexual encounter, LB called her mother, JF, crying and upset.[65] She told her mother that she and another person whom she had traveled to Germany with were in his room, she went to leave and he did not want her to leave, she froze, she told him no repeatedly, and then a sexual encounter happened.[66] JF demanded LB go to the hospital and report her sexual interactions as a sexual assault.[67]

H. LB told the Office of Special Investigations that she did not "believe in somebody getting hated on, especially if they're not guilty."

LB interviewed with the Department of the Air Force Office of Special Investigations (OSI) on 17 September 2019—two days after the sexual activity with A1C Brierly.[68] She told OSI a story of the events that took place between her and A1C Brierly in his hotel room, and she told them he had assaulted her.[69] The OSI agents interviewing LB asked her questions about her

[60] R. at 183, 186.
[61] R. at 185.
[62] R. at 147-48.
[63] R. at 148-49.
[64] R. at 149.
[65] R. at 189.
[66] R. at 191-92.
[67] R. at 193.
[68] R. at 106-7.
[69] R. at 107.

allegations and whether she told anyone that it was A1C Brierly who allegedly assaulted her.[70] LB said that she "did not mention names" to her mom or sister and she was not sure if she told them it was a coworker.[71] LB then said to the OSI agents, "I don't believe in somebody getting hated on, especially if they're not guilty."[72]

I. The Preliminary Hearing Officer recommended withdrawal and dismissal of all charges and specifications against A1C Brierly.

On 5 May 2022, the Government charged A1C Brierly with two specifications of abusive sexual contact, two specifications of sexual assault, and one specification of assault consummated by a battery.[73] A1C Brierly's Article 32, UCMJ, 10 U.S.C. § 832, hearing was held on 12 May 2022.[74] a military judge assigned to the Air Force Trial Judiciary, served as the preliminary hearing officer (PHO).[75] The PHO marked the audio recording of the preliminary hearing as PHO Exhibit 7, and sealed the closed session portion of the audio recording.[76] After reviewing all the evidence presented at the preliminary hearing, to include the OSI Report of Investigation (ROI) and OSI's interview of LB, the PHO recommended to the Special Court-Martial Convening Authority that "all charges and specifications be withdrawn and dismissed" because "it is unlikely that the prosecution would be able to meet [the beyond a reasonable doubt] burden [of proof] at trial."[77]

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[70] R. at 174.
[71] *Id.*
[72] R. at 155.
[73] Charge Sheet, DD Form 458, 5 May 2022.
[74] PHO Report, DD Form 457, Continuation of Item 24, at 8.
[75] *Id.* at 1.
[76] *Id.*
[77] *Id.* at 6, 8.

ARGUMENT

I.

AIRMAN FIRST CLASS BRIERLY'S CONVICTIONS ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE LB WAS NOT A CREDIBLE WITNESS, AND AIRMAN FIRST CLASS BRIERLY HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

Standard of Review

This Court reviews issues of factual and legal sufficiency *de novo*.[78]

Law and Analysis

A1C Brierly is entitled to relief on factual and legal sufficiency grounds. 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, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."[79] In doing so, this Court "applies neither a presumption of innocence nor a presumption of guilt."[80] The test for legal sufficiency is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[81]

The evidence adduced at trial demonstrates that LB was not a credible witness, such that any rational trier of fact could not have found the essential elements of the alleged crimes beyond a reasonable doubt. Furthermore, this Court cannot be convinced of A1C Brierly's guilt beyond a reasonable doubt. But even if this Court believes LB's story of events could be true, any rational trier of fact would have found A1C Brierly had a reasonable mistake of fact as to consent.

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[78] Article 66, UCMJ, 10 U.S.C. § 866; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).
[79] *Turner*, 25 M.J. at 325.
[80] *Washington*, 57 M.J. at 399.
[81] *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (quotations and citations omitted).

A. LB was not a credible witness.

1. LB's version of events at trial was significantly different than what she had previously alleged just two days after her sexual interactions with A1C Brierly.

LB's story about what occurred in the hotel room with A1C Brierly changed dramatically over the course of three years. When she first told her story to OSI on 17 September 2019, she shared a set of facts with the agents and explained that she did not share A1C Brierly's name as her assailant because she "[didn't] believe in somebody getting hated on, especially if they're not guilty."[82] Yet more than three years later, her story at trial had changed significantly.

Trial defense counsel impeached LB with inconsistent statements no less than 17 times:

1. LB testified on direct that she "didn't know how much [A1C Brierly] had to drink" on the night of the alleged assault.[83] But LB told OSI that A1C Brierly had approximately six beers over the course of the evening.[84]

2. LB testified on direct that while she was in A1C Brierly's hotel room the first time, he invited her to sit on his bed by patting the bed next to him.[85] LB described a story where A1C Brierly coaxed her into bed. But LB told OSI that when she was in A1C Brierly's that she was lying on A1C Brierly's bed on a propped elbow and then she laid down completely on his bed.[86] In fact, LB did not even share the new information about "patting the bed" with the trial counsel when she interviewed with them on the Saturday before trial started. The first time she ever told anyone this new information about A1C Brierly patting the bed was at trial, during her direct.[87]

3. LB testified on direct that she "wanted to be respectful" when A1C Brierly was falling asleep, so she left his room.[88] But LB told OSI that when she was in A1C Brierly's hotel room the first time, she tried talking to him before she left his room.[89] She said "Hey, I'm going back to my room," "Are you okay?" and "Do you want the lights on or off?"[90] She didn't get a response from him to

[82] R. at 154.
[83] R. at 62, 64, 117-18.
[84] R. at 117-18.
[85] R. at 73, 122.
[86] R. at 122.
[87] *Id.*
[88] R. at 76, 124-26.
[89] R. at 124-27.
[90] R. at 124-25.

any of these questions.[91] She told OSI "I just find that disrespectful. I'm not going to keep asking him dead end questions," so she left his room.[92]

4. LB testified she could not recall whether she turned out the lights in A1C Brierly's room.[93] But LB told OSI that when A1C Brierly wasn't responding to her, she turned off the lights and left his room.[94]

5. LB testified that she "[could not] recall" whether she sent A1C Brierly a text message after she left his room the first time.[95] But she told the Sexual Assault Forensic Examiner (SAFE) that she sent a text message to A1C Brierly.[96] When confronted by trial defense counsel with the exact words she sent to A1C Brierly—"I'm going to be up for a bit, so if you need anything let me know. Don't throw up in your bed, and drink water"—she agreed she had in fact sent the text message.[97]

6. LB testified on direct that she went into A1C Brierly's hotel room a second time on the night in question, after midnight.[98] She sat down next to him on his bed, and she was in between him and the wall.[99] She testified that after discussing their "biggest fears," A1C Brierly patted the bed next to him, inviting LB to lay between him and the wall. She laid down next to him, in between him and the wall.[100] But LB told OSI that when she was sitting on the bed closest to the wall, after their discussion about their "biggest fears," that A1C Brierly told her "Hey, that's my side of the bed" and had her move over, away from the wall.[101]

7. LB testified that it was appropriate for her to be in her married coworker's bedroom, after midnight, in the dark, in his bed with him, to play games.[102] But LB told OSI that "In the professional aspects . . . [she] shouldn't have been in [A1C Brierly's] room."[103]

8. LB testified that after the "biggest fears" conversation with A1C Brierly, and after she laid down on the bed next to him, in the dark, that A1C Brierly got up

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[91] R. at 124-25.
[92] R. at 125.
[93] R. at 124-27.
[94] *Id.*
[95] *Id.*
[96] Pros. Ex. 3 at 4.
[97] R. at 124-27.
[98] R. at 78-80, 127-28.
[99] R. at 78-80.
[100] *Id.*
[101] R. at 128-29.
[102] R. at 130-31.
[103] *Id.*

to use the bathroom.[104] LB testified she "[didn't] recall" whether A1C Brierly left the door open while he was using the bathroom.[105] But LB told OSI that "[A1C Brierly] went pee and was drunk and he opened the door" and LB "could see into the bathroom."[106] LB told OSI she figured he left the bathroom door open because he was drunk.[107]

9. LB testified on direct that after A1C Brierly put his mouth on her breast, he pulled her ripped jean shorts off.[108] She went into detail, explaining how A1C Brierly "move[d] one of his legs to the inside of [her] legs," to get her shorts off, all while A1C Brierly was on top of her.[109] But LB told OSI she did not remember how her pants came off.[110] In fact, when speaking to OSI, this was one of the areas where LB did not remember anything.[111]

10. LB testified that during the sexual interactions, A1C Brierly put his penis in her mouth twice—once before he penetrated her vaginally, and once after.[112] But LB never told OSI that he put his penis in her mouth the first time. LB told OSI that he put his penis in her vagina first, *then* he put his penis in her mouth.[113] When confronted by trial defense counsel regarding this change in her story, LB stated, "it's hard to recall the exact order of events."[114]

11. LB testified on direct that after the sexual activity with A1C Brierly had ended, she "wanted to leave" but A1C Brierly was "standing in between [her] and the door."[115] She testified that A1C Brierly said no, she couldn't leave, so LB felt like she couldn't leave.[116] On cross-examination, LB changed her story, and testified that A1C Brierly said, "don't leave," not that she couldn't leave.[117] But when LB spoke to OSI, two days after the alleged assault happened, LB said that A1C Brierly told her "Here, come sit down."[118] And she went back and sat on the bed with a person she claimed had just sexually assaulted her.[119]

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[104] R. at 132.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] R. at 85.
[109] R. at 85, 136-37.
[110] R. at 136-37.
[111] *Id.*
[112] R. at 86-87, 89.
[113] R. at 137-38.
[114] R. at 138.
[115] R. at 90.
[116] *Id.*
[117] R. at 143.
[118] R. at 144.
[119] *Id.*

12. LB testified on direct that after the sexual activity ended and she "felt like [she] couldn't leave," she hid herself "in the corner of the bed, in the corner of the wall, in the fetal position," crying.[120] Yet, that is so wildly different than what she told OSI just two days after this alleged assault happened. LB told OSI that she sat on the bed and zoned out for five minutes, and she didn't tell OSI that she was crying.[121]

13. LB testified that later, after the alleged assault, she saw A1C Brierly as she was leaving the hotel's outdoor patio and he grabbed her by the arm.[122] But when LB described this same circumstance of running into A1C Brierly in the hotel hallway, she never told OSI that A1C Brierly grabbed her by the arm.[123]

14. LB testified that it was her impression, based on what A1C Brierly was saying and how he was acting after the sexual activity, that A1C Brierly did not think he had done anything wrong, and he thought they had just hooked up.[124] LB at first denied saying that she told A1C Brierly, "it's whatever."[125] But then when confronted by trial defense counsel about her interview with OSI, she admitted that she had in fact said to OSI that she told A1C Brierly, "it's whatever" regarding their sexual interactions.[126]

15. LB testified on direct that A1C Brierly held her hand in the hallway until she promised not to tell anyone what happened between them.[127] But LB told OSI that A1C Brierly grabbed her hand to shake hands and they both promised not to tell anyone.[128]

16. LB testified that she had a phone call with her ex-girlfriend, and she vaguely told her about the events that occurred with A1C Brierly.[129] LB testified that she could not recall the events of the phone call, or who broke up with who.[130] But LB talked to OSI about her relationship with her ex-girlfriend. And LB told OSI that her ex-girlfriend broke up with her because her ex-girlfriend was tired of waiting on LB to work on herself.[131] LB also told OSI that her ex-girlfriend had another female with her at that time and that made her feel bad.[132]

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[120] R. at 90-93.
[121] R. at 145.
[122] R. at 95, 148.
[123] R. at 148.
[124] R. at 149.
[125] *Id.*
[126] *Id.*
[127] R. at 95, 150.
[128] R. at 150.
[129] R. at 152.
[130] *Id.*
[131] R. at 153.
[132] *Id.*

17. LB testified on direct that she did not agree to any of the actions by A1C Brierly on the night in question.[133] But LB told OSI, "I don't believe in somebody getting hated on, especially if they're not guilty" after referencing that she had not shared A1C Brierly's name as her alleged assailant.[134]

LB's inability to tell a consistent story, and the fact that there were at least 17 changes to her trial testimony compared to what she had previously shared with OSI, demonstrates why her changed testimony should not be given any weight during this Court's analysis. Individually, these changes in her story may seem small. However, when all these changes are added up, it demonstrates that LB was not a credible witness and could not be believed. On direct, LB removed her own active participation from the equation when describing the interactions with A1C Brierly. She described a scenario where she wasn't staying in his room because she wanted to stay but rather, she was trapped, and she couldn't leave. She made herself out to be passive and vulnerable. The changes in her story made her out to be more of a victim and highlighted her desire to make her story more believable.

This is concerning given that when the PHO reviewed the evidence at A1C Brierly's preliminary hearing, to include LB's interview with OSI, he recommended "withdrawing all charges and specifications" because "based on the evidence presented at the hearing, it is unlikely that the prosecution would be able to meet [the beyond a reasonable doubt] burden [of proof] at trial."[135] Of note, the PHO for A1C Brierly's preliminary hearing was a sitting military judge assigned to the Air Force Trial Judiciary.[136] The story he heard—the one LB told to OSI just two days after the alleged acts occurred—caused him to recommend to the Special Court-Martial

[133] R. at 107-08, 154.
[134] R. at 154.
[135] PHO Report, DD Form 457, Continuation of Item 24, at 6.
[136] *Id.* at 1.

Convening Authority that this case *not* go to trial and all charges be withdrawn and dismissed.[137] LB was on notice that the PHO did not believe her story was enough. It is no surprise then that her story at trial is even more exaggerated and made her out to be more of a victim.

It is also concerning the number of times LB could not recall facts surrounding the alleged offenses. LB could not recall facts and circumstances surrounding the offenses she had alleged against A1C Brierly 17 times, to include important details about what happened in the moments just before or just after the alleged assaults.[138] In fact, LB even stated that it was "hard to recall the exact order of events" as she is being questioned about whether A1C Brierly allegedly penetrated her mouth or vagina first.[139] At one point, LB stated she "[couldn't] recall" what statements she made to A1C Brierly to "tell him to stop."[140] LB's inability to recall key details surrounding the alleged crimes, combined with all of her story changes, diminished her credibility as a witness and emphasizes the real possibility that she did, in fact, consent to sexual activity with A1C Brierly.

2. LB had a motive to fabricate.

LB had a motive to fabricate the events that occurred in A1C Brierly's hotel room and her willingness to be an active participant in them. LB was likely experiencing cognitive dissonance as a result of her consensual sexual behavior with a married man from her unit. She did not want to be known as someone who slept with a married man, especially when that married man is a coworker in a small unit. Furthermore, LB had met A1C Brierly's wife and described her as "really

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[137] *Id.* at 8.
[138] R at 66, 80, 86, 89, 118, 125, 126, 129, 132, 138, 144, 152, 154, 165, 167.
[139] R. at 138; *see also* R. at 129 (LB stated it was "hard to recall the exact order of events" when being questioned about where she was positioned on the bed prior to A1C Brierly allegedly sexually assaulting her).
[140] R. at 165.

nice" and a sweet person.[141] LB likely felt guilty for her participation in the sexual activity with A1C Brierly. It was easier to be a victim of sexual assault than to swallow the truth of having sex with a married man.

The military judge recognized Dr. NS, a licensed clinical and forensic psychologist, as an expert in forensic psychology at A1C Brierly's court-martial.[142] Dr. NS explained that cognitive dissonance, a well-known theory in the field of psychology, is the "need to have [one's] beliefs and [one's] actions matched . . . [, and the] need to feel like [the individual is] acting . . . 'consonant' with [that person's] morals, instead of dissonance."[143] Individuals experience an internal, psychological discomfort, or dissonance, when they feel they are not acting in line with their values, or when their morals conflict with their behavior.[144] When a person's morals conflict with their behavior, this becomes a threat to the person's self-integrity or self-identity.[145] People seek to reduce this dissonance—this internal discomfort and threat—by changing their perception of what happened.[146] This is a natural inclination, an unconscious natural process, and this internal reconciliation can happen almost instantly.[147] Once a person has "restructured the cognition in [his or her] mind to reduce dissonance . . . [a] third party is the receiver of that already reconstructed information."[148] The information presented to the third party "might already be inaccurate [ ] because of . . . attempts to reduce [the person's] own hypocrisy."[149]

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[141] R. at 113, 142.
[142] R. at 331-32.
[143] R. at 333, 335.
[144] R. at 333, 336.
[145] R. at 337.
[146] R. at 337-38, 358.
[147] R. at 339, 348.
[148] R. at 340.
[149] *Id.*

"Memory is very malleable."[150] "People can change [their] memory, and . . . can come to believe things that never happened . . . because of processes like cognitive dissonance."[151] In the interest of self-perception, individuals can convince themselves of things that are not true, or deny themselves the truth, all the time.[152]

Cognitive dissonance can be instantaneous, especially when the case is salient, or a person is invested in the outcome.[153] That is what happened with LB and the events that occurred in A1C Brierly's hotel room. LB reworked the narrative in her mind to omit her active participation, so she could believe she was not a willing participant rather than a person who slept with a newly married coworker. LB continued to rework the narrative from what occurred in that room from the first time she shared the story with her mother, then with OSI, until she testified at trial, to eliminate any active participation she had in A1C Brierly's hotel room. As she continued to tell her story to others, the version she presented reduced the cognitive dissonance she was experiencing by describing the events as nonconsensual. And these individuals supported her version of events; they supported her perception about who she is, to protect her sense of self and what is right.

LB also had a motive to fabricate to save her relationship with her girlfriend. Things with her girlfriend were already rocky.[154] LB may have believed that being the victim of sexual assault might help her mend her stateside relationship. Cognitive dissonance likely played a role in this instantaneous, natural inclination to change her perception of what happened in the hotel room.

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[150] R. at 353.
[151] R. at 362-63.
[152] R. at 346.
[153] R. at 349-50.
[154] R. at 115.

Lastly, LB had a motive to fabricate based on the pressure from her mother. LB's mother, JF, demanded LB go to the hospital and report her sexual interactions as a sexual assault.[155] At only 20 years old, and with a persistent and pressuring mother, LB gave in and followed her mother's directive. Once the train started down the tracks, LB could not turn it back around.

LB knew A1C Brierly was drunk.[156] She knew he was so intoxicated that he likely would not remember what happened in that hotel room. To preserve her self-identity or integrity, she shifted her perception about what occurred in that room. This cognitive dissonance and all three motives to fabricate undermine LB's credibility and testimony and demonstrate the real possibility that the sexual activity between LB and A1C Brierly was consensual.

3. LB's story of events is physically implausible.

LB's account of the sexual activity between her and A1C Brierly is not believable because it is not physically plausible. A1C Brierly was heavily intoxicated that evening.[157] Given how drunk A1C Brierly was, he would not have had the spatial awareness and physical balance to do what LB alleged he did. LB claimed that A1C Brierly was able to pull off her pants while she was completely passive.[158] But it would not be physically plausible for A1C Brierly to pull off LB's jean shorts, against her will and without any assistance of lifting her hips, while she was lying on her back on the bed. A1C Brierly would have had to pull these jeans shorts past her hips, past her buttocks, past her thighs, and completely off, all while being so drunk that he cannot even manage to get up a set of stairs without falling.[159] According to LB, A1C Brierly removed her shorts by

[155] R. at 193.
[156] R. at 61-64, 132.
[157] R. at 61-64, 132, 183.
[158] R. at 85.
[159] *See* R. at 185 (JD testified that A1C Brierly fell up the stairs that evening).

maneuvering his leg inside her leg while on top of her.[160] LB also claimed that A1C Brierly was able to take off his own pants, while drunk, and while still on top of her.[161] None of this is physically plausible with how drunk A1C Brierly was. This demonstrates LB's lack of credibility and why it makes more sense that LB was an active, consenting, participating member of the sexual acts between her and A1C Brierly.

It is also physically implausible that A1C Brierly could have forced his penis into LB's mouth in the way that she described. As drunk as A1C Brierly was, it wouldn't be plausible for him to have the balance and capability to grab LB's neck, as she claimed, pull her up from lying down into a seated position, and stick his possibly flaccid penis into her mouth—all without losing balance or falling over.[162] LB claimed he did this twice, while lying on top of her.[163] She claimed it is from that angle, of A1C Brierly lying on top of her in a missionary position, that he is able to grab her neck, pull her up, and force her mouth onto his penis.[164] That would be incredibly difficult to accomplish if both parties were sober, let alone if the male on top was drunk and the female on the bottom was not an active participant.

What also doesn't make sense is that, according to LB, she was able to keep her mouth closed when A1C Brierly was trying to kiss her mouth, but somehow A1C Brierly was able to "force" his penis inside her mouth, against her will, without prying her mouth open or holding it open.[165] When LB was confronted by this, she could not explain why she was "frozen," even

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[160] R. at 137. As previously noted, LB did not remember how her pants came off when she spoke to OSI just two days after this allegedly happened, yet somehow more than three years later, provided for the very first time, a detailed account of how her pants came off by a drunk person. R. at 137.
[161] R. at 139.
[162] R. at 86-87, 138.
[163] R. at 86-87, 89, 139.
[164] R. at 139.
[165] R. at 86-87, 89, 138-39.

though she had previously left the room, and the walls were so thin that other coworkers likely would have heard her had she yelled.[166] Despite there being no evidence that A1C Brierly had given her or anyone else a reason to think that she should fear him,[167] she offered up a story that she was afraid of him.[168]

After the first alleged oral penetration, LB claimed A1C Brierly laid her back down on the bed so he could penetrate her vagina, and then once again, grabbed her by her neck and pulled her up to penetrate her mouth—without falling over, and in the missionary position on top of her.[169] According to LB, A1C Brierly did all of this within a matter of minutes, yet not long before this sexual encounter, he was nearly passed out in his bed, too drunk to respond to her questions and nearly falling asleep.

None of this could have occurred without active participation from LB. A1C Brierly was too intoxicated to have the balance or physical capacity to accomplish all these physical tasks without LB's participation. Additionally, the Government did not offer any independent evidence—eyewitness, photograph, or video evidence—that corroborated LB's allegation that A1C Brierly engaged in sexual activity with or without her consent. LB's version of events is not physically plausible, making her unreliable and not a credible witness.

4. <u>LB had a reputation and character for being attention-seeking, exaggerating, and stretching the truth.</u>

LB had a reputation within her shop, and within her squadron, for being attention-seeking, controlling, and dominant.[170] Multiple witnesses who had worked with LB for many years had an

[166] R. at 163-64.
[167] R. at 62, 113, 202-3.
[168] R. at 163-64.
[169] R. at 87.
[170] R. at 307, 315, 325-36.

opinion that she had a character for exaggerating, stretching the truth, and attention-seeking.[171] By itself, this reputation and character calls into question LB's credibility as a witness and her testimony at the court-martial. However, when considered along with LB's inconsistencies in her story, her motive to fabricate, her cognitive dissonance, and the physical implausibility of her story, there is a reasonable likelihood that LB's version of events is not accurate and she did, in fact, consent to sexual activity with A1C Brierly. Without a reliable version of events, or any evidence to corroborate LB's story of events, no rational trier of fact would have found the essential elements of the alleged crimes beyond a reasonable doubt. Furthermore, there is not sufficient evidence for this Court to be convinced of A1C Brierly's guilt beyond a reasonable doubt.

B. A1C Brierly had a reasonable mistake of fact that LB consented to sexual activity.

Mistake of fact as to consent is a defense to battery, abusive sexual contact, and sexual assault.[172] A mistake of fact as to consent defense requires that the appellant mistakenly believed that another person consented to touching or sexual activity.[173] The appellant's belief that the other person consented must be honest and reasonable.[174] Once raised, the Government bears "the burden of proving beyond a reasonable doubt that the defense did not exist."[175]

1. <u>LB flirted with A1C Brierly at dinner earlier in the night.</u>

LB went out to dinner with A1C Brierly and other coworkers. While at dinner, LB was seen flirting with A1C Brierly.[176] TSgt DC, also at the dinner, described LB as flirting with A1C Brierly based on "the way she was looking at him, [with] blushed cheeks, [and while] playing

[171] R. at 307, 314, 325-26.
[172] *See* Rule for Courts-Martial (R.C.M.) 916(j)(1).
[173] *Id.*
[174] *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998); R.C.M. 916(j)(1).
[175] R.C.M. 916(b)(1).
[176] R. at 289.

with her hair," and showing "like she might be interested in him."[177] If another coworker who got the impression that LB was flirting with A1C Brierly and "interested in him," then it would be reasonable for A1C Brierly to also think LB was interested in him. When taken together with LB's story describing events that allegedly occurred later in the evening, it would be reasonable for A1C Brierly to have a mistaken belief as to consent regarding sexual interactions with LB.

2. LB went into A1C Brierly's hotel room twice, around midnight, and willingly laid down in bed with him.

LB went into A1C Brierly's hotel room, just the two of them, around midnight.[178] She laid down next to A1C Brierly, in his bed, on her own volition.[179] She laid "fairly close" to A1C Brierly—"close enough for both of [them] to see the [phone] screen" to watch a show on her phone—as A1C Brierly was starting to fall asleep.[180] She did all of this willingly, and while knowing he was married.

Once A1C Brierly was no longer responding to her questions, indicating he had passed out or fallen asleep, she left.[181] LB's and A1C Brierly's night could have ended there. LB had gone back to her own hotel room, where she could have stayed for the remainder of the evening.[182] But within a matter of minutes, LB went back into A1C Brierly's hotel room, a second time, just the two of them.[183]

Back in his hotel room, she sat next to A1C Brierly, on his hotel bed, in the dark.[184] Neither

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[177] R. at 289.
[178] R. at 120-23.
[179] R at 68. LB testified that Amn Brierly "patted the bed" for her to lay down next to him, but on cross, she admitted that she never told this to OSI, or the Government trial counsel. The very first time she talked about it happening is on direct at trial, so her credibility regarding whether this statement is truthful, and whether this actually occurred, is questionable at best. R. at 122.
[180] R. at 72-74, 123-27.
[181] R. at 76-77, 123-27.
[182] R. at 76-77.
[183] R. at 77.
[184] R. at 128.

A1C Brierly, nor LB, turned on the lights.[185] At some point, she laid on the bed next to him.[186]

LB had multiple opportunities to get up and leave A1C Brierly's hotel room. LB even told OSI that she "shouldn't have been in his room,"[187] but she stayed, nonetheless. At one point, A1C Brierly got up to use the restroom and peed with the bathroom door open.[188] LB testified that she could see A1C Brierly was drunk and getting tired.[189] But LB continued to lay in his bed and did not leave his room.[190] LB agreed to stay with him, in his bed, lying next to him, until he fell asleep, even though it "did not look okay" for her to be in his room.[191]

It is reasonable that A1C Brierly would start to get the impression that LB was open to some kind of sexual interactions. LB had flirted with A1C Brierly earlier in the night, and then LB repeatedly went into A1C Brierly's room, after midnight. LB knew that A1C Brierly was married, but she continued to stay in his room and laid down in bed with him in the dark.

3. LB stayed in A1C Brierly's hotel room when he tried to engage in sexual activity with her.

According to LB, when she was lying next to A1C Brierly, in the dark, after midnight, A1C Brierly put her hand on his shorts, over his penis.[192] LB said to A1C Brierly, "I know where you're going, you're married, you have a wife" and "it's not okay."[193] She also told him that he will regret this in the morning.[194] LB told him she needed to leave, but she did not, in fact, leave.[195] All of this indicates A1C Brierly had a reasonable mistake of fact as to consent. Even though LB

[185] R. at 128.
[186] R. at 80, 129.
[187] R. at 130.
[188] R. at 132.
[189] *Id.*
[190] R. at 133.
[191] *Id.*
[192] *Id.*
[193] R. at 134.
[194] *Id.*
[195] *Id.*

was highlighting that what they might be doing was "morally" wrong, a reasonable person could still believe that LB was consenting to sexual activity.

According to LB, A1C Brierly began kissing her. LB did not leave or yell, even though she testified that the walls at the hotel room were so thin that she had heard someone crying in another room.[196] As A1C Brierly kissed LB's neck, LB said to him "Jon, you're married, we can't do this, you're going to hate yourself tomorrow for this," again indicating that morally, their sexual interactions might be a mistake.[197] According to LB, it appeared A1C Brierly did not hear her.[198]

On direct examination, LB left out the fact that A1C Brierly tried to perform oral sex on her.[199] She left this out because it would not make sense for him to be performing oral sex on her if she was claiming she was trapped and could not leave. But she later admitted on cross-examination that he did, in fact, try to perform oral sex on her, and she did not get up to leave.[200] This is evidence that would illustrate A1C Brierly's reasonable mistake of fact.

According to LB, A1C Brierly took off his pants after he had taken off her pants. LB admitted that A1C Brierly did not force her to stay on the bed when this happened.[201] Rather, she chose not to get up out of bed to leave.[202] LB also claimed that A1C Brierly, in his drunken state, pulled her up into a sitting position by grabbing the back of her neck and "stuck his penis in [her] mouth."[203] LB did not turn her head away, push him off her, or keep her mouth shut like she had when he tried to kiss her.[204] Nor did she take any of these actions when he allegedly attempted to

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[196] R. at 134-36, 77.
[197] R. at 135.
[198] *Id.*
[199] R. at 85-86, 136.
[200] R. at 136.
[201] R. at 139.
[202] *Id.*
[203] R. at 86.
[204] R. at 139.

put his penis in her mouth a second time.[205] Within a couple seconds of his penis being in her mouth a second time, he ejaculated.[206] She did not immediately spit it out, but rather held it in her mouth.[207]

LB testified on direct that throughout the sexual encounter with A1C Brierly, she pulled away from him, told him "no" multiple times, told him to stop, and at one point began crying.[208] However, as highlighted above, LB changed her trial testimony to make herself out to be more of a victim. This Court should give more weight to what she told OSI, as was highlighted during her cross-examination. She admitted on cross-examination that many of the statements she claimed to have told A1C Brierly, and that she later explained to OSI, were ones where she was explaining they "shouldn't" engage in sexual activity because A1C Brierly was married—not that she didn't *want* to engage in sexual activity with him. What was likely happening was that instead of saying "no" or "stop" clearly, LB tried to convey to A1C Brierly that any sexual activity between the two of them was morally wrong, and he would regret it in the morning. These kinds of statements explain why A1C Brierly had a reasonable mistake of fact as to consent regarding sexual activity with LB.

4. A1C Brierly communicated a subjective mistake of fact as to consent.

The remainder of events that occurred after A1C Brierly and LB engaged in sexual activity demonstrate A1C Brierly's subjective mistake of fact as to consent.

According to LB, she confronted A1C Brierly about what had occurred.[209] She said, "You

[205] R. at 89.
[206] *Id.*
[207] R. at 141.
[208] R. at 82-83.
[209] R. at 141.

have a fucking wife, I feel disgusting."[210] LB felt like his wife was going to "yell at [her]."[211] A1C Brierly responded, "we fucked up," demonstrating he believed they were two consenting individuals.[212] LB then sat on the bed with A1C Brierly, the person she claimed had just sexually assaulted her, and "zoned out for five minutes."[213]

Once LB left A1C Brierly's room, she grabbed her cigarettes and went downstairs to the hotel patio.[214] On the patio, she saw then-TSgts JD and WL and told them she was upset because she and her girlfriend had gotten into a fight and broke up.[215] LB told them either she was moving out, or her girlfriend was moving out, while LB was TDY.[216] She did not tell either of them that she had just been sexually assaulted or report what had just happened.[217]

A1C Brierly went to the patio; LB did not leave when he showed up.[218] After being on the patio for some time, LB and A1C Brierly both left to go back up to their hotel rooms. On the way to their rooms, they stopped to talk.[219] A1C Brierly again told LB, "[w]e fucked up" and "we don't have to tell anyone."[220] It was LB's impression that A1C Brierly did not think he had done anything wrong, but rather that they "had just hooked up."[221] This is evidence of A1C Brierly's subjective mistake of fact as to consent.

When evaluating LB's entire story of events, it does not make sense that A1C Brierly

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[210] R. at 142.
[211] *Id.*
[212] *Id.*
[213] R. at 144-45.
[214] R. at 92.
[215] R. at 92, 145-46.
[216] R. at 182.
[217] R. at 146.
[218] *Id.*
[219] R. at 147-48.
[220] R. at 148-49.
[221] R. at 149.

engaged in sexual activity with LB without her consent. But even if this Court finds her story could be credible, A1C Brierly was acting under a mistake of fact as to consent. Based on all the different things that occurred between the two of them at dinner and inside A1C Brierly's hotel room, his mistake of fact as to consent was reasonable. The Government did not prove his mistake of fact was unreasonable, and therefore his convictions are factually and legally insufficient.

WHEREFORE, A1C Brierly respectfully requests this Honorable Court set aside the findings for all Charges and their specifications, and the sentence.

II.

AIRMAN FIRST CLASS BRIERLY IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE.

Additional Facts

A1C Brierly's case was docketed with this Court on 9 June 2023. A1C Brierly's record of trial (ROT) is missing a complete copy of PHO Exhibit 7—the audio recording of the open and closed sessions of the Article 32, UCMJ, 10 U.S.C. § 832, hearing. The disc included in A1C Brierly's ROT plays approximately 22 minutes of the beginning of the open sessions of the hearing, but then stops. The audio recording does not capture the complete open sessions of the hearing. Included in the ROT is a memorandum for record, signed by a paralegal, explaining that "a malfunction in [the] audio equipment" resulted in the "full Article 32 audio" not being captured.[222] The audio recording of the closed session (PHO Exhibit 7), where counsel discussed potential Military Rule of Evidence (M.R.E.) 412 evidence for consideration by the PHO, is not contained in the record and appears to not exist at all.[223]

[222] Memorandum of Record, *Incomplete Article 32 Audio*, 4 May 2023, ROT Volume 4.
[223] A1C Brierly's ROT is also missing documentation that A1C Brierly was given an opportunity to respond to the victim's submission of matters. While this is an error, A1C Brierly is not alleging

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*."[224]

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review."[225] Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge.[226] R.C.M. 1112(f) requires attachment of the preliminary hearing report under Article 32, UCMJ. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut.[227]

The threshold question is "whether the omitted material was 'substantial,' either qualitatively or quantitatively."[228] Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness."[229] This Court individually analyzes whether an omission is substantial.[230]

The missing audio recording of A1C Brierly's preliminary hearing is a substantial omission. Because the majority of the preliminary hearing was not recorded, and a transcript of the hearing does not exist, there is no way to determine what was said during the hearing or what

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prejudice because what was presented to the Convening Authority is substantially similar to what LB offered as an impact statement at sentencing.

[224] *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).
[225] *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977).
[226] 10 U.S.C. § 854.
[227] *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted).
[228] *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citation omitted).
[229] *Id*. (citing *United States v. Nelson*, 3 C.M.A. 482 (C.M.A. 1953)).
[230] *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

arguments were made regarding the M.R.E. 412 evidence that was ultimately not considered by the PHO. Since the missing audio recording has been lost and cannot be produced by the legal office, a rebuttable presumption of prejudice is raised.

A1C Brierly cannot receive a complete review of his case by his appellate defense counsel, with the opportunity to raise any and all issues, because his ROT is substantially incomplete. This Court has the power to grant relief "on the basis of the entire record" of trial.[231] The Government failed to comply with R.C.M. 405(j)(5), which requires that the "preliminary hearing [be] recorded by a suitable recording device," and R.C.M. 1112(f).

This Court is well aware of the trend of incomplete records.[232] The issue here is more

[231] Article 66, UCMJ, 10 U.S.C. § 866.

[232] *See United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. 9 Apr. 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. 21 Mar. 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. 19 Mar. 2024) (unpub. op.) (remanding due to record of trial issues); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. 11 Mar. 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. 31 Jan. 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. 18 Jan. 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpub. op.); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App.

egregious than mere lack of attention to detail that can easily be resolved by attaching missing portions of the record. In this case, the audio recording of the preliminary hearing cannot be recovered, and the preliminary hearing report is incomplete. At a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing a complete record of trial.

A1C Brierly has already served his sentence to confinement. The only remedy that will provide meaningful relief to A1C Brierly is disapproval of his punitive discharge.

WHEREFORE, A1C Brierly respectfully requests this Honorable Court disapprove his dishonorable discharge since the preliminary hearing report cannot be produced and his record is incomplete.

Respectfully submitted,

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22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.).

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on 21 May 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** USAF Appellant.	)	No. ACM 40479
	)	21 June 2024

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

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ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE LB WAS NOT A CREDIBLE WITNESS, AND APPELLANT HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

II.

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

STATEMENT OF CASE

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

STATEMENT OF FACTS

LB and Appellant come from a small close-knit unit

Appellant and LB were part of the Air National Guard (ANG) assigned to the engine shop at located at Standiford Field in Louisville, Kentucky. (R. at 42, 48.) Standiford Field is a small base with approximately a dozen buildings. (R. at 43.) The engine shop, where they both worked, has approximately 20 part-time Airmen who show up once a month and 10 full-time Airmen who work together on a daily basis. (Id.)

The Airmen at the engine shop are a "tight knit" unit who know each other well. (R. at 47.) Appellant and LB were part of the full-time crew and would see each other on a daily basis. (R. at 46,48,49.) LB and Appellant would see each other at their commander's call, in the breakroom, and would work together on the flightline. (R. at 48.) LB was not attracted to

Appellant and considered him, like many other co-workers, to be like a brother or a father. (R.at 49.) LB got along well with Appellant; she trusted him and felt safe around him. (Id.) Similarly, Appellant never expressed any attraction to LB. (R. at 50.) LB had previously identified herself as bisexual but at the time of trial identified herself as a lesbian. (R. at 115.)

Appellant and LB were to TDY to Germany

On 15 September 2019, LB, Appellant and several other members from were on temporary duty (TDY) to Germany. (R. at 53.) All TDY members stayed at the same hotel; Appellant and LB's rooms were in close proximity, LB's room was on the left side of an emergency exit, and Appellant's room was on the same floor to right side of the same emergency exit. (R. at 59.) In addition to their rooms, other TDY members were also on the same floor and had rooms in the same hallway. (R. at 67.)

After checking into the hotel, LB, Appellant and approximately eight other co-workers went to a small restaurant. (R. at 61.) While at the restaurant and throughout the evening, LB did not consume alcohol and was considered the "designated driver." (R. at 116.) Appellant and other members of the party consumed alcohol to include a round of shots before leaving the restaurant. (R. at 61-62.)

Technical Sergeat (TSgt) JJ was present at the restaurant and witnessed both Appellant and LB. (R. at 213.) JJ did not notice anything between Appellant and LB that she would consider romantic behavior. (R. at 213-214.) However, she did notice some behavior that JJ would characterize as flirting. (R. at 213.) Technical Sergeant (TSgt) DC was also present at the restaurant with Appellant and LB. (R. at 288-289.) Apart from this TDY, DC had never met either Appellant or LB. (Id.) DC observed LB and believed that she was flirting with Appellant

based on the way she was looking at him, blushed cheeks, and was playing with her hair. (R. at 289.) DC had never before witnessed LB and Appellant interact. (R. at 295-296.)

After returning to the hotel, the party sat in a patio area of the hotel and talked while some members of the party, including Appellant, continued to drink alcohol. (R. at 63, 64.) LB did not drink any alcohol. (R. at 64.) Around midnight, members of the party departed for their respective rooms because some had to work the following day. (R. at 65.) When LB and Appellant returned to their rooms, LB accompanied him to his room to make sure he had water and a trash can nearby. (R. at 66.) When LB entered Appellant's room, Appellant rolled his face into his pillow and asked LB to turn on the television. (R. at 68.) LB was unable to turn on the television and instead suggested that they watch a video or movie on her phone. (Id.) LB was sitting at the foot of the bed when Appellant patted on the bed for her to lie next to him. (R. at 73.) She explained what the video was about and laid down on the bed, holding her phone so both could see. (R. at 68.)

LB laid on the bed between Appellant and the wall. (R. at 74, 75.) The two watched LB's phone for approximately 10 or 15 minutes, during which time there was no physical contact, romantic interaction, or other discussion. (R. at 75-76.) After 10-15 minutes, Appellant started acting like he was tired. (R. at 76.) LB double checked to make sure he had water and then departed Appellant's room and went across the hallway to her room. (Id.)

After returning to her room, LB was sitting at a table in her room when she heard a noise that sounded like someone crying. (R. at 77.) LB opened her door and poked her head out to hear the noise better and noticed that Appellant was also looking outside of his room. (Id.) Appellant stated that this place, the hotel, was "creeping him out" and invited LB to come back into his room to play games. (Id.)

LB returned to Appellant's room with the expectation that she and Appellant would continue watching the video on her phone or play cards. (R. at 78.) When LB entered Appellant's room, the room remained dark and neither she nor Appellant turned on the lights. (R. at 128.) Appellant motioned for LB to sit next to him at the foot of the bed. (Id.) Appellant and LB asked each other about their greatest fears. (R. at 79.) After some additional small talk, Appellant laid back down. (Id.) LB thought about leaving because she assumed Appellant was not feeling well. (Id.) However, Appellant again patted on the bed for LB to lie down next to him. (Id.) LB proceeded to lay down and asked Appellant if he wanted to watch the video again; Appellant did not respond. (Id.) Appellant remained quiet for a few seconds and then resumed small talk about their fears and other little things. (R. at 80.)

LB rebuffed and protested Appellant's sexual advances

At one point, Appellant grabbed LB's hand and placed it on his pants over his groin area, at which point LB could feel his penis through his shorts. (R. at 80.) In response, LB immediately pulled her hand away and told Appellant that was not okay. (R. at 81.) Appellant responded that he did not know what LB meant. (Id.) LB considered that maybe Appellant did not know where he placed his hand and LB just left the matter alone. (Id.) However, Appellant again grabbed LB's hand and placed it on his groin area a second time in the exact same manner. (Id.) In response, LB told Appellant that she needed to leave. (Id.) Appellant told her not to leave. (Id.)

LB proceeded to sit up when Appellant got on top of her with one of his legs on both sides of her legs. (R. at 82.) Appellant's hands were on either side of her arms and head; Appellant then started kissing LB's neck with his lips and attempted to kiss her mouth. (R. at 82.) LB told Appellant no on multiple occasions and started pulling her neck away from

Appellant. (R. at 81-82.) When Appellant tried to kiss LB on the lips, she kept her mouth closed, pulled away, and again told him no. (R. at 83.) At this point LB felt trapped and uncomfortable. (Id.) Appellant next pulled up her shirt and bra with one hand while the other hand was on the bed; he started kissing LB's breasts with his tongue and mouth. (R. at 83-84.)

LB felt frozen and trapped. (R. at 84.) LB loudly told him stop on multiple occasions; she told him that he's married; she tried to beg with him and explained that this was not what he wanted to do. (R. at 84.) Appellant did not stop and instead pulled LB's pants (light jean shorts) down by moving one of his legs to the inside of her legs. (R. at 85.) LB continued telling Appellant no and that he did not want to do this. (R. at 85-86.)

After Appellant removed LB's pants, he removed his own pants, and grabbed LB by the back of her neck and pulled her upwards so that she could sit. (R. at 86.) After pulling her up Appellant stuck his penis in LB's mouth; he also placed one hand on the back of LB's neck to force his penis in her mouth in a repetitive motion. (R. at 86-87.) LB could on remember the exact order of events and indicated that he could have had vaginal sex with her before having oral sex. (R. at 138.) LB also remembered at one point Appellant attempted to perform oral sex on her. (R. at 136.) At no point during this encounter did LB indicate that she wanted Appellant to engage in oral sex with her; nor did Appellant ask LB if his actions were okay. (R. at 86.)

LB felt stuck. (R. at 87.) She did not know how to make Appellant stop. (Id.) She felt like Appellant was not hearing her because she kept saying no but Appellant would not stop. (R. at 87, 165.) Appellant continued forcing his penis into LB's mouth for approximately one minute before he stopped and laid her back down. (R. at 87.) Appellant then placed his legs inside of LB's legs and penetrated her vagina with his penis and continued thrusting his penis inside her vagina for a couple of minutes. (R. at 87-88.)

LB continued telling Appellant no and started to cry. (R. at 88.) LB did not yell because she was afraid of how Appellant would react or if he would become angry. (R. at 162.) When growing up LB had an abusive father, and if she did not listen to him there would be "consequences." (R. at 163.) Instead of stopping Appellant grabbed the back of LB's neck and sat her back up; he then re-inserted his penis in her mouth and within a couple of seconds ejaculated in her mouth. (R. at 88-89.) After ejaculating, Appellant got off of LB and laid back down while LB was able to run to the bathroom to spit out the ejaculant. (R. at 89-90.)

LB returned to the room and quickly put her shorts back on. (R. at 90.) While doing so she told Appellant that she asked him to stop; she told him that she begged him to stop. (Id.) Appellant responded that he did not understand. (Id.) Appellant told LB that she could not leave and stood between her and the door stating that he did not understand what just happened. (Id.) LB felt like she could not leave the room and then went to the corner of the bed by the wall, laid in a fetal position with her knees pulled to her chest and started to cry. (R. at 91.) Appellant responded again by saying that he did not understand and that they "fucked up." (R. at 91.)

LB immediately reports the sexual assault

LB was eventually able to leave Appellant's room and returned to her room. (R. at 92.) LB did not know what to do at that point and was trying to process what had happened. (Id.) She went to the patio of the hotel where she had been before and saw two co-workers. (Id.) The co-workers asked why LB was crying and LB, being afraid to bring up the situation, instead told the co-workers that she had just broken up with her girlfriend. (Id.) Master Sergeant (MSgt) JD was a co-worker and noticed LB's arrival to the patio and later testified that LB appeared upset and a little "teary-eyed." (R. at 182.) MSgt JD also remembered seeing Appellant and opined that he was intoxicated. (R. at 184.)

At some point, while LB was on the patio with her co-workers, Appellant also went to the patio. (R. at 93.) LB opined that Appellant was still drunk and appeared "zoned out." (R. at 146.) When LB departed the patio, Appellant followed her. (R. at 95.) When LB arrived at her floor, Appellant grabbed her arm and said, "Hey, we fucked up. Don't tell anybody." (Id.) Appellant held onto her hand until LB promised that she would not say anything. (Id.) LB would later report to the Air Force Office of Special Investigation (OSI) that she was not sure if he thought that they had "just hooked up or something." (R. at 149.)

When LB returned to her room, she took off the clothing she was wearing and placed it in a drawer in her hotel room. (R. at 95.) She felt violated and did not know what to do. (Id.) LB sat on her bed, pulled her knees to her chest, and cried. (R. at 96.) LB called her mother. (Id.) Crying, she told her mother that something happened that she did not want to happen, but that when she said "no" he would not stop. (R. at 97.) Upon hearing this information, LB's mother told her that she needed to contact someone. (R. at 97.) LB's mother testified that she remembered the call and that LB was "crying hysterically" and that it took several minutes to calm her down so that she could speak. (R. at 189-190.) After describing what happened, LB expressed to her mother that she was upset that she did not fight or hit Appellant – all the things that her mother had taught her to do. (R. at 193.)

After speaking with her mother, LB called her supervisor at her home unit in Kentucky, Senior Master Sergeant retired (SMSgt) JW. (R. at 198.) SMSgt JW remembered the call and described LB's demeanor on the telephone as shaken, upset, and disoriented. (R. at 198.) SMSgt JW suspected that LB was going to report a sexual assault and stopped LB from reporting and reminded her of the options she had to report in terms of "restricted" and "unrestricted" reporting. (R. at 199.)

The following evening, on 16 September 2019, LB went to the hospital to have a rape kit completed. (R. at 103-106, 244-245.) DNA collected and examined from external genital swabs of LB revealed the presence of Appellant's DNA. (R. at 278.) The following morning LB provided a statement to OSI. (R. at 106-107.) Initially LB did not want to report the incident and actually did not at first report Appellant's name. (R. at 151.) She did not want to give his name because she did not believe in someone getting "hated on," especially if they are not guilty. (R. at 154, 170.) During trial, LB explained that she did not mean to express with this statement that Appellant was not guilty of the offenses she described to OSI. (R. at 171.)

ARGUMENTS

I.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT; LB WAS A CREDIBLE WITNESS AND ANY MISTAKE OF FACT WITH REGARD TO CONSENT ON BEHALF OF APPELLANT WAS NOT REASONABLE.

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). .

Law & Analysis

The test for a factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017).

The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). Thus, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

a. LB's initial report of the sexual assault in September 2019 and her in-court testimony, were remarkably consistent considering that over three years had passed since the assault.

Appellant asserts that LB's version of events on the night of the assault "changed dramatically" over the course of the three plus years between the assault and the trial. (App. Br. at 10.) It did not. Common sense suggests that with the passage of time, an individual may forget the details of a sexual assault; however, and in this situation, LB testified that she remembered the sexual advances and her repeated protests that seemingly fell on deaf ears. (R. at 81-82, 83, 85, 86, 88, 165.) Indeed, LB's openness about what she remembers and what she no longer recalls cuts in favor of her credibility because it is not based off a prior statement for the sake of consistency, but rather what she actually remembered.

Appellant's alcohol consumption

Appellant points out that LB initially reported Appellant had consumed six beers over the course of the evening but testified that she did not know how much Appellant had consumed. (R. at 10.) This inconsistency is insignificant, is likely due to the passage of time, and does nothing to diminish LB's credibility. LB was never tasked with monitoring Appellant's or any other member of the group's alcohol intake on the night in question so that fact that she may not

have a perfect memory if it is understandable. The fact that she no longer remembers the number of beers Appellant consumed does not mean that she is lying about the allegation of sexual assault.

Testimony regarding "patting the bed"

Appellant asserts that LB is not a credible witness because she described for the first time on direct examination a situation in which Appellant "coaxed" her into his bed by "patting" it when she first entered his room. (App. Br. 10.) LB did no such thing. She did not testify that Appellant "coaxed" her to lie in his bed. Instead, she testified that she voluntarily sat on his bed and watched a video on her phone with Appellant. (R. at 74, 75.) It is insignificant that Appellant may have "patted" his bed before she voluntarily offered to watch a video with Appellant on his bed.

Testimony regarding leaving the room for the first time

Appellant points out an inconsistency in that LB testified that she wanted to be respectful when Appellant was sleeping so she left his room. (App. Br. at 10.) However, when she reported the incident to OSI over three years earlier she stated that when she was leaving his room for the first time, Appellant would not respond to her questions about turning the lights off etc.; she found his behavior disrespectful and left his room. (Id.) Again, given the fact that more than three years had passed, it is not surprising that LB could not remember exactly what was said before she left the room. However, she consistently testified that she voluntarily left his room, and the fact she does not remember the specific words that were said does nothing to diminish her credibility.

Testimony regarding turning the lights off and text message

Appellant points out that LB could not remember if she turned the lights off before she left the room. (App. Br. at 10.) However, she told OSI that she turned the lights off. (Id.) It is difficult to see the relevance of this testimony or how it impacts her credibility when people commonly forget whether they turn off household items. Similarly, Appellant draws attention to the fact that LB could not recall if sent a text message to Appellant after LB left his room for the first time. (App. Br. at 10.) When confronted with message, LB agreed that she had sent the message. (R. at 124-127.) This is not a "gotcha" moment that undermines LB credibility but again, reflects the passage of time and the fact that sending text messages is something that individuals do every day multiple times.

Position in bed after discussing "biggest fears," appropriateness of being in Appellant's room, and peeing with the bathroom door open

Appellant points out that LB testified that when she entered Appellant's room for the second time, she was in between Appellant and the wall. (App. Br. at 11) She also reported this position to OSI some three years earlier. (R. at 78-80.) However, she also told OSI that at one point Appellant told her that was his side of the bed. (Id.) It is unclear how this is inconsistent or if it is merely incomplete. LB testified that she was on Appellant's bed in between Appellant and the wall. She told the same thing to OSI, however, neglected to testify that Appellant, at one point, switched sides with her because that was his side. It is difficult to see how this damages her credibility or means that she was lying about the sexual assaults merely because she neglected to say that at one point Appellant preferred the side of the bed next to the wall.

Similarly, LB's equivocation about whether it was unprofessional or inappropriate to be in Appellant's room at night does not diminish her credibility as asserted by Appellant. (App. Br. at 11.) Rather, it is indicative of their close-working relationship. LB worked with Appellant

every day and considered him a brother. (R. at 49.) Neither had ever expressed any physical or romantic feelings towards one another. (R. at 50.) In her view, her presence in his room was just two co-workers hanging out together – a platonic relationship. However, objectively, someone unfamiliar with their relationship may perceive it as inappropriate. These facts illuminate LB's testimony and her statement to OSI, that while it may have been appropriate to her, it may be viewed by some as unprofessional. As a result, her testimony and her statement to OSI are not inconsistent and do not diminish her credibility.

Appellant alleges that the fact that LB cannot remember if Appellant kept the door open or closed when he went "pee" is inconsistent with her statement to OSI and diminished her credibility. (App. Br. at 12.) Not so. Like many of these instances of not remembering, this could be simply the result of the passage of time. Trial or defense counsel could have attempted to refresh her recollection. They did not. Had they done so, she may have remembered the door being open. Regardless, her failure to remember this, whether the door was open when Appellant went pee, three years later does not diminish her credibility.

Removal of LB's pants; and order of events

Appellant points to the fact that LB was able to testify as to how Appellant was able to remove her pants but told OSI that this was one of the areas where LB could not remember anything. (App. Br. at 12.) While LB's testimony represents an addition from what she was able to report to OSI, this additional information and discrepancy was raised by trial defense counsel and considered by the finder of fact. (R. at 401.) This additional information does not mean that the findings are factually insufficient or that LB was lying about the sexual assault.

Similarly, Appellant points to the fact that LB could not remember the exact order of events. (App. Br. at 10.) LB testified that Appellant forced his penis in her mouth before he penetrated

her vaginally. (R. at 86-87,89.) And then again placed is penis in her mouth after penetrating her vagina. (Id.) While this represents an addition from what she was able to report to OSI, this additional information and discrepancy were raised by trial defense counsel and considered by the finder of fact. (R. at 401.) While this is additional information, this does not mean that the findings are factually insufficient or that LB was lying about the sexual assault. It could simply reflect that LB had trouble remembering the exact sequence of events due to shock or the passage of time.

Post sexual assault testimony

Appellant points out that LB testified that she felt as though she could not leave Appellant's room after the sexual assault because Appellant was standing between her and the door; but on cross examination testified that Appellant said, "don't leave;" and when reporting the event to OSI, she reported that Appellant said "Here, come sit down." (App. Br. at 12.) These subtle changes in her testimony are just that – subtle changes – that do not contradict the common thread in her testimony – that she wanted to leave but felt compelled to stay and speak with Appellant at his request. Based on her testimony, Appellant could hear her say no on multiple occasions during the sexual assault. (R. at 81-82, 83, 85, 86, 88, 165.) Therefore, it makes sense that Appellant would not want her to leave until Appellant knew that she was "okay" with what had just transpired, and she did not feel like a rape victim.

Appellant makes a big deal out of the fact that LB testified that she was crying on Appellant's bed but told OSI that she just sat on the bed and "zoned out." (App. Br. at 13.) The significant of this discrepancy is undercut by the fact that other witnesses testified that she cried or appeared to have cried immediately after the sexual assault. Her mother testified that LB was crying hysterically when she called after the sexual assault. (R. at 189-190.) MSgt JD also

noticed that upon LB's arrival to the patio (immediately after the sexual assault) LB appeared upset and a little "teary-eyed." (R. at 182.) Therefore, regardless of whether LB cried on Appellant's bed or shortly thereafter is of little significance and does little to diminish her credibility.

Similarly, Appellant is concerned that LB testified that Appellant grabbed her arm when she was leaving the hotel's outdoor patio, but never mentioned this arm grab to OSI. (App. Br. at 13.) Whether Appellant grabbed her arm is of little significance and does nothing to diminish her credibility. Moreover, the circumstances under which Appellant made LB promise not to tell anyone – "held her hand" versus "shaking on it" are of little significance. (App. Br. at 13.) The consistency is that Appellant wanted an assurance from LB that she would not report the sexual activity. As a result, the description of how Appellant held her hand, does not undercut LB's credibility. Nor does the fact that LB did not immediately confront Appellant with his crime and said, "it's whatever." (App. Br. at 13.) Appellant did not listen when LB told him to stop having sexual intercourse with her. (R. at 81-82, 83, 85, 86, 88, 165.) There was no benefit to confronting him; and to do so would have only aggravated the situation because it likely would have resulted in an argument in which Appellant tried to gaslight LB into believing she was a willing participant. Therefore, LB describing the sexual conduct as "whatever" to Appellant was reasonable under the circumstance and did not diminish her credibility.

That LB could not remember the specifics of her breakup with her girlfriend does not undercut her credibility. (App. Br. at 13.) The breakup happened over three years earlier and there was no attempt by either counsel to try to refresh LB's recollection with a prior statement. That she did not remember the details is not indictive of an improper motive and does not diminish her credibility.

Lastly, Appellant assigns significant to the statement LB made to OSI, "I don't believe in somebody getting hated on, especially if they're not guilty." (App. Br. at 14.) However, LB was able to explain this statement on re-direct and testified that it did not indicate that either sexual assault did not occur or that she did not want Appellant to be held accountable for his actions. (R. at 171.)

Appellant acknowledges that all the inconsistencies are small. (App. Br. at 14.) However, Appellant suggests that if there are enough small changes to one's story that these small changes somehow transform into something larger. (Id.) Appellant fails to apply common sense and consider the fact that these minor changes are largely explained by the over three years that it took this case to proceed to trial. It would have been potentially more concerning had LB remembered every detail, i.e. how many beers Appellant had; whether she turned the lights off; whether the door was open or closed, or open halfway when Appellant was peeing; and, whether the promise not to tell was preceded by a "handshake" or a "grab." LB's inability to remember these minor details underscores her credibility, because it is evidence she was not testifying from a written or recorded document but rather to what she remembered.

Appellant puts weight in the fact that the preliminary hearing review officer was a military judge and recommended that all charges and specification be dismissed. (App. Br. at 14.) However, in a legal and factual sufficiency review, this Court can only consider evidence introduced on the mertis. Therefore, the preliminary hearing officer's opinion is irrelevant.

LB had little motive to fabricate

Appellant asserts that LB had a motive to fabricate the sexual assault so as to eliminate a "cognitive dissonance;" it was easier to be victim of sexual assault than to swallow the truth of having sex with a married man. (App. Br. at 16.) This theory was fully developed at trial by

defense counsel through the use of expert testimony and rejected by the finder of fact. (R. at 331-335.) The theory that LB contrived this entire event is not persuasive. There was no significant lapse in time between the sexual assault and efforts to report it and therefore little time to fabricate a story. LB immediately called her mother and her supervisor. (R. at 96-98, 198.) LB would have no reason to fabricate a story to her mother who was on another continent and would not otherwise learn of the incident. LB also went to the hospital for a rape exam and spoke to OSI the day following the sexual assault. (R. at 103-107.) This is not the case where LB pondered her options for months and contrived a story to defeat the cognitive dissonance of being a good person but yet sleeping with a married man. Instead, she took no time and reported the sexual assault almost immediately after it happened.

The cognitive dissonance theory is also unpersuasive because it suggests that LB made up the sexual assault so that LB could continue to see herself in accordance with her values. (App. Br. at 16.) However, making a false allegation would likely result in a greater dissonance and a greater departure from her values because she would be wrongly subjecting a fellow co-worker - someone she viewed as a brother – to criminal liability. In addition, reporting the sexual assault would also have far-reaching negative consequences on Appellant's wife, an individual LB described as a "sweet person." (R. at 113, 142.) It would have been far easier for LB to accept the fact that she and Appellant just made a mutual mistake and not tell anyone about the sexual encounter. As a result, the cognitive dissonance theory was unpersuasive appropriately rejected by the finder of fact.

Appellant also asserts that LB's girlfriend and mother also provided her with a motive to fabricate. (R. at 17-18.) That a victim of sexual assault may have another romantic partner is a relevant factor to consider because it may in some cases provide the victim with a motive to

fabricate. The fact that LB had a girlfriend and that they broke up shortly after the sexual assault is something that was considered and rejected by the finder of fact. (R. at 404-405.) As for Appellant's mother, Appellant argues that once LB told her mother of the sexual assault, LB felt compelled to continue with the allegation. (R. at 18.) This is the same argument is also unpersuasive because it could be said about any victim of sexual assault who makes an unrestricted report. As a result, it does not diminish the sufficiency of Appellant's conviction.

LB's version of events was physically possible

Appellant asserts that LB's version of events was physically impossible given the level of Appellant's intoxication. (App. Br. at 18.) Not so. While Appellant was intoxicated, he was able to return to his room after the group returned from dinner. (R. at 66, 68.) He was able to watch a video with LB on her phone. (R. at 75-77.) And, he was alert enough, that when there was a noise in the hallway, he was able to get out of bed and poke his head in the hallway to inspect. (R. at 77.) Additionally, after the sexual assault, he was able to return to the patio, with no assistance and continued socializing with his co-workers. (R. at 93.) These facts demonstrate that while Appellant may have been intoxicated, he was lucid enough to move around and perform complex tasks. There is no evidence that Appellant was intoxicated to the state where he could not move or did not understand his surroundings. The evidence, therefore, supported a finding that Appellant was able to execute the assault in the manner describe by LB.

Appellant's intoxication likely played a more insidious role. LB knew Appellant was intoxicated, and he did not listen to her when she repeatedly told him to stop. (R. at 81-82, 83, 85, 86, 88, 165.) In doing so, Appellant demonstrated to LB that he was not the person she was familiar with and gave her a reason to fear him. If Appellant would not listen to her protests, there would be no telling what action he would have taken had she provided more physical

resistance. As a result, Appellant's intoxication did not prevent him from executing the sexual assault, and it also provided an explanation for LB's behavior. It does not diminish the factual sufficiency of his conviction, and a rational trier of fact could have found all elements beyond a reasonable doubt.

LB's reputation and character

Appellant asserts that LB's character for exaggerating, stretching the truth, and attention seeking call into question her credibility as a witness. (App. Br. at 20-21.) While these attributes have some impact on her credibility, no witness testified that LB had a poor reputation for truthfulness. At most, the reputation extended to exaggeration of the truth and attention seeking. (R. at 307, 314, 325-326.) As a result, this character evidence is a far cry from supporting a finding that LB made up her version of events or lied on the stand. This character evidence does not diminish the factual sufficiency of Appellant's conviction, and a rational trier of fact could have found all elements beyond a reasonable doubt.

In sum, LB's version of events on the night of the assault changed little over the course of the three plus years between the assault and the trial. Appellant even acknowledged that these changes were small. Most, if not all, the points raised by Appellant were fully developed at trial and rejected by the finder of fact. This is largely due to the fact that while some factors may have diminish LB's credibility, these same factors are not unique to this allegation, but are instead common to allegations of sexual assault between Airmen co-workers. The military judge had the opportunity to observe LB's testimony and evaluate all impeachment evidence; the judge still found her credible. As a result, any rational trier of fact could have found all elements beyond a reasonable and this Court should be convinced of appellant's guilt beyond a reasonable doubt. Accordingly, this Court should affirm Appellant's conviction.

b. Appellant did not have a reasonable mistake of fact with respect to consent.

Appellant asserts that he had a reasonable mistake of fact that LB consented to sexual activity. (App. Br. at 21.) However, any belief that LB was consenting to sexual activity while begging for Appellant to stop was unreasonable. (R. at 90.)

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." Id. Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to sexual assault and abusive sexual contact. *See* e.g., United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (as a defense to a charge of sexual assault). Once raised, the Government bears "the burden of proving beyond a reasonable doubt that the defense did not exist." R.C.M. 916(b)(1).

Here, there is little evidence that supported a finding that Appellant had a reasonable mistake of fact that LB was consenting to the sexual activity. Appellant asserts LB was flirting with Appellant at dinner. (App. Br. at 21.) This evidence is not compelling and was considered and rejected by the finder of fact. (R. at 405.) It consisted, in part, of a witness, who had never met LB or Appellant, who opined that LB was flirting based on the way she was looking at him, blushed cheeks, and playing with her hair. (R. at 289, 295-296.) There was no evidence that LB verbally expressed any romantic interest in Appellant or that they ever held hands, kissed, or made a modicum of contact indicative of a sexual interest in one another. This lack of affection towards one another is not surprising because while LB and Appellant had worked together on a

daily basis, and there was no evidence offered that they ever expressed any previous romantic interest in one another. (R. at 48-50.) Moreover, the witness who described this flirting conduct could have easily gotten it wrong. This TDY was the first time he met LB and Appellant and as a result had nothing to measure her behavior with. (R. at 295-296.) What he observed as flirting behavior from LB may have been her normal behavior and not flirting at all. As a result, the alleged "flirting" at the restaurant does not support a reasonable mistake of fact with regard to consent. Even so, flirtatious behavior from someone alone does not make it reasonable to automatically believe that person wants to escalate the conduct to sexual contact or intercourse.

LB's trips to Appellant's room similarly do not support a reasonable mistake of fact. She considered Appellant like a brother and wanted to make sure that he was situated in his room due to his intoxication. (R. at 49-66.) When she remained in his room, they watched a video during which time there was zero physical contact between the two. (R. at 75-76.) When LB later returned to Appellant's room any belief that LB was consenting was quickly obviated when LB protested. (R. at 81-82, 83, 85, 86, 88, 165.)

Appellant points out that LB's initial objection to the sexual activity was primarily on moral grounds. (App. Br. at 23-24.) She initially told him it was not okay and that he would regret it in the morning and that he was married. (R. at 134.) However, LB quickly increased the frequency and gravity of her protests; she told him no multiple times and at one point began crying. (R. at 82-83.) Appellant seems to acknowledge that the repeated protests and the crying would eliminate any reasonable mistake of fact. (App. Br. at 25.) Appellant's mistake of fact defense is therefore predicated on the finder of fact not finding LB's testimony credible but rather giving more weight to the statements LB made to OSI as revealed on cross examination. (Id.) Appellant asserts that LB changed her testimony to make herself out to be more of a victim.

(Id.) However, LB was subjected to a robust cross examination, and all these matters were raised before the finder of fact. (R. at 111-172.) Indeed, Appellant has raised no evidence or issue that has not already been considered by the finder of fact. The finder of fact has the duty to determine the credibility of the witnesses. United States v. Damatta-Olivera, 37 M.J. 474, 477 (C.A.A.F. 1993). And in this case the finder of fact determined that LB's testimony was credible and therefore, as a result no reasonable mistake of fact could have existed in light LB's repeated protests and crying during the assault.

Appellant points to the statements made after the sexual assault and asserts they support his mistake of fact as to consent defense. (App. Br. 25-26.) They do not. Instead, these statements supported a finding that Appellant had just sexually assaulted LB. LB's first statement after the sexual assault, "you have a fucking wife, I feel disgusting," is not indicative of consensual sexual encounter. (R. at 142.) It is the exact opposite of what one would expect after a consensual sexual encounter and consistent with her testimony that she was protesting throughout the assault.

Appellant's assertion after the sexual assault, "we fucked up" and his quest to win LB's silence are also not indicative of a consensual sexual encounter. (R. at 142.) Instead, it is evidence that Appellant is trying to "gaslight" an emotional LB into believing that she was a willing participant in the sexual activity despite the crying and the protests to the contrary. That LB was emotional or crying is corroborated by the witness who saw her return to the hotel patio after the assault and described her as teary-eyed. (R. at 182.) That Appellant was trying to make LB believe she was a willing participant is further evidenced by the fact that Appellant followed LB in the middle of the night to the patio, for no other reason, other than to convey to her that they had "fucked up," a sentiment that he had just conveyed, and that they could not tell anyone.

(R. at 149.) In fact, Appellant held onto LB's hand until LB promised that she would not say anything. (R. at 95.) Had this truly been a consensual encounter, Appellant could have easily waited until the following day or texted LB to tell her not to say anything – it was the middle of the night, and it would have been extraordinary for LB to contact Appellant's wife to tell her of the sexual encounter. In other words, Appellant had no reason to immediately fear LB would disclose the sex to his wife or to anyone for that matter.

What is more likely, is that Appellant needed LB, not only to agree not to tell anyone, but more importantly he needed her to agree that "we" fucked up and that she considered herself a willing participant in the sexual activity. That Appellant needed to confirm this fact, which is a given in a consensual encounter, is evidence that Appellant knew that LB was not consenting to the sexual activity. As a result, there was no reasonable mistake of fact that LB was consenting, and a rational trier of fact could have found all elements beyond a reasonable doubt.

In sum, while some evidence presented could suggest that Appellant subjectively believed LB's consented to the sexual activity, this belief was not reasonable. The two had worked together on daily basis and there was no evidence that either had ever expressed any sexual or romantic feelings for the other. While there is some scant evidence of flirting, even if true, this behavior is not sufficient to support a finding that LB consented to the sexual activity – especially given her repeated protests during the sexual assault itself. As a result, any rational trier of fact could have found all elements beyond a reasonable, and this Court should be convinced of appellant's guilt beyond a reasonable doubt. Accordingly, this Court should affirm Appellant's conviction.

II.

THE OMISSION OF THE AUDIO RECORDING OF THE OPENED AND CLOSED SESSIONS OF THE ARTICLE 32 HEARING IS NOT A SUBSTANTIAL OMISSION AND DOES NOT RAISE A PRESUMPTION OF PREJUDICE.

Additional Facts

On 12 May 2022, Appellant and trial counsel participated in a preliminary hearing conducted under Article 32, UCMJ. (*Preliminary Hearing Officer's Report*, 20 May 2022, ROT, Vol. 4 at 1.) The hearing was recorded by trial counsel using a handheld recording device. (Id. at 2.) Trial counsel learned after the conclusion of the hearing that the batteries in the recording device had died near the end of the hearing, leaving the closing arguments by counsel unrecorded. (Id.) In total, 22 minutes of the preliminary hearing were successfully recorded. (Id. at Ex. 7.)

Defense counsel had access to all exhibits considered by the preliminary hearing officer (PHO) including the following:

a. Charge Sheet, 5 May 2022
b. OSI Report of Investigation (ROI), 26 March 2020
c. OSI Interview of LB, 17 September 2019
d. Time Hacks for PHO Exhibit 3, 11 May 2022
e. PHO Scheduling Memo, 5 May 2022
f. Hearing Recording (audio recording)

(Id. at 8.)

No witnesses testified during the hearing. (Id.) The PHO recommended that all charges and specifications be withdrawn and dismissed. (Id. at 8.) Defense counsel did not object to the incomplete recording during or after the preliminary hearing or at trial.

Standard of Review

Whether the record of trial (ROT) is incomplete is a question of law that the Court reviews de novo. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2). 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. Henry, 53 M.J. at 111 (*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. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citations omitted).

Analysis

The omission of the concluding portions of the preliminary hearing recording was not a substantial omission to the record of trial and does not raise a presumption of prejudice. Appellant failed to raise this objection to the report when it was issued or with the military judge when the Appellant was arraigned. This is not the case where Appellant only just discovered the omission when he received the record of trial. That the recording was incomplete was part of the preliminary hearing officer's report and could have been raised at that time with the preliminary hearing officer or before the military judge. By failing to object to the preliminary hearing

Appellant has forfeited the objection and now bears the burden of establishing that its omission resulted in plain error. R.C.M. 905 provides:

> (b) Any defense, objection, or request which is capable of determination without the trial of the general issue of guilty may be raised before trial. The following *must* be raised before trial.
>
> > (1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding or referral of charges, *or in the preliminary hearin*g.

R.C.M. 905(b)(1) (emphasis added).

Appellant's failure to raise this objection before trial has resulted in his forfeiture of the objection. *See* R.C.M. 905(e)(1). Forfeiture is the passive abandonment of a right by neglecting to preserve an objection and results in a plain error analysis. United States v. Davis, 76 M.J. 224, 227 (C.A.A.F. 2017). Under a plain error analysis, an Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the Appellant. Id. at 225. Appellant has failed to discharge his burden.

Here, the failure to record the preliminary hearing represented an error because a preliminary hearing shall be recorded with a suitable recording device. Article 32(e) A complete record of the preliminary hearing is also required to be attached to the record of trial. R.C. M. 112(f). However, in this case, Appellant has failed to demonstrate any resulting prejudice from the omission of the recording or even how its omission from the record of trial is substantial. Appellant states that there is no way to know what the preliminary officer considered. (App. Br. at 28.) Yet, this is not the case because the preliminary officer listed all the evidence he considered; and, all such evidence was attached to his report. *Preliminary Hearing Officer's Report,* 20 May 2022, ROT, Vol. 4 at 7.)

Appellant points out the loss of the arguments made by counsel. (App. Br. at 29.) However, arguments are not evidence and failure to record the hearing did not result in any loss of evidence. This is because there was no witness testimony, sworn or unsworn at the preliminary hearing. (Id. at 8.) Since there were no witnesses who testified at the hearing it is difficult to imagine how a complete recording would represent anything other than an "empty shell" or *pro forma* exhibit to the report that would have absolutely no bearing on Appellant's case. This is not the case where the victim or the accused provided statements that could be further used at trial that were irretrievably lost. Instead, there was no new or additional evidence generated at the hearing. Therefore, Appellant and this Court have access to all the evidence relied upon by the investigating officer and the ability to conduct a complete review of the case.

If Appellant suffered any true prejudice in preparing for trial from the unrecorded audio of from the Article 32 hearing, he could and should have raised that issue at trial. He did not. As a result, the Appellant has failed to demonstrate how the omission of the recording resulted in any prejudice now or even how its omission was substantial.

Appellant attempts to invoke other cases in the Air Force with incomplete records. (App. Br. at 29-30.) But as Appellant seems to acknowledge, this situation is different. (Id.) This is not a case of the base negligently forgetting to include an exhibit or other portion of the record. Here, the base could not include the recording, because it had never existed in the first place. A malfunction in this audio equipment at an Article 32 hearing is a fluke occurrence that does not entitle Appellant to any relief where he has shown no prejudice.

In sum, the missing portion of the recording did not represent a substantial omission of the record of trial. The failure to record arguments by counsel was based on simple negligence and did not result in the loss of any evidence because no testimony was offered at the hearing.

Appellant failed to object at the conclusion of the hearing or with the militaiy judge and suffered no prejudice because the investigating officer recommended dismissal of all charges and specification. Accordingly, this Comi should deny this assignment of enor.

CONCLUSION

The United States respectfully requests this Honorable Comi deny Appellant's claims and affinn the sentence in this case.

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I ce1iify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 21 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME TO FILE REPLY BRIEF** Before Panel No. 2 No. ACM 40479 22 June 2024

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

Pursuant to Rule 23.3(m)(1), (m)(6), and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) out of time to file a reply to the Government Answer, filed on 21 June 2024. Appellant requests an enlargement for a period of five days, which will end on **3 July 2024**. The record of trial was docketed with this Court on 9 June 2023. From the date of docketing to the present date, 379 days have elapsed. On the date requested, 390 days will have elapsed.

On 16-17 January 2023, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Contrary to his pleas, the military judge found Appellant guilty of two specifications of abusive sexual contact and two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2018), and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018). R. at 413; Entry of Judgment (EOJ), dated 22 February 2023. The military judge sentenced Appellant to 15

months' confinement, reduction to the grade of E-1, and a dishonorable discharge. R. at 454; EOJ. The convening authority took no action on the findings and the sentence. Convening Authority Decision on Action – *United States v. Airman First Class Jonathan L. Brierly*, dated 14 February 2023.

The record of trial is 6 volumes consisting of 8 prosecution exhibits, 16 defense exhibits, 24 appellate exhibits, and 1 court exhibit; the transcript is 455 pages. Appellant is no longer confined.

Counsel filed this EOT the day following receipt of the Answer. Maj Crouch, Appellant's counsel up to this point, will be and unable to complete the reply. Until yesterday evening, it was anticipated that Maj Crouch would complete the reply, but that is no longer possible. This constitutes good cause for the out-of-time filing.

Undersigned counsel currently represents 18 clients and is presently assigned 4 cases pending brief before this Court. This will become counsel's highest priority case. The additional time is required because undersigned counsel will need additional time with the record in order to reply, as counsel has not previously reviewed the record. Undersigned counsel is generally familiar with the briefing in this case and will be able to complete the review and coordinate with Appellant on a reply with the additional time requested. Given the number of issues briefed and the length of the record, this is feasible. For these reasons, this enlargement of time is both necessary and reasonable.

Appellant was advised of undersigned counsel's potential participation in this case, agrees to undersigned counsel completing the reply brief, understands his right to speedy appellate review, and concurs with this specific enlargement of time. Through no fault of Appellant, undersigned counsel will require additional time to complete the reply brief.

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

Respectfully submitted,

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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 22 June 2024.

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25 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JONATHAN L. BRIERLY, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME – OUT OF TIME ACM 40479 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Airman First Class (E-3) **JONATHAN L. BRIERLY,** United States Air Force, *Appellant.*	)	No. ACM 40479 1 July 2024

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

Appellant, Airman First Class (A1C) Jonathan L. Brierly, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 21 June 2024 (Ans.). In addition to the arguments in his opening brief, filed on 21 May 2024 (App. Br.), A1C Brierly submits the following arguments.

I.

AIRMAN FIRST CLASS BRIERLY'S CONVICTIONS ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE LB WAS NOT A CREDIBLE WITNESS, AND AIRMAN FIRST CLASS BRIERLY HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

1. During the three years between the allegation and the court-martial, LB made her story more compelling.

LB interviewed with Air Force Office of Special Investigations (OSI) within two days of the incident. (R. at 106.) The opening brief pointed out the yawning gap between her initial statement and her testimony at the court-martial three and a half years later. (App. Br. at 10–14.) The Government explains these testimonial

deviations as follows: "Common sense suggests that with the passage of time, an individual may forget the details of a sexual assault." (Ans. at 10.) This is an unremarkable statement with which A1C Brierly agrees. But it misses the point of his argument in the opening brief. It was not just that LB forgot details. That is perhaps expected. It is that her story got stronger and more detrimental to A1C Brierly—through her modifications, additions, and subtractions—between the time of the interview and the time of the court-martial. What happened in between? At least one meaningful event: the preliminary hearing officer determined the charges should not go to court-martial. And by 2023, a more powerful version of events emerged. This Court should view her shifting story as fatal to her credibility, which is the linchpin of the conviction.

A targeted review of some of the changes illustrates the point. To OSI, LB said that her response to the incident was to sit "zoned out" for about five minutes. (R. at 145.) At trial, she said she was sitting in the fetal position crying. (R. at 91, 145.) She also had no idea how her pants came off when talking to OSI, but knew years later. (R. at 137.) Or how she came up with a second instance where A1C Brierly allegedly penetrated her mouth with his penis, despite telling OSI it was only once. (R. at 137–38.) Or that she claimed at trial that after the incident A1C Brierly said she could not leave and blocked the door, but to OSI said that he only asked her to sit down next to him. (R. at 90, 142–44.) Or the addition that A1C Brierly grabbed LB's arm when she was leaving the patio, while she told OSI he only grabbed her hand to shake hands. (R. at 147–48, 150.) Each of these additions makes the story seem

worse. And that matters. "Common sense" does not suggest that the passage of time would add new and potent details to a complaining witness's story.

2. A1C Brierly's mistake of fact was reasonable.

The shifting sands of LB's story also matter for the mistake of fact defense. If this Court is troubled by her evolving story, it should consider how the mistake of fact defense would look absent these embellishments. As even LB stated, it seemed as though A1C Brierly believed he had done nothing wrong and they just hooked up. (R. at 149.) Yet that impression is at odds with the additional evidence she provided *after* her OSI interview, and after an adverse preliminary hearing recommendation. The person who seemed like he thought he had done nothing wrong does not block doorways or grab arms. And it would be hard to for A1C Brierly to ignore if LB was lying on the ground crying in the fetal position. This Court should not credit this new evidence and should evaluate the reasonableness of A1C Brierly's belief without the questionable additions to LB's testimony. *See, e.g.*, *United States v. Horne*, No. ACM 39717, 2021 CCA LEXIS 261, at *126–28 (A.F. Ct. Crim. App. 27 May 2021) (unpublished) (Johnson, C.J., dissenting) (considering the victim's credibility issues when assessing a mistake-of-fact defense).

Additionally, the Government minimizes the fact that a witness observed LB flirting with A1C Brierly before she went to his room twice, alone, late at night. (Ans. at 19.) It dismissively states the witness "could have easily gotten it wrong." (Ans. at 20.) But inconvenient evidence is not so easily discarded. This Court should weigh this behavior when evaluating LB's credibility—she denied ever flirting with

A1C Brierly—and when considering whether A1C Brierly's mistake of fact was reasonable. (R. at 114.)

3. This Court does not yield to the factfinder's determination.

"In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quotation marks and citations omitted). This well-established principle provides this Court with the latitude, and the duty, to evaluate the strength of the evidence presented. But, curiously, the Government repeatedly asks this Court to defer to the finder of fact. This Court should not. Courts of criminal appeals deal only in convicted offenses. *See generally* Article 66, UCMJ, 10 U.S.C. § 866. If every evidentiary weakness could be swept away by saying a factfinder considered it, what role is there for this Court?

Yet time and again the Government repeats this mantra that a finder of fact considered certain evidence. (Ans. at 12 ("While LB's testimony represents an addition from what she was able to report to OSI, this additional information and discrepancy was raised by trial defense counsel and considered by the finder of fact."), 13 (virtually the same), 15–16 (claiming the theory that cognitive dissonance explains LB's reaction was "fully developed at trial by defense counsel through the use of expert testimony and rejected by the finder of fact"), 16 (similar), 17 ("The fact that LB had a girlfriend and that they broke up shortly after the sexual assault is

something that was considered and rejected by the finder of fact."), 18 ("Most, if not all, the points raised by Appellant were fully developed at trial and rejected by the finder of fact."), 19 (regarding flirting at dinner, stating that this "evidence is not compelling and was considered and rejected by the finder of fact").) This Court should take a "fresh, impartial look" and not simply defer to what happened at trial. Things go wrong in courts-martial, which is why we have appeals.

The most concerning of the Government's such references relates to LB's credibility and the mistake of fact. The Government argues that the mistake of fact defense is "predicated on the finder of fact not finding LB's testimony credible," and "in this case the finder of fact determined that LB's testimony was credible and therefore, as a result no reasonable mistake of fact could have existed in light of LB's repeated protests and crying during the assault." (Ans. at 20–21.) Again, this position diminishes this Court's role and suggests that a factfinder's credibility determination, however wrong, is unassailable.

4. Conclusion

This Court reviews factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Applying this standard of review, this Court should not be convinced beyond a reasonable doubt of A1C Brierly's guilt. Additionally, given LB's credibility problems and evolving story, no reasonable factfinder could conclude A1C Brierly is guilty beyond a reasonable doubt. This Court should thus find each conviction factually and legally insufficient.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings for all charges and their specifications, and the sentence.

II.

AIRMAN FIRST CLASS BRIERLY IS ENTITLED TO SENTENCE RELIEF BECAUSE HIS RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE.

This Court has frequently and repeatedly remanded cases due to incomplete records of trial. (*See* App. Br. at 29 n.232.) When so doing, this Court has often cited the rule that "[a] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *See, e.g.*, *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115, at *4 (A.F. Ct. Crim. App. 19 Mar. 2024) (unpublished) (quoting *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000)). But here the Government attempts to turn the tables on A1C Brierly, claiming he forfeited the issue, and thus bears the burden on prejudice, because he failed to raise the issue before trial. (Ans. at 24–25.) The citation for this argument is to R.C.M. 905 on forfeiture of defects in the preliminary hearing. (Ans. at 25.) Notably, of the dozens of cases from this Court addressing record completion, the Government could not cite a single case in which the Court has reviewed record completion through the lens of plain error. This is not the case to start.

This Court should conclude the missing audio is a substantial omission and that the Government has failed to rebut the presumption of prejudice.

WHEREFORE, A1C Brierly respectfully requests this Honorable Court disapprove his dishonorable discharge since the preliminary hearing report cannot be produced and his record is incomplete.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 July 2024.

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