UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Justin COUTY	)	
Cadet	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

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. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 11 August 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 his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 October 2023**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

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

GRANTED
15 Aug 2023

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 August 2023.

Respectfully submitted,

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

14 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 11 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 his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 November 2023**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a [illegible], 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening [illegible]ok no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

GRANTED
12 Oct 2023

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 October 2023.

Respectfully submitted,

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

12 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 9 November 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 his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 December 2023**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a [illegible] months of confinement, total forfeitures, and a reprimand. R. at 868. The convening [illegible]k no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

GRANTED
16 NOV 2023

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 8 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 January 2024**.[1] The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to

GRANTED
11 DEC 2023

[1] In a previous filing submitted on 7 December 2023, the motion indicated that the period of enlargement would end on 16 January 2023. This motion corrects the year of that date to 2024.

a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 18 cases; 13 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Smith*. Oral argument is scheduled for 16 January 2023. Undersigned counsel has begun to prepare for oral argument. In addition, four cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel has reviewed the unsealed transcript and exhibits and is conducting legal research.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is reviewing the record of trial.

3) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages.

4) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages.

5) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages.

6) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

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

8 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 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
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 9 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 11th day of January, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 February 2024**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FIFTH)**
	)	
v.	)	Before Panel No. 3
	)	
Air Force Cadet	)	No. ACM 40484
JUSTIN COUTY,	)	
United States Air Force	)	9 January 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 February 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 18 cases; 13 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Smith*. Oral argument is scheduled for 16 January 2023. Undersigned counsel has begun to prepare for oral argument. In addition, four cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel has reviewed the sealed and unsealed transcript and exhibits and is conducting legal research.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is presently reviewing the record of trial.
3) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages.

4) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages.

5) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages.

6) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 January 2024.

Respectfully submitted,

[redacted]

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

11 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 5 February 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 March 2024**. The record of trial was docketed with this Court on 20 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 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening ty took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

GRANTED
7 FEB 2024

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 19 cases; 16 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Six cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel is drafting his initial assignment of errors, which will be filed on 7 February 2024.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages.
3) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is presently reviewing the record of trial.
4) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages.

5) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages.

6) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

6 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 February 2024.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME(SEVENTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 6 March 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 April 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a [illegible]al, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening [illegible]ook no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

GRANTED
8 MAR 2024

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Five cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel filed an AOE in this case on 7 February 2024. The Government's answer is due on 8 March 2024, with any reply by this appellant due on 15 March 2024. This appellant is currently confined.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned counsel has reviewed the sealed and unsealed record, identified various issues, and has begun research on those issues. This appellant is not currently confined.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. On 21 February 2024, undersigned counsel filed a consent motion to

review sealed materials. Undersigned counsel has not yet reviewed the record in this case. This appellant is currently confined.

4) *United States v. Thomas*, ACM 40418 – The record of trial is six volumes, consisting of six prosecution exhibits, 16 defense exhibits, and 50 appellate exhibits; the transcript is 746 pages. Undersigned counsel has reviewed the unsealed record and identified several issues. This appellant is not currently confined.

5) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. This appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

8 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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 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 our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY,	)	
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 5 April 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government 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 8th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 May 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 THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 5 April 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 May 2024**. The record of trial was docketed with this Court on 20 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 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 17 cases; 12 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned and civilian co-counsel are conducting research in preparation of a petition and corresponding supplement.

Additionally, the following cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes, consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel has completed an initial AOE and reply brief. This Court granted appellant's request for oral argument, which is scheduled for 25 April 2024. Undersigned counsel is preparing for that argument. This appellant is currently confined.
2) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned counsel and civilian co-counsel completed appellant's assignment of errors and filed the same today, 5 April 2024. The Government's response will be due on 6 May 2024, with any reply being due on 13 May 2024. This appellant is not currently confined.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript

is 730 pages. On 21 February 2024, undersigned counsel filed a consent motion to review sealed materials. Undersigned counsel has not yet reviewed the record in this case. This appellant is currently confined.

4) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. This appellant is currently confined.

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

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

Respectfully submitted,

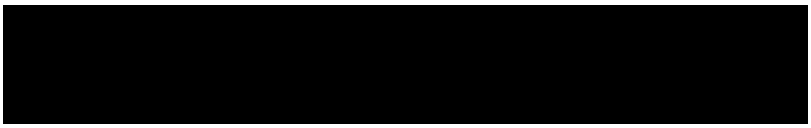
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



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

5 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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.

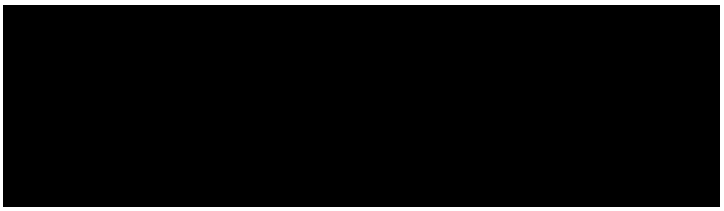
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days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

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

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

CERTIFICATE OF FILING AND SERVICE

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



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 3 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) 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 7th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 June 2024**.

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

Appellant's counsel should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits.

Appellant's counsel are advised that any requests for future enlargements of time may necessitate a status conference prior to the court taking action on any forthcoming request.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 3 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 June 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 318 days have elapsed. On the date requested, 360 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 23 cases; 17 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Knodel*. Undersigned and civilian co-counsel are drafting a petition and corresponding supplement.

Additionally, the following cases before this Court have priority over the instant case:

1) *United States v. Logan*, ACM 40407 – The record of trial is seven volumes, consisting of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the transcript is 657 pages. Undersigned counsel and civilian co-counsel filed an assignment of errors on 5 April 2024. The Government's answer will be due on 6 May 2024, with any reply being due on 13 May 2024. This appellant is not currently confined.
2) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel has completed his review and is drafting assignments of error. This appellant is currently confined.
3) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 appeal. The Government's initial brief is due on 6 May 2024, with this appellee's answer being due on 27 May 2024. Undersigned counsel has completed an initial review of the record.
4) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript

is 730 pages. On 21 February 2024, undersigned counsel filed a consent motion to review sealed materials. Undersigned counsel has begun a review of the unsealed record and identified potential errors. This appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 May 2024.

Respectfully submitted,

[redacted]

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

6 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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 our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 May 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin A. COUTY	)	
Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 June 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

In his motion, Appellant's counsel provided only a generic basis for "good cause shown" to grant the requested extension, providing no details on the unique aspects of Appellant's case which have rendered Appellant's counsel incapable of reviewing the 868-page record of trial after nearly 360 days since counsel's receipt of the record. Instead, Appellant's counsel provided only a basic statement that, "[t]hrough no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case."

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 13th day of June, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 July 2024.**

Appellant's counsel is further advised that any future requests for enlargements of time will not be granted *absent exceptional circumstances.*

Appellant and his counsel are expressly advised that a mandatory part of demonstrating "*exceptional circumstances*" for any forthcoming request for enlargement of time shall include, in addition to the matters required under this court's Rules of Practice and Procedure, a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) *whether Appellant was provided an update of the status of counsel's progress on Appellant's case,*

(3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

.

FOR THE COURT

[redacted]

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 (TENTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 5 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 July 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 25 cases; 19 cases are pending initial AOEs before this Court. The following cases before this Court have priority over the instant case:

1) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel filed an assignment of error on 13 May 2024. The Government's answer is due on 12 June 2024, with any reply being due on 19 June 2024. This appellant is currently confined.
2) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 appeal. Undersigned counsel filed an answer on 28 May 2024. Today, 5 June 2024, the Government filed their reply brief along with a motion for oral argument. Appellee will not be opposing the Government's motion. Should this Court grant the Government's motion, preparation for that oral argument will take priority over the instant case.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. On 21 February 2024, undersigned counsel filed a consent motion to review sealed materials. Undersigned counsel has begun a review of the unsealed record and identified potential errors. This appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time. However, Appellant does not consent to disclosing the attorney-client privileged communication of "whether Appellant was provided an update of the status of counsel's progress on Appellant's case," as ordered by this Court on 7 May 2024. Nevertheless, undersigned counsel is in compliance with his jurisdictions' Rules of Professional Conduct pertaining to client communications.

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

Respectfully submitted,

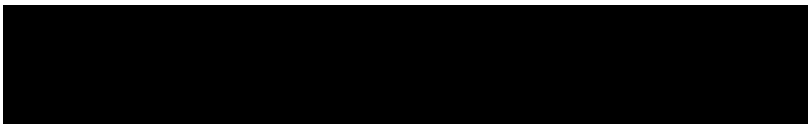
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



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

7 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 June 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin A. COUTY	)	
Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 3 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error (AOE) brief. In the request, Appellant's counsel recited that "[u]ndersigned counsel has been diligently reviewing Appellant's record and has identified several potential errors. In addition, undersigned counsel has *begun* conducting research on those potential errors." (Emphasis added). The Government opposes the motion.

The court held a status conference on 11 July 2024 to elicit further facts upon which to consider Appellant's request. Lieutenant Colonel (Lt Col) Allen Abrams (Deputy Chief, Appellate Defense Division) and Captain (Capt) Trevor Ward (Appellant's detailed appellate counsel) personally attended for the Defense, and Major Brittany Spiers (appellate government counsel), attended for the Government. Judge Charles Warren and Capt Olga Stanford (commissioner) attended on behalf of the court.

During the status conference, and when asked whether any "exceptional circumstances" existed as to Appellant's eleventh enlargement of time request, Capt Ward referenced his diligent efforts and productivity since Appellant's last enlargement of time, and conceded there were no exceptional circumstances for the current request other than volume and management of his own docket. When the court voiced its concern that Capt Ward had only "begun conducting research on potential errors" at this advanced stage of appellate review of Appellant's case, and asked what the anticipated date of submission would be, Capt Ward advised that based upon his current progress and balancing his other case priorities, he anticipated submitting Appellant's AOE brief in September 2024.

In response, the court proposed that additional measures were necessary to ensure that Appellant's counsel filed their brief not later than 13 September 2024 (by which time 450 days will have elapsed since the docketing of

Appellant's case with this court). The proposal by the court consisted of Appellant's counsel providing a draft list of projected AOEs within 15 days of the court granting this requested enlargement of time. Appellant's counsel did not object.

Further, when the court inquired whether there was any sort of systemic manning issues within the Appellate Defense Division contributing to the delays in case processing times generally, Lt Col Abrams responded that their Division requested eight additional active duty attorneys to cover forthcoming direct appeals and a record number of United States Supreme Court petitions anticipated to commence in December 2024 through April 2025.

The court has considered Appellant's motion, the Government's opposition, case law,[1] and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 12th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **13 August 2024.**

It is further ordered that Appellant's counsel will provide to the court a draft list of anticipated assignments of error for Appellant's case not later than **27 July 2024**.[2]

In addition to the information already required by the court in its prior orders, any forthcoming requests for enlargements of time will include a specific statement as to the number of pages of the record and number of exhibits

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[1] In particular, this court considered our superior court's decision in *United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008) (citations omitted) (holding that "the Courts of Criminal Appeals [(CCAs)] have broad power to issue orders to counsel to ensure the timely progress of cases reviewed under Article 66[, UCMJ]") and *United States v. May*, 47 M.J. 478, 482 (C.A.A.F. 1998) (holding that CCAs are empowered to ensure military appellate counsel abide by their "obligation to comply with court orders and protect the interests of their client"). We are also cognizant of our superior court's admonition in *United States v. Moreno,* 63 M.J. 129, 143 (C.A.A.F. 2006), that CCAs are expected to "document reasons for delay and to exercise the institutional vigilance that was absent in Moreno's case" and ensuring timely appellate review.

[2] As explained by the court during the status conference, Appellant's counsel is not bound by this projected list of AOEs in terms of permissible subject matter in any forthcoming assignment of errors submitted to this court. Counsel are free to ultimately brief all, some or none of the draft AOEs. Rather, this is intended as a "good faith assessment" of the case by appellate defense counsel based upon counsel's review of the case as of 26 July 2024. However, if counsel believes that the draft AOEs are not the totality of the case, he should advise the court as such when filing his list of draft AOEs on or before 26 July 2024.

reviewed to date, and the anticipated date of the completion of any remaining record review.

FOR THE COURT

[redacted]

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 (ELEVENTH)**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 3 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 August 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 379 days have elapsed. On the date requested, 420 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. R. at 868. The convening authority took no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 25 cases; 18 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: Uni*ted States v. Valentin-Andino*. Undersigned counsel is presently conducting research in preparation of filing a petition and corresponding supplement. In addition, the following cases before this Court have priority over the instant case:

1) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 appeal. On 5 June 2024, the Government filed their reply brief along with a motion for oral argument. Appellee did not oppose that motion. Should this Court grant the Government's motion, preparation for that oral argument will take priority over the instant case.
2) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has reviewed the sealed and unsealed record, has conducted research on potential errors, and has begun drafting an assignment of errors. This appellant is currently confined.

3) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is currently confined.[1]

Undersigned counsel has been diligently reviewing Appellant's record and has identified several potential errors. In addition, undersigned counsel has begun conducting research on those potential errors. Nevertheless, based on this Court's Order in *United States v. Rice*, the instant case has been moved down in the order of priority, with the consent of Appellant.[2]

Undersigned counsel recognizes that this Court's Order granting Appellant's Motion for Enlargement of Time (Tenth), dated 13 June 2024, "advised that any future requests for enlargements of time will not be granted *absent exceptional circumstances*." (emphasis in original). This Court's Order in *United States v. Rice*—requiring *substantiation* of exceptional circumstances to obtain any additional enlargements—creates an exceptional circumstance *in this case* because undersigned counsel must now complete a review of, and assignment of errors brief for, *United States v. Rice* prior to 2 August 2024. In order to accomplish this, undersigned counsel must place his review of Appellant's fully litigated trial on hold.[3]

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[1] This guilty plea case now takes priority over Appellant's fully litigated matter based on this Court's Order Granting SrA Rice's Motion for Enlargement of Time (Ninth), dated 27 June 2024. That Order informed undersigned counsel that any additional requests for enlargement would "not be granted absent *exceptional circumstances*." (emphasis in original). The Order continued, instructing undersigned counsel that those exceptional circumstances will have to be "substantiate[d]."

[2] While Appellant consents to this shift in priorities, he also recognizes his choice is "between a rock and a hard place:" either consent to this change and obtain competent appellate representation or not consent and lose his right to competent appellate representation. As the CAAF has recognized, this type of Hobson's "choice" is really no choice at all. *Cf. United States v. Gilmet*, 83 M.J. 398, 407 (C.A.A.F. 2023).

[3] This is the second time an order of this Court has compelled undersigned counsel to stop a review of a litigated case and begin the review of a guilty plea case. *Compare* Order Granting SrA Rice's Motion for Enlargement of Time (Ninth), dated 27 June 2024 (informing undersigned counsel that no additional enlargements will be granted absent substantiation of exceptional circumstances),

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

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

Respectfully submitted,

[redacted]

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

with SSgt Pulley's Motion for Enlargement of Time (Tenth), Granted 15 April 2024 (informing that this Court's Order in *United States v. Dillon* necessitated that Maj Dillon's guilty plea case take priority over SSgt Pulley's litigated matter). Each time this occurs, undersigned counsel must stop a review of the litigated matter and turn to the guilty plea case. Thereafter, when undersigned counsel returns to review the litigated matter, additional manhours are spent to re-familiarize himself with the record, thus resulting in further post-trial delay.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 July 2024.

Respectfully submitted,

[redacted]

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

8 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his 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.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 July 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine the closed session audio recording and trial transcript pages 44–108 pertaining to Mil. R. Evid. 412 motions practice in this case; Prosecution Exhibit 15; and Appellate Exhibits VI–XVIII, and XIX–XXII. All requested items were reviewed by trial and defense counsel at Appellant's court-martial.

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.).

Upon review of the record of trial, the court noted the following documents were not sealed (notwithstanding the military judge's order to seal) and should be sealed pursuant to Mil. R. Evid. 412(c)(2): trial transcript pages 112–165 and 168–184.*

While these additional transcript pages were not specifically requested by Appellant's counsel in the consent motion to examine sealed materials, we construe the scope of the motion to include all portions of the trial transcript dealing with the Mil. R. Evid. 412 motions hearing, and thus will consider these

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* The court has determined that there is good cause for trial transcript pages 112–165 and 168–184 to be sealed pursuant to Mil. R. Evid. 412(c)(2). *See also* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion."). Therefore, we order those pages be sealed. The Clerk of Court will ensure the documents to be sealed are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

additional trial transcript pages as constructively included in Appellant's motion.

The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 18th day of July 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view the closed session audio recording and trial transcript pages pertaining to Mil. R. Evid. 412 motions practice in this case: **transcript pages 44–108, 112–165, 168–184**; **Prosecution Exhibit 15**; and **Appellate Exhibits VI–XVIII, and XIX–XXII** subject to the following conditions:

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

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

It is further ordered:

The Government shall take all steps necessary to ensure **trial transcript pages 112–165 and 168–184** in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

However, if appellate government counsel and appellate defense counsel possess any of the documents to be sealed, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate government counsel and appellate defense counsel shall destroy any retained copies of the documents to be sealed in their possession.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Air Force Cadet **JUSTIN COUTY**, United States Air Force *Appellant*	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 3 No. ACM 40484 15 July 2024

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

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

1) **Closed Session Audio Recording (Record of Trial (ROT), Volume 1)**. This closed session hearing was attended by trial counsel, defense counsel, victims' counsel, and military judge. The closed session was ostensibly held to consider Mil. R. Evid. 412 motions made by the parties. R. at 35-42.[1] The closed session was ordered sealed by the military judge. *See, e.g.*, R. at 109.
2) **Closed Session Transcript Pages (R. at 44-108)**. The closed hearing was attended by trial counsel, defense counsel, victims' counsel, and military judge. R. at 42. The closed session was ostensibly held to consider Mil. R. Evid. 412 motions made by the parties.

[1] The electronic transcript available on the Flite Knowledge Management System contains page numbers which differ from the hard copy of the transcript available to undersigned counsel. It appears this is because of apparent placeholder pages for the closed session hearing in the electronic transcript but not the hard copy transcript. The page numbers of the two records are the same until page 43; thereafter, they differ. For record citations 1-43, citations will reflect as R. 1-43. After page 43, citations will distinguish between electronic record (E.R.) citations and record (R.) citations.

R. at 35-42. The closed sessions were ordered sealed by the military judge. *See, e.g.*, R. at 109.

3) **Prosecution Exhibit 15**. This exhibit is a forensic examination report. ROT, Vol. 5, Exhibit Index; *cf.* E.R. at 453. This exhibit was entered into evidence and considered by the trier of fact for findings and sentencing. E.R. at 455. This exhibit was reviewed by trial and defense counsel and ordered sealed by the military judge. E.R. at 454-55, 466.

4) **Appellate Exhibits VI-XVIII**. These exhibits were various motions and evidence concerning the litigation of Mil. R. Evid. 412 issues. *See* R. at 35-42; E.R. at 44. These various exhibits were reviewed by the parties, considered by the military judge, and ordered sealed. R. at 35-42; E.R. at 44.

5) **Appellate Exhibits XIX-XXII**. These exhibits are rulings on the various motions filed under Mil. R. Evid. 412. E.R. at 53-54. These rulings were provided to the parties. E.R. at 53-54. These exhibits were ordered sealed by the military judge. E.R. at 54. However, this order is not reflected on the master exhibit index. ROT, Vol. 5, Exhibit Index. Further, undersigned counsel's copy of the ROT contains these sealed exhibits. Undersigned counsel has not reviewed these exhibits and will await this Court's Order—if any—prior to reviewing them.

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

at trial. In order to fully present matters to this Court, the undersigned counsel requires access to sealed material.

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

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 15 July 2024.

Respectfully submitted,

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 July 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine sealed portions of the record of trial and exhibits contained therein, *inter alia*, Appellate Exhibits XIX–XXII. All requested items were reviewed by trial and defense counsel at Appellant's court-martial. We granted the motion via order on 18 July 2024.

However, upon further review of the record of trial, the court discovered that Appellate Exhibits XIX – XXII were *not* sealed, notwithstanding the military judge's order to seal. The court further concludes these materials should be sealed pursuant to Mil. R. Evid. 412(c)(2).*

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.).

Consistent with the court's prior order of 18 July 2024, the court reiterates its conclusion that Appellant's counsel has made a colorable showing that review of the sealed materials (specifically Appellate Exhibit XIX – XXII) is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 29th day of July 2024,

ORDERED:

Appellate Exhibits XIX–XXII are ordered **SEALED**.

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* The Clerk of Court will ensure the documents to be sealed are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

Appellate defense counsel and appellate government counsel may view these materials subject to the following conditions:

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

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

It is further ordered:

The Government shall take all steps necessary to ensure **Appellate Exhibits XIX–XXII** in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

However, if appellate government counsel and appellate defense counsel possess any of the documents to be sealed, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate government counsel and appellate defense counsel shall destroy any retained copies of the documents to be sealed in their possession.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force, *Appellant.*	)	No. ACM 40484
	)	13 August 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER AFC COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST SM IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

WHETHER COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST AR IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER AFC COUTY'S FIFTH AND SIXTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OH HIS PEERS WERE VIOLATED BY ARTICLE 25, UCMJ, BECAUSE AIR FORCE CADETS WERE NOT PERMITTED TO SERVE AS MEMBERS AT AFC COUTY'S COURT-MARTIAL.[1]

STATEMENT OF THE CASE

On 26 October 2022 and 17 – 21 January 2023, Appellant, Air Force Cadet (AFC) Justin Couty, was tried by a military judge alone sitting as a general court-martial at the United States

[1] This issue is raised personally by AFC Couty, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Air Force Academy (Academy), Colorado. R. at 1, 18, 32.[2] Consistent with his pleas, the military judge found AFC Couty not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[3] R. at 55, 691. Contrary to his pleas, the military judge found AFC Couty guilty of an additional charge and two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 55, 691. On 21 January 2023, the military judge sentenced AFC Couty to a dismissal, a total of 60 months of confinement, total forfeitures, and a reprimand. R. at 734. The convening authority took no action on the findings or sentence adjudged in this case. Convening Authority Decision on Action – *United States v. AFC Justin Couty*.

On 12 August 2024, undersigned counsel filed a Motion for Enlargement of Time (EOT) (Twelfth) Out of Time. That Motion for EOT informed this Court that AFC Couty intended to hire civilian appellate defense counsel and, as such, was requesting an EOT for 30 days to allow civilian appellate defense counsel an opportunity to review the record, conduct research, and draft potential assignments of error. As of this writing, this Court has not acted on the Motion for EOT (Twelfth).[4]

STATEMENT OF FACTS

Prior to his conviction, AFC Couty attended the Academy. R. at 718. Attending the Academy was a "dream come true," and AFC Couty enjoyed the intellect and work ethic of his

[2] The electronic transcript available on the Flite Knowledge Management system contains page numbers which differ from the hard copy of the transcript. It appears this is because of apparent placeholder pages for the closed session hearings. The page numbers are the same until page 43. For purposes of this filing, all record citations are to the electronic transcript.
[3] Unless otherwise noted, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).
[4] Because the instant filing is due today, undersigned counsel is filing this assignment of errors brief out of an abundance of caution. However, should this Court grant the Motion for EOT (Twelfth), AFC Couty will likely seek leave of the Court to withdraw this filing.

peers. R. at 718. Part of his time at the Academy was plagued by the COVID-19 pandemic, which created "new and difficult" challenges. R. at 718. While at the Academy, AFC Couty developed a reputation for being "a player," R. at 498, 538, and someone who would cheat on his significant others. R. at 383, 545. Some referred to AFC Couty as the "[A]cademy womanizer." R. at 643.

Additional facts necessary to resolve the specific issues raised are provided below.

ARGUMENT

I. AFC COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST SM IS LEGALLY AND FACTUALLY INSUFFICIENT.

Additional Facts

AFC Couty and SM were friends at the Academy. R. at 86. Throughout their friendship, they would often hang out to study or play sports. R. at 86-87. During their friendship, AFC Couty was "on and off with relationships and . . . never really seemed single." R. at 89-90. At one point, one of the girls that AFC Couty was dating "seemed jealous" of SM's friendship with AFC Couty. R. at 90. Despite being in various relationships during his friendship with SM, AFC Couty would sometimes flirt with SM. R. at 88, 90.

On 26 November 2019, SM was off base at a friend's house in preparation for a skiing trip to Breckinridge, Colorado. R. at 90-91, 95. SM had previously made plans to get dinner with AFC Couty on 26 November 2019. R. at 91; Pros. Ex. 2 at 1-2. At some point during the early evening, AFC Couty picked SM up from the house and drove SM to a restaurant. R. at 91-92; Pros. Ex. 1 at 1. While SM had been drinking prior to going to dinner, she "was not that drunk." R. at 114. After dinner, AFC Couty drove SM back to the house. R. at 94. By this point, there were several people at the house "and it kind of looked like a party." R. at 94. AFC Couty ended up joining the party. R. at 94.

At some point during the party, SM went to the bedroom where she was staying and fell asleep. R. at 95. While SM testified that she had not texted or talked to AFC Couty during the party, R. at 94-95, AFC Couty sent SM a text message asking, "Which bedroom is it?" Pros. Ex. 1 at 2. SM testified that she didn't see this message until the next morning. R. at 95. Nonetheless, AFC Couty was somehow able to locate the room where SM was staying. R. at 97. AFC Couty knocked on the door and asked SM if he could come in—although, SM did not admit to this until cross-examination. R. at 116. After AFC Couty entered the room, SM offered to let AFC Couty sleep in the same twin-size bed where she was sleeping, ostensibly because AFC Couty had been drinking.[5] R. at 97.

When AFC Couty got into bed, he took his shirt off but was not "fully naked." R. at 99. SM admitted that she only had on a t-shirt and underwear when she invited AFC Couty into bed with her. R. at 120. At this point, SM was positioned against the wall and AFC Couty was on the other side of the bed. Pros. Ex. 2 at 1. Once in the bed, there was "space" between SM and AFC Couty because SM wanted to "respect the boundary that he had a girlfriend." R. at 99. SM clarified that he was only "as far apart as you can be in a twin bed." R. at 98. Once in bed, AFC Couty started talking about his girlfriend; everything he said about her was positive. R. at 99.

At some point, however, the conversation turned into AFC Couty complimenting SM. R. at 98. AFC Couty explained that if he was given the opportunity, he would rather be with SM than his girlfriend and that he would break up with her for SM. R. at 98. SM was flattered that AFC Couty was interested in her. R. at 98. But, SM was hesitant because AFC Couty had a girlfriend and she hadn't interacted with him during the party. R. at 98, 119-20.

[5] According to SM, this was not the "first option" only because AFC Couty had a girlfriend and she "wouldn't be a happy girlfriend" if her partner slept in the same bed with another person. R. at 97, 117-18.

During this conversation, AFC Couty began stroking SM's arm and moving closer to her. R. at 98. Eventually, SM and AFC Couty began kissing. R. at 98, 100. This kissing led to making out,[6] and SM got on top of AFC Couty and straddled him. R. at 100. When SM got on top of AFC Couty, she felt sleepy. R. at 100. SM told AFC Couty that "I'm too drunk for this," and rolled off him onto her stomach. R. at 98, 101. While SM did not clarify what she meant by "this," she testified that AFC Couty responded to her statement with "okay." R. at 122. SM elaborated that AFC Couty "seemed to know things were done" merely because he said "okay." R. at 122.

When SM rolled off AFC Couty, she had traded positions with him: now AFC Couty was against the wall and SM was on the open-ended side of the bed. R. at 100-01. Thereafter, AFC Couty got on top of SM and they had sex. R. at 101-02. When asked if this was without her consent, SM said "*I hadn't said anything*, so, yes, that was without my consent." R. at 102-03 (emphasis added). Despite the sex being nonconsensual in SM's mind, SM was concerned that saying anything during the sex might make AFC Couty think she was rejecting him.[7] R. at 103. SM admitted that, while having sex with AFC Couty, the words "stop or get off of me . . . did not come to mind." R. at 124. Instead, it appears SM was thinking about not wanting to be a "homewrecker." R. at 134. Moreover, during the sex, AFC Couty could not see SM's face, read her facial expressions, or see any other body language. R. at 103.

Eventually, SM asked AFC Couty if they could change sex positions. R. at 104. AFC Couty immediately complied and stopped having sex with SM. R. at 104, 124-25. Then, SM

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[6] "Making out is a slang term for extended bouts of amorous kissing, which may include other forms of petting and sexual foreplay." *Making Out*, ENCYCLOPEDIA.COM (2024), available at https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/making-out.

[7] Although SM had apparently rejected AFC Couty on prior occasions, he had never reacted physically. R. at 103. Rather, AFC Couty would just be "bothered" by the rejection. R. at 103.

rolled onto her back and crossed her legs. R. at 104. At this point, SM testified that now "[i]t was clear that there was going to be no other sexual position after that." R. at 104. AFC Couty did not try to have sex with SM after this, R. at 125, and there was no evidence elicited at trial that AFC Couty ejaculated at any point during the sex. SM and AFC Couty remained in the bed and talked after the sex stopped. R. at 106. However, the conversation was brief because, at this point, AFC Couty "could tell there was a change in [SM] and how upset [she] was." R. at 106. Ultimately, though, SM and AFC Couty fell asleep in the same bed. R. at 105; Pros. Ex. 2 at 1.

The next day, SM woke up before AFC Couty and went to the kitchen. R. at 126-27. AFC Couty woke up shortly after and joined SM in the kitchen to say goodbye. R. at 127. SM and AFC Couty hugged, and AFC Couty tried to kiss SM. R. at 127. At trial, SM characterized this as AFC Couty "fleeing the scene." R. at 126. SM then went skiing with friends but did not tell anyone, to include her best friend who was on the skiing trip, about the allegedly non-consensual sex she had with AFC Couty. R. at 128.

In the coming days, AFC Couty texted SM, to include the following messages:

> [1.] Thanks for listening last night. Let me know when you get to Breck. Have fun.
>
> [2.] Hey I just wanted to say Happy Thanksgiving to you and I am grateful that I got to meet you. I hope that you have fun and continue to light the world with that bright smile you have.

Pros. Ex. 1 at 2-3. SM characterized these messages as "really nice" and "sweet." R. at 129. In addition to the messages captured in Prosecution Exhibit 1, AFC Couty apparently texted SM

multiple other messages that were "nice" and "sweet."[8] R. at 129. However, SM did not respond to any of AFC Couty's messages. R. at 129.

Before Christmas 2019, AFC Couty wrote a letter to SM. Pros. Ex. 3. According to SM, that letter "really explains the night really well . . . how it started off his [sic] friends and then all of a sudden I think he felt there was something rekindled when he joined me in bed." R. at 109; Pros. Ex. 3 ("I did not expect anything to happen that night to be completely honest with you. I also did not expect for my feelings to rekindle about you. I don't know what started it up again but I did know that I had a lot of fun that night."). Before reading AFC Couty's letter, SM thought of the 26 November 2019 sexual encounter with AFC Couty as a "one night stand." R. at 134. However, receiving his letter apparently "changed [her] mind" into believing the encounter was non-consensual. R. at 134.

Standard of Review

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

Law

A. Legal Sufficiency

This Court may only affirm such findings that are "correct in law and fact." Article 66(d), UCMJ. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted).

[8] Despite being provided to the Government, it appears these messages were not admitted into evidence. R. at 129. Air Force Office of Special Investigations (AFOSI) agents would later testify that they were unsure if these messages were even collected. *See, e.g.*, R. at 154.

B. Factual Sufficiency

Factual sufficiency requires this Court to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [the Court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted). A review for factual sufficiency "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Washington*, 57 M.J. at 399. This is an "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) (cleaned up).

This Court's authority under Article 66(c) "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). To be sure, this Court has the power to "judge the credibility of witnesses, determine controverted questions of fact . . . and substitute its judgment for that of the military judge." *United States v. Col*e, 31 M.J. 270, 272 (C.M.A. 1990).

C. Article 120, UCMJ, Sexual Assault

The Government had to prove the following elements beyond a reasonable doubt to convict AFC Couty of sexual assault against SM:

(1) That AFC Couty committed a sexual act upon SM; and
(2) That the accused did so without the consent of SM.

MCM, Part IV, ¶ 60(b)(2)(d). The term "consent" means "a freely given agreement to the conduct at issue by a competent person." Article 120(g)(7)(A), UCMJ. All of the surrounding circumstances may be considered in determining whether someone gives consent. Article 120(g)(7)(C), UCMJ. Determining consent is a case-specific analysis dependent on the "surrounding circumstances" of each case. *United States v. Rodela*, 82 M.J. 521, 527 (A.F. Ct. Crim. App. 2021).

"It 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. *Rodela*, 82 M.J. at 525 (quoting R.C.M. 916(j)(1)). "An honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense" to sexual assault. *Id*. (citing *United States McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019)). Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense did not exist. *McDonald*, 78 M.J. at 379 (citing R.C.M. 916(b)(1)). Mistake of fact must be both honest and reasonable. *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995). In other words, the mistake of fact must be both subjective and objective.[9] *Id*.

Analysis

AFC Couty's conviction for sexual assault against SM is legally and factually insufficient for two reasons. First, because the Government failed to prove that SM did not consent to the sexual intercourse. And second, because even if the Government proved SM did not consent, the

[9] The Court of Appeals for the Armed Forces (C.A.A.F.) has sometimes referred to the mens rea underpinning reasonable mistake of fact as non-negligence. *McDonald*, 78 M.J. at 379.

Government failed to prove that AFC Couty did not have a reasonable mistake of fact as to consent.

A. SM Actually Consented to the Sexual Intercourse with AFC Couty

The Government failed to prove that SM did not consent to the sexual intercourse with AFC Couty. Consent is a freely given agreement between two or more persons, and it is gleaned from the surrounding circumstances. Article 120(g)(7)(C), UCMJ. The sexual intercourse between SM and AFC Couty on 26 November 2019 is replete with circumstances that demonstrate actual consent.

First, when AFC Couty arrived at SM's bedroom on 26 November 2019, she invited him to join her in a twin sized bed. R. at 97. She extended this invitation recognizing that there is a limited amount of space two adults can have while lying in such a bed. R. at 98. When SM invited AFC Couty into the bed with her, she was wearing only underwear and a t-shirt. R. at 120. As AFC Couty got into the bed, he took his shirt off. R. at 99. SM did not tell AF Couty to put his shirt back on, nor did she put on additional clothes before AFC Couty got into the bed. These non-verbal cues set the stage for the progressive trajectory of consensual sexual conduct between SM and AFC Couty.

Already close together in the twin bed with sparse clothing, SM did not push back or recoil when AFC Couty flirted with her. R. at 98. Instead, she felt flattered. R. at 98. This intimate verbal back-and-forth became physical as AFC Couty caressed SM's arm. R. at 98. Again, SM did push back or recoil. Instead, they moved closer together and began to kiss. R. at 98. Then, rather than AFC Couty making the next move, SM took the lead by rolling on top of AFC Couty and making out with him while in a straddling position. R. at 100. They made out in this position for some time. R. at 100.

Eventually, SM began to feel tired in this *position* and told AFC Couty "I'm too drunk for this" before rolling onto her stomach. R. at 98, 100. AFC Couty responded saying "okay." R. at 122. SM testified that AFC Couty understood this to mean "things were done" because he said "okay." R. at 122. But, SM had no indication from AFC Couty other than "okay" that demonstrated this apparent understanding. After all, "I'm too drunk for this" is not a communication of lack of consent, especially given the verbal and non-verbal cues preceding the statement.

It makes sense then that, after rolling onto her stomach, AFC Couty got on top of SM: it was a response to her statement "I'm too tired for this" position. Then, after AFC Couty got on top of SM, she didn't "say anything." R. at 101-03. Even after AFC Couty penetrated SM's vagina, she didn't "say anything." In fact, during the sexual intercourse, the words "stop or get off of me . . . did not come to [SM's] mind" at all. R. at 124. Instead, SM was seemingly more concerned about being a homewrecker and not hurting AFC Couty's feelings. R. at 103, 134. But these thoughts are not indicative of a lack of consent. When words like "stop" or "get off of me" do not even come to mind during the charged sexual conduct, no rational trier of fact could conclude a lack of consent in this case.

When SM did finally say something to AFC Couty, the statement she made was "can we try another position?" R. at 104. In addressing this alleged indication of "lack of consent" in closing, trial defense counsel put it aptly: "I don't know in what world you're making out, you start having sex, and then you tell the person 'can we change positions,' that [that] is a clear communication of lack of consent." R. at 645 (cleaned up).

While SM testified that the sexual intercourse with AFC Couty was non-consensual, this testimony was a retrospective interpretation based on SM's fundamental misunderstanding of the

law of consent. According to SM, after she rolled off AFC Couty and he started having sex with her, she "hadn't said anything, so, yes, that was without my consent." R. at 102-03. But the surrounding circumstances were clear indicators of consent, and SM was not thinking of "stop" or "get off of me" during the sex. Based on the surrounding circumstances, and SM's misunderstanding of how consent is communicated, no rational trier of fact could conclude SM did not consent.

Moreover, no rational trier of fact could have determined there was a lack of consent because there was testimony elicited at trial that SM did not even think the sexual intercourse was non-consensual. After all, SM believed that the sexual intercourse was a "one night stand."[10] R. at 134. This only changed once she received AFC Couty's letter, which convinced her that the sexual encounter had been non-consensual. R. at 134. Even so, a proceeding event cannot render freely given consent revoked, especially when the consent was given a month earlier.

Based on the foregoing, the Government failed to prove that SM did not actually consent to the sexual intercourse. Considering this evidence, no rational trier of fact could have found the second element of this offense beyond a reasonable doubt, and this Court should itself not be convinced of AFC Couty's guilt beyond a reasonable doubt. As such, AFC Couty's conviction for sexual assault against SM is legally and factually insufficient.

B. AFC Couty had a Reasonable Mistake of Fact as to Consent

Even if the Government proved SM did not consent, they failed to prove that AFC Couty did not have an honest and reasonable mistake of fact as to SM's consent. First, all of the evidence

[10] This is furthered by the fact that SM slept in the same twin size bed with AFC Couty after allegedly being sexually assaulted by him. R. at 105; Pros. Ex. 2 at 1.

of actual consent, discussed in section I.A., *supra*, demonstrates AFC Couty's reasonable mistake of fact.

Second, the communication—or lack thereof—from SM is a clear indicator that AFC Couty had an honest and reasonable mistake of fact. As articulated above, during the sex, SM did not communicate anything to AFC Couty indicating that the sex was non-consensual. This, along with the non-verbal communication preceding the sex—such as making out while half-naked and straddling AFC Couty—demonstrates evidence of a reasonable and honest mistake of fact. Further, SM admitted that AFC Couty could not see SM's face, read her facial expressions, or see any other body language during the sex. R. at 103. So, even if there were non-verbal expressions of non-consent during the sex, AFC Couty could not have seen them. While SM did state "I'm too drunk for this," this vague statement could be reasonably interpreted as being contingent upon SM's position on top of AFC Couty. After all, SM testified that she felt tired in that straddling position.

Third, when SM did eventually communicate to AFC Couty that they should change sex positions, AFC Couty immediately stopped the sexual intercourse. R. at 104,124-25. Despite the fact that the statement, "could we try a different position," is a far cry from "stop" or "get off of me," AFC Couty nevertheless stopped the sexual intercourse at the first indication that SM was uncomfortable. R. at 124-25. This is a clear indicator of a reasonable mistake of fact as to consent; if AFC Couty intended to have non-consensual sex with SM, he would not have stopped when she asked to change positions or when she crossed her legs. SM herself recognized that AFC Couty stopped having sex with her when he realized "that there was going to be no other sexual position after that." R. at 104; R. at 125.

The honesty of AFC Couty's mistake is furthered by other evidence in the record, to include the fact that he slept in the same twin sized bed as SM after the alleged assault and engaged her in conversation before falling asleep. R. at 105. The next morning, AFC Couty said goodbye to SM by giving her a hug and kissing her. R. at 126-27. AFC Couty apparently did this in front of a third-party. R. at 126-27. While SM referred to this behavior as AFC Couty "fleeing the scene," it should not be lost on this Court that a perpetrator "fleeing the scene" rarely, if ever, stops to say goodbye to their victim, especially by hugging and kissing them. Even after AFC Couty left the house, he continued to communicate "really nice" things to her. R. at 129. Perhaps most telling, AFC Couty later communicated to his girlfriend, II, that he believed the sex with SM was consensual. R. at 515-16. All of these post-sex actions demonstrate that AFC Couty had an honest mistake of fact as to consent.

Based on the foregoing, the Government failed to prove beyond a reasonable doubt that AFC Couty did not have an honest and reasonable mistake of fact as to consent. No rational trier of fact could be convinced that AFC Couty did not have a reasonable mistake of fact, and this Court should not itself be convinced beyond a reasonable doubt that AFC Couty did not have such a reasonable mistake. As such, AFC Couty's conviction for sexual assault against SM is legally and factually insufficient.

WHEREFORE, AFC Couty respectfully requests this Court set aside the findings and sentence as to Specification 1 of the Additional Charge.

II. AFC COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST AR IS LEGALLY AND FACTUALLY INSUFFICIENT.

Additional Facts

During the 2020-2021 academic year, AR and AFC Couty were "squaddies," which meant they were in the same squadron together. R. at 336. When the cadets returned from Christmas

break, "COVID was still an issue." During this time, cadets were not allowed to go off base or "do a whole lot of anything other than hanging out in [their] rooms." R. at 336. Because of this, AR started hanging out with AFC Couty. R. at 337. AFC Couty would usually hang out with AR as part of a larger group. R. at 337. AFC Couty was dating II at the time. R. at 338.

During AR's friendship with AFC Couty, she had "heard rumors about [him] cheating." R. at 339. AR referred to AFC Couty's cheating as "the dirty stuff." R. at 339. AR also believed that AFC Couty's relationship with his girlfriend, II, was akin to fraternization because II was a sophomore and AFC Couty was a senior. R. at 339. Despite believing that sexual interactions between a sophomore and senior was fraternization, AR agreed to have a threesome with AFC Couty and II. The threesome was consensual. R. at 340. Afterward, however, AR heard that II was upset because AFC Couty gave AR "more attention" during the threesome. R. at 341.

On 6 March 2021, AR was in her room watching a movie with her roommate. R. at 344. At some point in the evening, AFC Couty messaged AR on Snapchat. R. at 342; Pros. Ex. 13. During that conversation, AFC Couty asked if he could purchase nude images of AR; AR "played along." R. at 342; Pros. Ex. 13 at 1-2. Thereafter, AFC Couty started talking to AR in a "sexual flirtatious way." R. at 345; Pros. Ex. 13. AR continued having the conversation with AFC Couty despite thinking it "was very weird . . . because he was in a relationship." R. at 345. Ultimately, AR believed that AFC Couty wanted to have sex with her. R. at 346. AR was conflicted: she knew that AFC Couty had a girlfriend but "also had drinks and . . . thought, well, maybe I want sex." R. at 346.

After exchanging some additional messages, AR met AFC Couty in the hallway. R. at 348. The two went up to the sixth floor to an empty room. R. at 348-49. When they got to the room, AR asked AFC Couty, "[Y]ou're sure [II] is okay with this right[?]" R. at 349. AFC Couty

responded, “Yes, it’s fine.” R. at 349. AR leaned against the bed and started kissing AFC Couty. R. at 349. While they were kissing AR was touching AFC Couty’s body, and AFC Couty was touching hers. R. at 349-50. During the kissing, AFC Couty’s and AR’s clothes came off, although AR could not remember how this happened. R. at 350.

Then, AR laid down in bed and AFC Couty stood over her. R. at 350. AFC Couty began to digitally penetrate AR. R. at 350. This was consensual. R. at 350. However, at some point the digital penetration became uncomfortable, and AR told AFC Couty, “[N]o, no, no.” R. at 350. AFC Couty responded, “Wait, are you saying no?” R. at 351. AR responded “[Y]es,” and AFC Couty stopped. R. at 351. Then AR told AFC Couty to “just go wash your hands.” R. at 351, 389. AFC Couty complied and went to the bathroom to wash his hands. R. at 351.

While AFC Couty was washing his hands, AR began putting on her shorts and underwear. R. at 351-52. AFC Couty finished washing his hands, approached AR, and kissed her. R. at 353. AR turned her head, exposing her neck to AFC Couty; AFC Couty began to kiss AR’s neck. AFC Couty kissed AR’s neck for 30-40 seconds. R. at 395. During this time, AR did not say anything to AFC Couty. R. at 396. At this point, AFC Couty began to remove AR’s shorts and underwear. R. at 396. The following exchange occurred during cross-examination:

> Q. Okay. And so your pants did eventually come down. Correct?
> A. Yes, sir.
> Q. Di[d] they come all the way off or what happened?
> A. I think they did come all the way off because I ended up grabbing them from the floor.
> Q. Okay. Were you wearing sneakers or shoes or anything like that?
> A. When I went into the room, yes. But I think at that point my shoes were not off yet. Or my shoes have already been off.
> Q. And so as he’s removing your shorts, he bent down and removed them from your legs.
> A. I think so.
> Q. And you picked up your feet to allow him to do that?
> A. I don’t remember.
> Q. At that point, he stood back up after the shorts came off?

A. I don't remember him ever bending down.
Q. Okay.
A. I don't think I saw him do that.
Q. Then did you – did you remove your shorts?
A. No.

R. at 397-98.

After AR's clothes were off, AR turned around, bent over the bed, and AFC Couty began having sexual intercourse with her. R. at 354. This sex lasted for "a few minutes." R. at 355. During the sex AR thought—without saying anything—this was something she just "had to get through." R. at 355. At some point, though, AR told AFC Couty "no, no no;" AFC Couty immediately stopped having sex with AR. R .at 355. AFC Couty replied, "[O]kay . . . we don't have to do anything you don't want to do." R. at 356. AR and AFC Couty walked downstairs together and stopped at the entrance of AR's hallway. R. at 357. During this time, they "talk[ed] for a second." R. at 357. AR made sure to act normal because she "didn't want [AFC Couty] to think anything was up." R. at 357.

The next day, AR contacted II and told her, "Your boyfriend started fucking me on the sixth floor." R. at 360. AR made sure not to characterize the interaction as "rape" or "sexual assault" because she "didn't want her to think that her boyfriend was a rapist." R. at 360-61. The same day, AR sent II the Snapchat messages that make up Pros. Ex. 13. R. at 361.

Standard of Review

AFC Couty hereby adopts the standard of review section at AOE I, *supra*.

Law

AFC Couty hereby adopts the law section at AOE I, *supra*.

Analysis

AFC Couty's conviction for sexual assault against AR is legally and factually insufficient for two reasons. First, because the Government failed to prove that AR did not consent to the sexual intercourse. And second, because even if the Government proved AR did not consent, the Government failed to prove that AFC Couty did not have a reasonable mistake of fact as to consent.

A. AR Actually Consented to the Sexual Intercourse with AFC Couty

The Government failed to prove that AR did not consent to the sexual intercourse with AFC Couty. Consent is a freely given agreement between two or more persons, and it is gleaned from the surrounding circumstances. Article 120(g)(7)(C), UCMJ. The circumstances underpinning the sexual intercourse between AR and AFC Couty demonstrates actual consent.

Prior to the charged conduct, AFC Couty messaged AR in a "sexual flirtatious way." R. at 345. AR testified that she "played along" to these messages, in part because she thought she wanted to have sex with AFC Couty. R. at 346. Ultimately, AR agreed to accompany AFC Couty to an empty dorm room in their building to have sex. R. 348; Pros. Ex. 13.

Everything that happened in that empty dorm room aligned with AR's plan to have sex with AFC Couty. When AR and AFC Couty entered the dorm room, they made out, got naked, and AR got into the bed. R. at 349-50. AFC Couty digitally penetrated AR—all of which was consensual. R .at 350. AR began experiencing pain, however, and told AFC Couty "no, no, no . . . just go wash your hands." R. at 350-51, 389. AR never told AFC Couty she was experiencing pain, or that the plan to have sex had changed.

Even after AFC Couty finished washing his hands and began kissing AR, AR did not communicate a lack of consent to this activity. R. at 353, 395. Similarly, when AFC Couty

removed AR's shorts and underwear, AR did not communicate a lack of consent. R. at 396-98. Moreover, while AR could not say whether she assisted AFC Couty in removing her shorts and underwear, her testimony indicates that she offered AFC Couty *at least some* assistance. R. at 397-98. Thereafter, AR turned around, bent over the bed, and AFC Couty had sexual intercourse with her for several minutes. R. at 355. Once again, during all this time, AR never communicated a lack of consent. R. at 355.

AR did testify that the sex was non-consensual in her mind. However, just like SM, this was based on AR's fundamental misunderstanding of the law of consent. AR testified that "because it hurt . . . I was raped." R. at 399. This, of course, is not how consent works. Painful sex can be consensual. The level or extent of potential discomfort—on its own—does not make an otherwise consensual activity nonconsensual. And, just like SM, no rational trier of fact could be convinced beyond a reasonable doubt that AR did not consent to the sex since it was based on a fundamental misunderstanding of consent.

AR's in-the-moment consent is reinforced by her after-the fact treatment of what happened. Specifically, immediately after the alleged sexual assault, AR engaged in conversation with AFC Couty. R. at 357. AR acted normal during this conversation because she didn't know if what had happened was consensual or not. R. at 357. Then, the next day, AR called II and informed her that she had sex with AFC Couty. R. at 360. AR made sure not to characterize the interaction as "rape" or "sexual assault." R. at 360-61. In fact, AR did not realize that she was sexually assaulted until several days after the sexual intercourse. R. at 361.

Based on the foregoing, the Government failed to prove that AR did not actually consent to the sexual intercourse. Considering the evidence, no rational trier of fact could have found the second element of this offense beyond a reasonable doubt, and this Court should itself not be

convinced of AFC Couty's guilt beyond a reasonable doubt. As such, AFC Couty's conviction of sexual assault is legally and factually insufficient.

B. AFC Couty had a Reasonable Mistake of Fact as to Consent

Even if the Government proved AR did not consent, they failed to prove that AFC Couty did not have an honest and reasonable mistake of fact as to AR's consent. First, all of the evidence of actual consent, discussed in section II.A., *supra*, demonstrates AFC Couty's reasonable mistake of fact.

Moreover, AR and AFC Couty had an ongoing sexual relationship which informed AFC Couty's mistake of fact. This sexual relationship began prior to the alleged assault when AR had a consensual threesome with AFC Couty and his girlfriend, II. R. at 340. This sexual relationship continued when AFC Couty messaged AR in a sexually flirtatious manner, and AR responded approvingly. Pros. Ex. 13. As the night went on, AR agreed to meet in an empty dorm room to have sex with AFC Couty.

Further, AR's actions before and during the charged sexual conduct would lead a reasonable person to believe she was consenting. While AR did tell AFC Couty to stop digitally penetrating her, her exact words were: "no . . . just go wash your hands." R. at 351. A reasonable person—who had explicitly planned to have sex with someone in an empty dorm room—would believe this "no" was contingent upon the washing of hands. Not only was such a mistake reasonable, it was honest: AFC Couty washed his hands then reengaged AR by kissing her lips and neck for 30-40 seconds. R. at 395.

Nothing AR did after AFC Couty reengaged her would lead a reasonable person to believe there was a lack of consent. AR did not tell AFC Couty "no," "stop," or otherwise communicate a lack of consent. AR then assisted AFC Couty in taking off her shorts and underwear before

bending over the bed and having sex with AFC Couty. R. at 355, 396-98. For several minutes of sex, AR did not say anything, believing she just had to get through it. R. at 355. All of these actions would lead any reasonable person to believe AR was actually consenting to the sexual intercourse.

Additionally, AFC Couty's mistake of fact was honest as demonstrated by the fact that every time that AR told AFC Couty "no" he immediately stopped. R. 351, 355. Perhaps most telling, when AR told AFC Couty "no" during the sexual intercourse, not only did he immediately stop, he also responded with "okay . . . we don't have to do anything you don't want to do." R. at 356. This is clear evidence of someone with an honest mistake of fact as to consent.

The post-sex actions of AFC Couty further demonstrate that his mistake was honest. For example, after AR told AFC Couty, "[N]o," which ended the sexual intercourse, he waited for her to use the bathroom and walked her to her floor before departing; during that time, they engaged in small talk. R. at 356-57. The next day, when he was confronted by his girlfriend about cheating on her with AR, AFC Couty admitted to the sexual intercourse, but made no indication that the encounter was non-consensual. R. at 512.

Based on the foregoing, the Government failed to prove beyond a reasonable doubt that AFC Couty did not have an honest and reasonable mistake of fact as to consent. No rational trier of fact could be convinced that AFC Couty did not have a reasonable mistake of fact, and this Court should not itself be convinced beyond a reasonable doubt that AFC Couty did not have such a reasonable mistake. As such, AFC Couty's conviction for sexual assault against AR is legally and factually insufficient.

WHEREFORE, AFC Couty respectfully requests this Court set aside the findings and sentence as to Specification 2 of the Additional Charge.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

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APPENDIX

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

AFC COUTY'S FIFTH AND SIXTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OH HIS PEERS WERE VIOLATED BY ARTICLE 25, UCMJ, BECAUSE AIR FORCE CADETS WERE NOT PERMITTED TO SERVE AS MEMBERS AT AFC COUTY'S COURT-MARTIAL.

Cadets at the Academy who are tried at a court-martial are deprived of their Fifth[11] and Sixth[12] Amendment rights to a trial by a jury of peers because cadets are not permitted to serve on panels. Article 25, UCMJ; R.C.M. 503(a)(2). The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury." The Fifth and Sixth Amendments require that such a jury consist of a cross-section of an accused's community, or a jury of peers.[13] *United States v. Herbert*, 698 F.2d 981, 983-84 (9th Cir. 1983) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The Supreme Court has tacitly recognized that a jury of peers—a cross-section of the community—is a fundamental right to an accused. *See, e.g.*, *Thompson v. United States*, 1025 (Brennan, J., dissenting) (citing *Strauder* v. *West Virginia*, 100 U.S. 303, 308-309 (1880)).

AFC Couty was denied his rights to a trial by jury namely because Article 25, UCMJ, and R.C.M. 503(a)(2) prohibited a jury of his peers—a right guaranteed by the Constitution. The Government cannot mandate a "jury selection system [that] actually results in master jury panels from which identifiable classes are grossly excluded." *Carmical v. Craven*, 457 F.2d 582, 587 (9th

[11] U.S. CONST. amend. V.
[12] U.S. CONST. amend. VI.
[13] "The phrase 'judgment of his peers' means at common law, a trial by a jury. . . . 'Judgment of his peers' is a term expressly borrowed from the Magna Charta." *McKeiver v. Pennsylvania*, 403 U.S. 528, 571 (1971) (Brennan, J., dissenting).

Cir. 1971). But, that's exactly what Article 25 creates: a jury selection system that grossly excludes an entire class of people (i.e., cadets).

To establish a prima facie violation of an accused's constitutional right to have a jury drawn from a fair cross-section of the community, a defendant must show that the distinctive group is not represented on the venire in a reasonable ratio to the percentage of that group in the community population, and that underrepresentation is due to systematic exclusion from jury selection process. *United States v. Nelson*, 718 F.2d 315 (9th Cir. 1983). In this case, that is easy because the Academy is made up of, mostly, cadets and the systemic exclusion is found in statute: Article 25, UCMJ. Therefore, AFC Couty has demonstrated a prima facie showing that his right to a jury of peers was violated.

Similarly, military case law has clearly and repeatedly shown that it is impermissible to use rank as "a device for deliberate and systematic exclusion of qualified persons" from court membership. *See, e.g.*, *United States v. McClain*, 22 M.J. 124, 129 (C.M.A. 1986). But Article 25, UCMJ, uses rank as such a device by systemically excluding an entire rank class from serving on courts-martial panels. This is contrary to established precedent.

While AFC Couty ultimately chose to be tried by a military judge sitting alone, this decision was nothing more than a Hobson's choice. *United States v. Gilmet*, 83 M.J. 398, 407 (C.A.A.F. 2023); *Hobson's Choice*, MERRIAM WEBSTER (online ed.) ("[T]he necessity of accepting one of two or more equally objectionable alternatives."). AFC Couty's Hobson's choice was between giving up his right to a trial by an unconstitutional jury (i.e., a venire that did not include cadets) or proceeding with a military judge alone. As such, AFC Couty—along with other members of the Academy—lack a true forum choice. Making this Hobson Choice even more difficult, officers at the Academy tend to be more senior than officers at other installations, such

as training bases or regular duty locations. Therefore, the pool for potential officer members is more experienced and older than at most other bases.

AFC Couty's case highlights the reason cadets do not have the same forum choice as other accused service members. AFC Couty was accused by multiple cadets. This was a high-profile case, with media attention. Members of Congress attended the trial in-person, along with members of the media. *Cf*. R. at 25-26; App. Ex. IV. When AFC Couty made his choice to be tried by military judge alone, he made that choice because the alternative—a group of officers far senior in rank and age—would comprise his panel. AFC Couty's venire would have consisted of the following members selected by the convening authority:

- 4 senior Captains (O-3, ~8 years of service)
- 5 Majors (O-4, ~12 years of service)
- 4 Lieutenant Colonels (O-5, ~16 years of service)
- 2 Colonels (O-6, ~20 years of service)

Cf. Convening Order A-1; Convening Order A-4.

AFC Couty, on the other hand, had zero years of active-duty service as a commissioned officer. Under the predecessor of Article 25, UCMJ, both service academy staff and cadets were explicitly barred from service on general courts-martial panels.[14] Service Academy Cadets are the only class of military personnel that are subject to the UCMJ but not allowed to participate on panels. Unless Congress amends Article 25, UCMJ—or this Court recognizes the inherent unconstitutional nature of Article 25, UCMJ—Academy cadets (charged as members of the

[14] Service academy staff may serve on courts-martial panels under the most recent version of Article 25, UCMJ.

service) will be faced with the same Hobson's Choice that AFC Couty faced: an unconstitutional panel or a military judge sitting alone.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH) – OUT OF TIME**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 12 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time, out of time, to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 September 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 419 days have elapsed. On the date requested, 450 days will have elapsed.

On 26 October 2022 and 17 – 21 January 2023, Appellant was tried by a general court-martial, sitting as a military judge alone, at the United States Air Force Academy, Colorado. R. at 1, 18, 32. Consistent with his pleas, the military judge found Appellant not guilty of one charge and one specification of sexual assault, and two specifications of abusive sexual contact, in violation of Article 120, UCMJ. R. at 188-89, 825. Contrary to his pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article [illegible]. at 188-89, 825. On 21 January 2023, the military judge sentenced Appellant to a [illegible] months of confinement, total forfeitures, and a reprimand. R. at 868. The convening [illegible] no action on the findings or sentence adjudged in this case. Record of Trial (ROT),

DENIED
14 AUG 2024

Vol. 1, Convening Authority Decision on Action – *United States v. AFC Justin Couty*. Appellant is currently confined.

The record of trial is seven volumes, consisting of 29 Appellate Exhibits, 20 prosecution exhibits, two defense exhibits, and two court exhibits; the transcript is 868 pages. Counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. No case, to include cases before the Court of Appeals for the Armed Forces, have priority over this case.

Undersigned counsel has completed a review of Appellant's case, identified potential errors, and has drafted an initial Assignment of Errors brief. Undersigned counsel was prepared to file that brief with this Court tomorrow, 13 August 2024. However, today, 12 August 2024, Appellant informed undersigned counsel of his intent to hire civilian counsel—Ms. Stephanie Kral and Ms. Abbigayle Hunter—to represent him on appeal.[1]

An enlargement of time is necessary to allow Appellant time to consult with his civilian appellate attorney. In addition, this enlargement of time will give the civilian appellate attorney an opportunity to review the ROT, identify potential errors, and draft an initial brief to this Court. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time. Additionally, Appellant has provided limited consent to disclose a confidential communication with counsel wherein undersigned counsel provided an update as to his progress on Appellant's case.

Good cause exists for this out of time filing. Appellant has an absolute right to representation by counsel on appeal. That right extends to the hiring of civilian appellate counsel,

[1] Appellant has provided limited consent to disclose this confidential communication.

at Appellant's own expense, should he choose to do so. Appellant did not decide to hire civilian appellate counsel until today, 12 August 2024.[2] Undersigned counsel filed this enlargement of time as soon as possible after being informed of Appellant's decision to hire civilian counsel.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
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[2] Appellant has provided limited consent to disclose this confidential communication.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 August 2024.

Respectfully submitted,

[redacted]

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13 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet JUSTIN COUTY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40484 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities.

Moreover, Appellant just hired two new civilian appellate defense counsel who have not yet filed notices of appearance and have not begun review of the record.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY** United States Air Force *Appellant.*	)	No. ACM 40484 12 September 2024

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

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v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY** United States Air Force *Appellant.*	)	No. ACM 40484 12 September 2024

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

ISSUES PRESENTED

I.

WHETHER AFC COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST SM IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

WHETHER COUTY'S CONVICTION FOR SEXUAL ASSAULT AGAINST AR IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER AFC COUTY'S FIFTH AND SIXTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OF HIS PEERS WERE VIOLATED BY ARTICLE 25, UCMJ, BECAUSE AIR FORCE CADETS WERE NOT PERMITTED TO SERVE AS MEMBERS AT AFC COUTY'S COURT-MARTIAL.[1]

[1] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J.431 (C.M.A. 1982).

STATEMENT OF CASE

At a general court-martial, Appellant pleaded not guilty to the Charge and one specification of sexual assault and two specifications of abusive sexual contact in violation of Article 120, UCMJ. (*Entry of Judgment*, dated 28 March 2023, ROT, Vol. 1.) He also pleaded not guilty to the Additional Charge and its two sexual assault specifications in violation of Article 120, UCMJ. (Id.) Appellant and the four named victims were cadets at the United States Air Force Academy (USAFA.) (Id.)

Appellant chose a military judge alone forum for findings and sentencing. (Id.) And the military judge found him guilty of the Additional Charge and its two specifications, but she acquitted Appellant of the Charge and its three specifications. (Id.) The military judge sentenced Appellant to a dismissal, 60 months of confinement, total forfeitures, and a reprimand. (Id.; R. at 734.) The military judge sentenced Appellant to a total of 60 months confinement: 30 months confinement for Specification 1 of the Additional Charge and 30 months confinement for Specification 2 of the Additional Charge to run consecutively. (*Entry of Judgment*, ROT, Vol. 1.) The convening authority took no action on the findings or sentence adjudged in this case. (*Convening Authority Decision on Action*, dated 10 March 2023, ROT, Vol. 1.)

STATEMENT OF FACTS

Relevant facts for each issue are provided in the Additional Fact sections below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SEXUALLY ASSAULTING SM IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

Appellant and SM studied for their nutrition class together. (R. at 220.) He boxed and had fighting experience, so he helped her prepare for a combatives test. (R. at 221.) They were not sexually or intimately involved and had gone out to dinner one on one before 26 November 2019, but Appellant did try to flirt with SM to no avail. (R. at 220, 221, 223.)

On 26 November 2019, SM stayed at a house in Colorado Springs, CO, with some friends and acquaintances, with plans to ski the next morning. (R. at 225-226, 269.) Appellant asked SM to go to dinner with him in Colorado Springs. (R. at 225-226, 269.) SM had been drinking and was hungry, so she agreed. (R. at 225-226.) Appellant picked her up at the house, and they went to a local Chinese food restaurant, and Appellant chatted about his girlfriend while SM listened, interjecting occasionally. (R. at 226.) Appellant paid for dinner, and SM planned to pay him back later. (R. at 226.)

Despite talking about the girlfriend he was dating at the time, Appellant flirted with SM. (R. at 227.) SM explained, "I didn't entirely know his intentions sometimes, because he was always flirting but even though he had a girlfriend. So, our relationship was always kind of back and forth in that sense, where the flirting was not believable because he had a girlfriend, but it was always persistent." (R. at 226-227.) SM never communicated any sexual or romantic interest in Appellant, and she never made any sexual advances towards him. (R. at 227.) The two never discussed having sex. (R. at 256.)

After dinner, Appellant took SM back to the house and walked her to the door. (R. at 228.) SM's acquaintances were drinking and playing beer pong. (R. at 228.) Seeing this, Appellant followed SM into the house. (R. at 228.) Once inside, SM left Appellant to play drinking games with the others, and she went upstairs to watch a movie with her friend and drink wine. (R. a 228.) She neither drank with Appellant nor talked with him for the rest of the evening. (R. at 228.) They two were not even texting each other. (R. at 228.) SM believed he wanted to have a good time and drink. (R. at 228-229.)

Eventually, SM decided to go to sleep. (R. at 229.) She walked downstairs to her room in the basement. (R. at 229.) She did not talk with Appellant or invite Appellant to her room. (R. at 229; Pros. Ex. 1.) Instead, she got ready for bed and locked the door to her room. (R. at 231.) Appellant texted her, "Which room is it?" but SM did not see the message or reply. (R. at 231; Pros. Ex. 1.) SM heard a knock on her door, and Appellant asked to come in, but before she could respond he entered. (R. at 249-250.) That was the first time she had seen Appellant since their dinner. (R at 254.) He asked if he could spend the night because he had been drinking. (R. at 231.) SM testified:

> I gave him other options of places to sleep because I knew there were two air mattresses in the house . . . I figured if he had been drinking that I wanted him to not drive, and if he needed a place to crash, I was willing to let him sleep in the twin size bed with me, even though I didn't find it to be a fitting first option.

(R. at 231.) SM laid next to the wall, and Appellant laid down next to SM on the edge of the twin sized bed, and the two talked about Appellant's girlfriend and how Appellant wanted to break up with her for SM. (R. at 231-232, 234.) Initially they were "as far apart as you can be in a twin bed" but the gap closed as Appellant stroked her arm and moved in to kiss her. (R. at 232.) Appellant kissed SM, and SM reciprocated. (R. at 232.) SM said, "I remember feeling

really weird and he felt weird to me and it felt wrong." (R. at 232.) While Appellant laid on his back, SM sat up and straddled him continuing to kiss Appellant. (R. at 234.) But when she did that, she "felt really drunk and tired still." (R. at 232.) She said, "I'm too drunk for this." (R. at 232.) Appellant said, "Okay." (R. at 256.) "And he seemed to take his hands off me, let me roll over on to my stomach. And he definitely knew that it was sleeping time." (R at 256.) "And [she] rolled over to the other side of the bed." (R. at 232.) She rolled onto her stomach and tried to go to sleep. (R. at 232, 273.)

Appellant was against the wall and SM was laying on the edge of the bed with her head facing away from Appellant. (R. at 235.) SM and Appellant were not cuddling each other. (R. at 234.) In the dark basement bedroom, SM thought Appellant understood they were going to sleep, and several minutes passed as SM began to drift to sleep. (R. at 234-235, 273.) "A definite pause" in the intimacy occurred. (R. at 235.)

But suddenly, SM felt Appellant climb on top of her back. (R. at 235.) Without saying anything to SM, Appellant braced one hand on her back and another on the bed while she was face down on her stomach. (R. at 236, 237.) He moved her underwear to the side and penetrated her vulva with his penis. (R. at 236, 256.) She did not move. (R. at 236.) She was silent, she did not reengage intimacy, and he did not say anything to her. (R at 236.) After approximately a minute, SM managed to ask Appellant to change positions to get him off her. (R. at 236, 237.) Appellant moved off her back. (R. at 236.) SM then proceeded to lay on her back with her legs crossed and her arms next to her sides. (R. at 238.) Neither engaged in any additional sexual contact. (R. at 238.) SM explained, "I stayed on that edge of the bed and then he looked like he finally went up against that wall. I think he tried to cuddle with me and then I pushed him away." (R. at 239.)

SM explained, "It's a vulnerable position and I couldn't have looked at him or he couldn't have read my facial expressions in that position. Or any body language because of the way I was basically pinned on my stomach." (R at 237.) She did not want to reject Appellant yet again while he was on her back, and she was unable to move under his weight. (R. at 237.) She also did not want to be "in the same bed with someone who was upset with" her. (R. at 257.)

The next morning, SM woke up early and left the room without talking to Appellant. (R. at 202.) Appellant caught up to SM in the kitchen where he said goodbye and gave her a hug. (R. at 261.) After that, SM cut off contact with Appellant, and she stopped responding to his text messages. (R. at 240.) When she returned from Thanksgiving break a few days after the sexual assault, she found a handwritten apology letter on her desk from Appellant. (R. at 241; Pros. Ex. 3.) In the letter, Appellant wrote:

> I am writing this letter because I believe in being a man and standing up for my own actions. I did not mean to put you in a situation that you were uncomfortable with.
>
> . . .
>
> I didn't want things to end like this at all. I want to apologize for putting you through this and I hope that you continue to find happiness in your life. I know most likely that you never want to talk to me but I don't harbor any ill will towards you. Whatever comes my way I am fully willing to accept and I hope you have fun and relax over Christmas.

(Pros. Ex. 3). A handwriting expert analyzed the letter and confirmed Appellant wrote the letter. (R. at 302.)

Standard of Review

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

Law

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

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted.) This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted.) Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted.)

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term

'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

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

The elements for sexual assault without consent are: "(i) That the accused committed a sexual act upon another person; and (ii) That the accused did so without the consent of the other person." Manual for Courts-Martial, pt. IV, ¶ 60.b.(2)(d.) "The term 'sexual act' means the penetration, however slight, of the penis into the vulva or anus or mouth." MCM, pt. IV, ¶ 60.a.(g)(1)(A.) "The term 'consent' means a freely given agreement to the conduct at issue by a competent person." MCM, pt. IV, ¶ 60.a.(g)(7)(A.) "An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A.) "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent. MCM, pt. IV, ¶ 60.a.(g)(7)(A.) "All the

surrounding circumstances are to be considered in determining whether a person gave consent." MCM, pt. IV, ¶ 60.a.(g)(7)(C.)

Analysis

A. *Appellant's conviction was legally and factually sufficient because SM verbally and physically expressed her nonconsent to Appellant before Appellant penetrated her vulva.*

The government proved beyond a reasonable doubt that Appellant penetrated SM's vulva without her consent. Consent is the only element at issue in this case. SM did not consent to the penal penetration, and any mistake of fact as to consent by Appellant was unreasonable. The conviction is factually and legally sufficient.

Appellant's conviction for penetrating SM's vulva with his penis is factually sufficient, and "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this Court should be "convinced of Appellant's guilt beyond a reasonable doubt." Turner, 25 M.J. at 325. Appellant committed a sexual act against SM by penetrating her vulva with his penis, and she did not consent to the sexual act. MCM, pt. IV, ¶ 60b.(2)(d); (R. at 236.) This Court makes its "own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt," and in this case the evidence supports a finding of guilt. Chisum, 75 M.J. at 952.

Appellant claims "the surrounding circumstances were clear indicators of consent, and SM was not thinking of 'stop' or 'get off of me' during the sex." (App. Br. 12.) But SM's actions were clear indictors of nonconsent. Appellant and SM laid next to each other on their sides, and consensually kissed while in the basement bedroom in Colorado Springs, CO. (R. at 225-226, 269.) SM decided to change positions, and she straddled Appellant. (R. at 234.) But as she did so, she realized she was drunk and tired, and she was no longer interested in making out with Appellant. (R. at 232.) She told Appellant, "I am too drunk for this," and Appellant

responded, "Okay." (R. at 256.) SM verbalized her nonconsent to Appellant by telling him she was too drunk to even kiss, let alone engage in more intense sexual activity. He articulated his understanding of her desire to stop the sexual encounter.

This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993.) At trial SM testified that after saying she was too drunk to kiss Appellant, she rolled to the outer edge of the bed and laid on her stomach. (R. at 234.) The break was long enough that SM felt herself drift toward sleep. (R. at 234-235, 273.) Space existed between the two of them because Appellant laid against the wall and SM laid on the edge of the twin bed with her face facing away from Appellant. (R. at 235.) SM did not reengage Appellant or in any way indicate an interest in further sexual interaction. Appellant heard SM say she was too drunk to kiss and felt her move off him and away from him, which was a physical indication that she was interested in penal penetration. SM's intoxication level did not change during the few minute break between SM kissing Appellant and Appellant penetrating SM's vulva. SM's words and physical conduct constituted proof beyond a reasonable doubt that she did not consent to Appellant's penal penetration. Thus, SM's testimony proved the element of lack of consent – the only element at issue on appeal – and this Court should find the conviction to be factually sufficient.

Appellant argues that sleeping in the same twin size bed was an indicator of consent. (App. Br. at 12.) The size of a bed does not communicate an interest in sex, it indicates a willingness to sleep in close quarters. SM gave Appellant other sleeping options, but he chose to sleep in the same bed as her. (R. at 231.) She did allow him to sleep next to her, and she did kiss

him, but the definite break in intimacy cuts against Appellant's argument that the smaller the bed the higher the degree of consent.

Appellant argues that SM's clothing indicated she consented to the sexual act. (App. Br. at 12.) She was wearing underwear and t-shirt, but she never put on additional clothing. (App. Br. at 10.) But "the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A.) Underwear and a t-shirt are articles of clothing that covered SM's genitals and breasts. Her underwear was a barrier to penetrative sex that Appellant moved to commit the sex act – SM did not move her underwear to facilitate Appellant's penetration. (R. at 236, 256.) These were the clothes that she typically slept in, and she was already in them and falling asleep when Appellant came into her room uninvited. Appellant also argues that "he was half naked, and she never told him to put clothes on." (App. Br. at 10.) By Appellant's logic every woman wearing a swimsuit on a public beach is consenting to sex with any man wearing only swim trunks. Consent requires "a freely given agreement to the conduct at issue," and clothing does not provide some manifestation of consent. MCM, pt. IV, ¶ 60.a.(g)(7)(A.)

Appellant next argues, "After all, 'I'm too drunk for this' is not a communication of lack of consent, especially given the verbal and non-verbal cues preceding the statement." (App. Br. at 11.) Appellant and SM laid next to each other on their sides, and consensually kissed while in the basement bedroom in Colorado Springs, CO. (R. at 232.) SM decided to change positions, and she straddled Appellant. (R. at 234.) But as she did so, she realized she was drunk and tired, and she was no longer interested in making out with Appellant. (R. at 232.) She told Appellant, "I am too drunk for this," and Appellant responded, "Okay." Appellant's argument focuses on SM's actions before she said, "I'm too drunk for this" by arguing that her actions before were

indication of consent. But this Court should focus on SM's actions *after* she said she was too drunk.

SM testified that the actions ahead of straddling Appellant were consensual until she changed her mind. But even if there were prior consensual sexual acts, a person is entitled to change their mind and decide not to consent to future sexual activity. *See* United States v. Wilson, 2018 CCA LEXIS 451, *10 (N.M. Ct. Crim. App. 2018) ("[I]t is axiomatic that a woman may revoke consent to sexual intercourse at any time—even immediately after initially consenting to it."). SM revoked her consent, and we know this because she said she was too drunk to continue engaging with Appellant, stopped straddling Appellant, distanced herself from him by rolling to the edge of the bed, laid on her stomach, and turned her head away from him. Once she changed positions, she did not then reengage with him by touching him or kissing him in her new position like she had when they first started kissing. Had she been interested in continuing their sexual encounter in a different position, she would have engaged with Appellant once more by kissing him, cuddling him, or otherwise interacting him. She did not, and some time passed before Appellant got on top of SM. The break in contact was long enough that SM felt herself drift toward sleep. (R. at 234-235, 273.)

After Appellant began his penal penetration, SM did not manifest consent. SM in her drunken state admits she was slow to register and respond, but she found a way to make him stop by asking him to change positions. (R. at 236, 237.) SM's question was not indicative of consent, but rather a way to get Appellant to move so she could escape his body weight. And by the time SM was even able to ask Appellant to change positions, the sexual assault was already completed. Once Appellant was off her, SM again physically manifested nonconsent to any additional sexual activity by laying on her back with her legs crossed – creating a literal barrier

to her genitals. This Court should be convinced beyond a reasonable doubt that SM did not consent to the sexual act.

Turning to legal sufficiency, a rational fact finder could determine that Appellant heard and understood that SM was no longer interested in continuing their sexual encounter – kissing was too much for SM. SM said she was too drunk to kiss Appellant, and then he felt her move off him and away from him which was a physical indication that she was not interested in penal penetration. Even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court ***will not disturb*** the conviction." McArthur, 573 F.3d at 614 (emphasis added). Viewing this evidence in "the light most favorable to the prosecution" a rational trier of fact could have found the essential element of consent was proven beyond a reasonable doubt. King, 78 M.J. at 221.

Appellant argues that "no rational trier of fact could have determined there was a lack of consent because . . . SM believed that the sexual intercourse was a 'one night stand.'" (App. Br. at 10). But SM explained she was confused after Appellant sexually assaulted her. Trial defense counsel asked, "So, after the sexual counter, in the months following that, in your mind you considered that to be a one-night stand?" (R. at 264.) SM testified, "No. It was -- something about it was different, definitely different. I didn't know how to categorize it at the time, because there was kissing. So, it was hard for me to -- I mainly wanted to forget it happened, but not in the sense of a one-night stand." (R. at 264.). SM was confused and was still understanding what occurred with Appellant. She said it was a one-night stand to categorize the situation, not because she consented to the sexual act. Then Appellant's argues, "Even so, a proceeding event cannot render freely given consent revoked, especially when the consent was given a month earlier." (App. Br. at 12.) But Appellant's letter was delivered close in time to the offense. The

offense occurred during Thanksgiving break, and SM received the letter after returning from Thanksgiving break while she was still coming to terms with what happened to her. (R. at 241, 266.) SM's internal understanding of the situation does nothing to change the facts of the sexual encounter, and the facts establish that Appellant perpetrated the sexual act without SM's consent. On the other hand, Appellant's apologetic letter corroborates that SM did not consent – otherwise Appellant would have had no reason to acknowledge that he put her into a situation she was uncomfortable with and that she would most likely never want to talk to him again.

Appellant argues that SM misunderstood how consent is communicated thus "no rational trier of fact could conclude SM did not consent." (App Br at 12.) Appellant points to one portion of SM's testimony for this proposition. She testified, "I hadn't said anything, so, yes, that was without my consent." (R. at 237.) Her statement is accurate. Consent can be communicated verbally and a lack of verbal communication of nonconsent does not equal consent. She had not said anything to Appellant to indicate her consent. But in the two pages of testimony preceding this statement, she also described her conduct that expressed a lack of consent. She described the definite break in intimacy, the distance between them, and the silence where neither Appellant nor SM discussed sex. SM explained all the actions, physical and verbal, that she took to disengage with Appellant and to communicate her lack of consent. Also, whether a mistake of fact as to consent defense applies to Appellant's conduct relies on what was in his mind – not SM's mind – and on the totality of the circumstances. R.C.M. 916(j).

A rational fact finder could look at the facts involving SM and decide under all the circumstances that SM communicated nonconsent verbally and physically – even if she did not fully understand the legal definition of consent. Any legal determination about whether the facts fit the legal definition of consent belongs to the fact finder. A rational trier of fact – a military

judge in this case who was presumed to know the law – concluded that SM did not consent to Appellant's penal penetration. Legal sufficiency asks whether *any* rational trier of fact could come to such a conclusion, and here one rational trier of face looked at the circumstances and was convinced SM did not consent. King, 78 M.J. at 221.

The government proved the element of consent beyond a reasonable doubt, and a reasonable fact finder could have found SM did not consent to Appellant's penal penetration of her vulva. Thus, this Court should find Appellant's conviction for sexually assaulting SM was legally and factually sufficient.

B. Appellant's mistake of fact as to consent was unreasonable because he did not obtain consent from SM after SM verbalized nonconsent and they ceased physical contact.

Appellant's mistake of fact as to consent defense was unreasonable because SM stopped kissing Appellant and tried to go to sleep, but despite the break in intimacy, he penetrated SM's vulva anyway. Appellant asserts his conviction is not legally or factually sufficient because the Government did not disprove his mistake of fact as to consent defense beyond a reasonable doubt. (App. Br. at 10.) But the surrounding circumstances do not support Appellant's mistake of fact as to consent defense. MCM, pt. IV, ¶ 60.a.(g)(7)(C.)

"For the defense of mistake of fact to exist, 'the ignorance or mistake of fact must have existed in the mind of the accused and must have been reasonable under all the circumstances.'" United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (*citing* R.C.M. 916(j)).

Appellant knew that SM thought she was too drunk to engage in sexual contact; thus, she no longer wanted to participate in their sexual encounter. Appellant said "Okay" after SM said she was too drunk to continue engaging in intimate activities with Appellant. This was a verbal recognition on this part that she wanted to stop. Thus, the ignorance or mistake of fact did not

exist in Appellant's mind at the time he penetrated her. Appellant did not meet the first prong of R.C.M. 916(j), and both prongs must be met for the affirmative defense to apply.

Under all the circumstances, any mistake of fact held by Appellant was unreasonable. R.C.M. 916(j). SM said she was too drunk to kiss. Appellant felt her move off him. Appellant no longer felt her touch, and SM did not reengage touching once she was in a new position as she had before they started kissing. The two did not cuddle. Based on this break in contact and her statement that she was too drunk for what they were doing, it was unreasonable for Appellant to then assume that SM was interested in penal penetration. A reasonable person would have understood that SM's intoxication level – her reason for stopping the sexual interaction – had not changed during the few minute break after kissing Appellant but before Appellant penetrated SM's vulva.

Even if Appellant thought she might have changed her mind during the few silent moments in the dark, he did not obtain SM's verbal consent or discern her consent through her conduct. When evaluating a mistake of fact defense, "[t]he burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." McDonald, 78 M.J. at 381. Appellant was unable to read SM's facial expressions or body language because her face was turned away from him and the basement room was dark. Had he made any effort to look at her face he would have seen her eyes were closed, and she was attempting to sleep. But he made no effort to touch her or determine if she was still awake. Instead, he got on top of her back while she was face down. He leaned his weight over her, using his hands to prop himself up, and with the weight of his body on her legs he penetrated her vulva with his penis. "Appellant's actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent." McDonald, 78 M.J. at. 381. No reasonable person in Appellant's position would

believe he had obtained consent. Appellant did not meet the second prong of R.C.M. 916(j), and both prongs must be met for the affirmative defense to apply.

Appellant argues that because he "kissed her goodbye and he continued to communicate 'really nice' things to her" his mistake of fact was reasonable. (App Br at 14.) SM testified that Appellant hugged her goodbye – he tried to kiss her goodbye, but she avoided it. (R. at 261.) But the entire interaction was awkward, and she was uninterested in talking with him again. (R. at 261.) The day after the encounter, she stopped communicating with Appellant – an indication that something happened, and she wanted nothing to do with him. In the letter, Appellant wrote:

> I am writing this letter because I believe in being a man and standing up for my own actions. I did not mean to put you in a situation that you were uncomfortable with.
>
> . . .
>
> I didn't want things to end like this at all. I want to apologize for putting you through this and I hope that you continue to find happiness in your life. I know most likely that you never want to talk to me, but I don't harbor any ill will towards you. Whatever comes my way I am fully willing to accept, and I hope you have fun and relax over Christmas.

(Pros. Ex. 3). A rational fact finder could determine Appellant's actions and words – sending nice messages and writing a handwritten apology letter – were indications of a guilty conscience or an attempt to prevent her from reporting him, and that he did not mistakenly believe SM consented. This Court should find Appellant's conviction for sexually assaulting SM was legally and factually sufficient and Appellant did not hold a reasonable mistake of fact as to SM's consent. This Court should deny this assignment of error.

II.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULTING AR IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

Appellant met AR through mutual friends at the USAFA, and they spent time together in group settings. (R. at 471.) They were not close friends, but Appellant reached out to AR and asked if she wanted to participate in a threesome with him and his girlfriend, II. (R. at 472, 474.) AR agreed, and the three participated in a consensual threesome. (R. at 474.)

On 6 March 2021, Appellant sent AR a Snapchat message asking her if she had an Only Fans account, and she said she did not. (R. at 475-476, 479; Pros. Ex. 13.) He then offered to pay her for nude photos, but she did not send nude photos to Appellant. (R. at 475-476, 479; Pros. Ex. 13.) Before AR responded to Appellant's request for nude pictures, Appellant asked to AR to meet him. (R. at 480.) Appellant did not explicitly say that he wanted to have sex, and the two did not discuss having sex. (R. at 480.) But AR thought Appellant wanted to have sex with her. (R. at 480.) AR was open to the idea of having sex with Appellant, but she had not decided whether she wanted to have sex with him. (R. at 480-481.) AR met Appellant in the hallway of the Vandenberg dormitory, and they walked up to an empty room on the sixth floor. (R. at 483.)

Once in the empty room on the sixth floor, AR and Appellant began consensually kissing. (R. at 483.) The two were consensually touching each other while they kissed. (R. at 483-484.) The two took off their clothes; AR laid on the bed, and while standing Appellant digitally penetrated AR's vulva with her consent. (R. at 484.) Appellant aggressively penetrated AR, and the penetration became painful. (R. at 484.) To get Appellant to stop digitally penetrating her, AR told him "No" three times, and he stopped only after the third "no." (R. at 484-485.) "And

the third time he said with his fingers still inside [AR], 'Wait, are you saying no?' And so, [she] said, 'Yeah.'" (R. at 485.) He stopped penetrating her and he said, "Oh okay." (R. at 485.)

AR told Appellant to go wash his hands because she believed she was bleeding. (R. at 485.) While Appellant washed his hands, AR began putting on her clothes. (R. at 485-486.) AR testified that to her the sexual encounter was over. (R. at 485.) When AR pulled on her pants, Appellant was standing in front of her. (R. at 486.) Neither Appellant nor AR said anything. (R. at 487.) But Appellant kissed AR on the mouth, but she turned her head to the side without kissing him back. (R. at 487.) Appellant began kissing AR on the neck. (R. at 487.) Then Appellant turned AR around so her back was to him, and he pushed her forward bending her over the bed. (R. at 488.) He removed her pants and inserted his penis into her vagina without her consent. (R. at 488, 532.) AR estimated Appellant penetrated her for a minute or two. (R. at 540.) AR did not do anything to encourage Appellant to turn her around and begin penetrating her. (R. at 488.) AR could not move. (R. at 489.) AR then said, "No" three times again. (R at 489.) Appellant only stopped after the third "no" and said "okay." (R. at 489-490.) When he stopped, AR put her clothes on and tried to get Appellant to leave her in the room, but he waited for her to use the bathroom and walked her down to her dorm room. (R. at 490-491.)

AR told her roommate within minutes that she believed Appellant sexually assaulted her, and she told another friend within a few days. (R. at 495.) AR underwent a Sexual Assault Nurse Examination (SANE) approximately five days after the incident. (R. at 498.) AR presented with a hymenal bruise which was consistent with blunt force trauma from penal or digital penetration. (R. at 595, 597-598.) AR provided her underwear to the nurse examiner during the SANE, and the underwear were tested for DNA, and the DNA mixture was consistent with Appellant's DNA and AR's DNA. (Pros. Ex. 17.)

Standard of Review

The United States incorporates the standard of review from Issue I into Issue II.

Law

The United States incorporates the law from Issue I into Issue II.

Analysis

A. Appellant's conviction was legally and factually sufficient because AR verbally and physically expressed her nonconsent to Appellant.

The government proved beyond a reasonable doubt that Appellant penetrated AR's vulva without her consent. Consent is the only element at issue in this case. AR did not consent to the penal penetration, and any mistake of fact as to consent by Appellant was unreasonable. The conviction is factually and legally sufficient.

Appellant's conviction for penetrating AR's vulva with his penis is factually sufficient, and after "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this Court should be "convinced of Appellant's guilt beyond a reasonable doubt." Turner, 25 M.J. at 325. Appellant committed a sexual act against AR by penetrating her vulva with his penis, and she did not consent to the sexual act. MCM, pt. IV, ¶ 60.b.(2)(d); (R. at 488.) This Court makes its "own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt," and in this case the evidence supports a finding of guilt. Chisum, 75 M.J. at 952.

Appellant claims "the surrounding circumstances were clear indicators of consent, and SM was not thinking of 'stop' or 'get off of me' during the sex." (App. Br. 12.) "An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A.) AR manifested nonconsent when she stopped Appellant from digitally penetrating her, began to dress herself,

and rejected Appellant's kiss on the lips by turning her head to the side. (R. at 485-487.) Then when he penetrated her, she said "no" three times before he complied and stopped what he was doing. (R. at 489.) Her conduct indicated the sexual encounter was over, and she was preparing to leave the room.

Appellant turned AR around so her back was to him, and he pushed her forward bending her over the bed. (R. at 488.) He removed her pants and inserted his penis into her vagina without her consent. (R. at 488, 532.) AR was eventually able to verbalize her nonconsent, but it took her saying "no" three times for Appellant to stop what he was doing to her. (R. at 489.)

Appellant argues that AR's statement "because it hurt . . . I was raped" shows that she misunderstood how consent works, and "no rational trier of fact could be convinced beyond a reasonable doubt that AR did not consent to the sex since it was based on a fundamental misunderstanding of consent." (App. Br. at 19.) A rational fact finder could look at the facts involving AR and decide under all the circumstances that she communicated nonconsent verbally and physically – even if she did not fully understand the legal definition of consent. Any legal determination about whether the facts fit the legal definition of consent belongs to the fact finder. A rational trier of fact – a military judge in this case who was presumed to know the law – concluded that AR did not consent to Appellant's penal penetration. Legal sufficiency asks whether any rational trier of fact could come to such a conclusion, and here one rational trier of face looked at the circumstances and was convinced SM did not consent. King, 78 M.J. at 221.

Appellant argues AR consented because AR acted normal after the fact; she avoided telling II that she was sexually assaulted by Appellant; and she did not realize she was sexually assaulted until a couple of days later. (App. Br. at 19.) AR testified that she tried to get Appellant to leave the room without her by saying she needed to go to the bathroom. (R. at 491.)

When asked why she did not want Appellant to believe anything was wrong, she said, "Because I needed to figure out what even happened, and I wanted to get away from him. And I didn't want him to follow me. And I didn't want him to ask me about it." (R. at 491.) Confusion accounts for why AR tried to act normally in front of Appellant – her perpetrator – and why she avoided telling his girlfriend, II, what happened to her. Often a person needs time to understand shocking events and decide what to do about those traumatic events. AR had such a response to Appellant's conduct.

Appellant's conviction is legally sufficient. *Any* rational fact finder could find that the government proved the essential elements of the offense beyond a reasonable doubt. King, 78 M.J. at 221. This Court "viewing the evidence in the light most favorable to the prosecution" should find that any rational fact finder could believe the government established guilt beyond a reasonable doubt. Acevedo, 77 M.J. at 187. Any rational fact finder could determine that Appellant ignored AR's attempts to stop their sexual encounter, dress herself, and leave the room. Instead, Appellant took hold of her, turned her around, and penetrated her vulva without her consent. In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." Barner, 56 M.J. at 134 (internal citations omitted.) Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted.) And the government meets that threshold for Appellant's sexual assault against AR.

Appellant claims that "[e]very time that AR told [Appellant], "No" he immediately stopped." (App. Br. at 17.) But AR testified that to stop the digital penetration she said "no" three times, and then to stop the penal penetration, she again needed to say "no" three times before Appellant stopped. (R. at 485.) AR revoked her consent when she said "no." Appellant

committed a sexual act without AR's consent when he continued to penetrate AR's vulva after the first "no."

The government proved the element of consent beyond a reasonable doubt, and a reasonable fact finder could have found AR did not consent to Appellant's penal penetration of her vulva. Thus, this Court should find Appellant's conviction for sexually assaulting SM was legally and factually sufficient.

B. Appellant's mistake of fact as to consent was unreasonable because he did not obtain consent from AR after AR verbalized nonconsent.

Appellant's mistake of fact as to consent defense was unreasonable because AR stopped the consensual sexual encounter and started getting dressed. Then when Appellant penetrated her, AR had to tell him "No" three times before he complied. Appellant asserts his conviction is not legally or factually sufficient because the Government did not disprove his mistake of fact as to consent defense beyond a reasonable doubt. (App. Br. at 10.) But the surrounding circumstances do not support Appellant's mistake of fact as to consent defense. MCM, pt. IV, ¶ 60.a.(g)(7)(C.) "For the defense of mistake of fact to exist, 'the ignorance or mistake of fact must have existed in the mind of the accused and must have been reasonable under all the circumstances.'" McDonald, 78 M.J. at 379 (*citing* R.C.M. 916(j)).

Appellant's mistake of fact as to consent defense was unreasonable because AR stopped Appellant's digital penetration and tried to put her clothes back on, but despite the break in intimacy, he turned AR around and penetrated her vulva anyway then he proceeded to ignore her saying "no" three times before finally complying. AR's actions before he penetrated her indicated that AR wanted to get dressed and leave the dorm room. Then she verbally told Appellant "No," but he did not listen until the third time she said it. A reasonable person looked at all the facts would have found Appellant's mistake was unreasonable. Continuing to penetrate

someone after they verbalized a lack of consent is does not constitute a mistake of fact – it means the Appellant ignores AR's revocation and continued doing what he wanted to do. Any mistake of fact was unreasonable under all the "under all the circumstances." R.C.M. 916(j). Appellant needed to demonstrate both prongs of the affirmative defense, but he failed on the reasonableness prong.

Appellant claims he and AR "had an ongoing sexual relationship which informed [his] mistake of fact." (App. Br. at 20.) But "[a] current or previous dating or social or sexual relationship by itself . . . does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A.) Appellant and AR had sex on one occasion before the alleged sexual assault, but the circumstances were different. First, the previous sexual encounter was a threesome involving Appellant's girlfriend. Second, the sexual encounter was not painful requiring AR to stop the interaction. The circumstances of this sexual encounter were different – II was not involved – and it was unreasonable for Appellant to believe that first sexual encounter generated a mistake of fact as to consent in the sexual encounter with only AR. Furthermore, AR was entitled to revoke consent at any time, which she did on the multiple occasions that she told Appellant "No."

Appellant argues that "AR did not tell AFC Couty "no," "stop," or otherwise communicate a lack of consent." (App. Br. at 20.) But she did. She engaged in consensual kissing, touching, and digital penetration, but when it became unbearably painful, she told Appellant to stop and go wash his hands. (R. at 484.) This created a break in the intimacy, and AR began to dress herself – the opposite of what most adults would do if they wanted to continue engaging in sexual activity. (R. at 486.)

Appellant argues that the request for him to go wash his hands was simply a contingency for them to continue their sexual encounter. (App. Br. at 20.) But if that were actually true, then

AR would have remained naked. The two had already taken their clothing off by the time, Appellant digitally penetrated AR. So, if she had wanted to continue with the penetration of her vulva, she would not have put her shorts back on – a piece of clothing that covers the vulva and prevents Appellant from penetrating it. She put a physical barrier on her body to indicate her disinterest in continuing the sexual encounter. The mistake of fact was unreasonable considering AR put a physical barrier on her body to prevent penetration.

When Appellant tried to reengage with AR, Appellant tried to kiss AR again, and she turned her neck to him rather than allowing him to kiss her on the lips. (R. at 487.) Appellant seems to argue AR turned her head to allow him to kiss her neck, but he ignores the fact that AR was dressing herself when he returned from washing his hands. Between stopping the sexual interaction, getting at least partially dressed, and rejecting Appellant's kiss, Appellant should have questioned whether the sexual encounter was still consensual. Considering the context of the situation, the mistake of fact was unreasonable considering AR was trying to leave the situation before Appellant penetrated her.

Appellant claims that "AR then assisted [Appellant] in taking off her shorts and underwear before bending over the bed and having sex with [Appellant]." (App. Br. at 21-22.) But AR did not testify that she assisted Appellant with her pants after he returned from washing his hands. (R. at 487.) AR testified:

> [AR]: Eventually, he turned me around and bent me over the bed and starting putting his penis in my vagina and then having sex with me.
>
> [Trial Counsel]: So when he turned you around did he pull off your clothes?
>
> [AR]: Yes, he did. Before I turned around he was pulling off my shorts.

> [Trial Counsel]: Did you help him in anyway take off your clothes?
>
> [AR]: No, I did not.
>
> [Trial Counsel]: Did you ask him to take off your clothes?
>
> [AR]: No, I did not.
>
> [Trial Counsel]: Did he say he was going to take off your clothes?
>
> [AR]: No, he did not.
>
> [Trial Counsel]: And I just want to be clear when he turned you around, what did he penetrate you with?
>
> [AR]: His penis.

(R. at 488.) AR did not help Appellant remove her clothes when he returned from washing his hands.

This Court should be convinced beyond a reasonable doubt that the government proved the element of consent beyond a reasonable doubt. A rational fact finder could have found AR did not consent to Appellant's penal penetration of her vulva. Thus, this Court should find Appellant's conviction for sexually assaulting AR was legally and factually sufficient and Appellant did not hold a reasonable mistake of fact as to AR's consent. This Court should deny this assignment of error.

III.

APPELLANT'S WAIVED HIS STATUTORY RIGHT TO A PANEL OF MEMBERS, AND HIS FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY ARTICLE 25, UCMJ.[2]

Additional Facts

The military judge informed Appellant of his forum rights twice. (R. at 13, 32.) At the arraignment, the military judge explained Appellant's forum rights and granted Appellant's request to defer forum selection until after motions were complete. (R. at 13.) Before entry of pleas, the military judge reiterated Appellant's forum rights. (R. at 32.) Both times Appellant stated he understood that he could choose to be tried by either a panel of members or a military judge. (R. at 13, 32.) Appellant chose a military judge alone forum:

> [Military Judge]: . . . Do you understand the difference between trial before members and trial before a military judge alone?
>
> [Appellant]: Yes, Your Honor.
>
> [Military Judge]: Do you understand the choices that you have?
>
> [Appellant]: Yes, Your Honor.
>
> [Military Judge]: By what type of court do you wish to be tried?
>
> [Appellant]: Military judge alone, Your Honor.

(R. at 32.) Appellant also submitted a written request for a military judge alone trial. (App. Ex. V.) The military judge asked, "Is your request a voluntary one? And by that, I mean, are you making this request of your own free will?" Appellant responded, "Yes, Your Honor." (R. at 33.)

[2] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J.431 (C.M.A. 1982).

At no point did Appellant file a motion for appropriate relief alleging a violation of his Fifth or Sixth Amendment rights because cadets were not qualified members of the venire. Instead during motions practice, his counsel stated, "Your Honor, we have the previous four 412 motions that have been filed. ***We have no additional motions aside from that***." (R. at 34) (emphasis added.) Then before entering please, defense counsel stated, "Your Honor, ***we have no additional motions at this time*** and [Appellant] pleads to all charges and specifications, not guilty." (R. at 189) (emphasis added.)

Standard of Review

Whether an accused's forum selection is knowing, voluntary, and intelligent is reviewed de novo. United States v. St. Blanc, 70 M.J. 424, 427 (C.A.A.F. 2012).

Law and Analysis

A. Appellant voluntarily and affirmatively waived his statutory right to a trial before a panel of members.

Appellant affirmatively waived any Fifth or Sixth Amendment claims on appeal when he knowingly and voluntarily chose a military judge alone forum at his court-martial. "An accused has the ultimate authority to determine whether to plead guilty, ***waive a jury***, testify in his or her own behalf, or take an appeal." United States v. Moss, 73 M.J. 64, 65 (C.A.A.F. 2013) (internation citations omitted)(emphasis added). The right to a panel of members is a waivable statutory right in the military. 10 U.S.C. § 816(b)(3); R.C.M. 903(c). An accused may waive his statutory right to a panel of members if it is a knowing and voluntary waiver. R.C.M. 903(c). To waive the statutory right, an accused must know "the identity of the military judge and after consultation with defense counsel" request "a court composed of a military judge alone and the military judge approves the request." 10 U.S.C. § 816(b)(3).

During the bifurcated arraignment and then the motions practice, Appellant had the opportunity to observe the military judge's demeanor and receive the judge's rulings. (R. at 1-33.) The military judge announced her qualifications and the parties did not challenge her for cause. (R. at 31.) Appellant, after consultation with his counsel, chose to be tried and sentenced by military judge alone, confirmed that at the time he made this selection he knew the military judge's identity, verified that his choice was a voluntary one, and that he knew he was giving up his right to trial by members. (R. at 13, 32.) The requirements of R.C.M. 903 were satisfied and thus Appellant's waiver of the right to members was knowing and voluntary.

Appellant affirmatively waived his right to a panel of members, and this Court should not pierce waiver to grant relief because Appellant now questions his own decision making on appeal. If this Court finds Appellant's waiver of a panel of members was knowing, voluntary, and intelligent, then Appellant's waiver was valid. St. Blanc, 70 M.J. at 427. If Appellant's waiver is valid, then "a valid waiver leaves no error for [this Court] to correct on appeal." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009). This Court should find Appellant waived this issue at the trial level and should deny Appellant relief on this assignment of error.

B. Appellant did not have a constitutional or statutory right to a jury of his peers at a court-martial.

Even if this issue was not waived, Appellant is not entitled to relief. Neither Appellant's constitutional nor statutory rights were violated because he did not have a right to a jury of his peers. Appellant argues that he was "denied his rights to a trial by jury namely because Article 25, UCMJ, and R.C.M. 503(a)(2) prohibited a jury of his peers—a right guaranteed by the Constitution." (App. Br. at 24.) But Appellant did not have a Fifth or Sixth Amendment right to a jury trial at a court-martial let alone a jury of his peers – USAFA cadets.

The Sixth Amendment demands in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. But our superior courts have long held, the Sixth Amendment does not apply to courts-martial. In Ex Parte Quirin, the Supreme Court reiterated that "'cases arising in the land or naval forces' are . . . . deemed excepted by implication from the Sixth [Amendment]." 317 U.S. 1 (1942). "[T]he Supreme Court has repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial." United States v. Anderson, 83 M.J. 291, 294 (C.A.A.F. 2023); *see also* Whelchel v. McDonald, 340 U.S. 122 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."); United States v. Begani, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021) (explaining that members of the land and naval forces do not have a Sixth Amendment right to a jury trial); United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) ("[T]here is no Sixth Amendment right to trial by jury in courts-martial."); United States v. Kemp, 22 C.M.A. 152, 154 (C.M.A. 1973) (explaining the same in the context of panel member appointment.).

Because Appellant does not have a right to a jury trial, he does not have the right to dictate the makeup of any jury. "A service member has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen." Ex Parte Quirin, 317 U.S. 1 (1942); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988.)

Although an accused does not have a constitutional right to a jury at a court-martial, Congress decided service members have a statutory right to choose their forum. 10 U.S.C. § 816. But Congress also decided panels should be more educated and higher ranking than the accused in each court-martial. "When it can be avoided, no member of an armed force may be

tried by a court-martial any member of which is junior to him in rank or grade." 10 U.S.C. § 825(e)(1.) A convening authority shall detail members that are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(3.) Congress specifically annotated when commissioned officers, warrant officers, and enlisted members could serve on panels and the qualifications required for their service. Ultimately, Congress would have known USAFA cadets were subject to the code and available to serve on panels but ultimately decided cadets were not qualified for the venire. 10 U.S.C. § 802; 10 U.S.C. § 825.

Appellant goes on to claim that "the Academy is made up of, mostly, cadets and the systemic exclusion is found in statute: Article 25, UCMJ. Therefore, [Appellant] has demonstrated a prima facie showing that his right to a jury of peers was violated." (App. Br. at 25.) First, no such right exists at a court-martial, and a non-existent right cannot be violated by following statutory requirements. Second, even if cadets were being systematically excluded, Appellant failed to litigate the issue at trial and the record is void of any evidence supporting the demographic makeup of USAFA or the pool from which panel members are selected. Thus, he failed to provide the trial court and now this court with the requisite evidence to make "a prima facia showing that his right to a jury of his peer was violated." Our superior court in United States v. Jeter determined a prima facie case of systematic exclusion (specifically for racial discrimination) is established "through submission of evidence." 81 M.J. 791, 796 (C.A.A.F. 2021). Appellant did not submit any evidence on this matter; thus, a prima facie case was not established.

Neither Appellant's constitutional nor statutory rights were violated. This Court should deny this assignment of error.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**REPLY BRIEF**
	)	Before Panel No. 3
v.	)	
	)	No. ACM 40484
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	19 September 2024

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

A. AFC Couty's conviction for sexual assault against SM is legally and factually insufficient.

The Government failed to prove that SM did not consent to the sexual intercourse with AFC Couty. Consent is understood from the totality of the circumstances and the facts of this case demonstrate actual consent. Article 120(g)(7)(C), Uniform Code of Military Justice (UCMJ). Moreover, the Government failed to prove that AFC Couty did not have a reasonable mistake of fact as to consent. Therefore, his conviction for sexual assault against SM should be set aside as legally and factually insufficient.

SM and AFC Couty got into a twin-size bed together while half naked. R. at 98-99, 120.[1] AFC Couty flirted with SM before the two began to make-out. R. at 10. Then, SM straddled AFC Couty—while both were half naked—and they made out in that position for some time. R. at 100. These facts demonstrate both consent and a reasonable mistake of fact. The Government agrees with these facts, Ans. at 4-6, but asks this Court to ignore them. Ans. at 11-12 ("This Court should

[1] As noted in AFC Couty's opening brief, the page numbers differ between the electronic and hard copy transcripts. AFC Couty will continue to cite to the electronic transcript as he did in his opening brief, although it appears the Government cited to the hard copy. *See, e.g.*, Ans. at 3.

focus on SM's actions *after* she said she was too drunk."). The Government cites no authority for this proposition, and this Court should not ignore the surrounding circumstances of a sexual act in determining both consent and mistake of fact. *United States v. Rodela*, 82 M.J. 521, 527 (A.F. Ct. Crim. App. 2021) (reasoning that consent is gleaned from the surrounding circumstances of a sexual encounter).

But, even if this Court were to ignore these facts, the record nevertheless demonstrates actual consent and a reasonable mistake of fact as to consent. At some point while straddling AFC Couty, SM stated, "I am too drunk for this." R. at 98, 100. This statement, according to the Government, was the sole indicator of nonconsent for both kissing and any other sexual activity that followed. Ans. at 10. In making this argument, the Government wrongly reads-in facts that were not elicited at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) ("[This Court's] assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial."). SM did not say "I am too drunk for kissing," "I am too drunk to have sex," or "I am too drunk to make out." Instead, she only said "I am too drunk for *this*." R. at 98, 100 (emphasis added). The "this" SM was "too drunk for" was ambiguous at best and, given the context of consensual foreplay that preceded the statement, it should not be understood as clear evidence of nonconsent. More problematic is that the Government reads-in these manufactured facts to AFC Couty's then-existing mind: "Appellant *knew* that SM thought she was too drunk to engage in sexual contact." Ans. at 15 (emphasis added). There is no evidence in the record for this proposition. Whatever "this" may have been, it did not explicitly refer to sexual activity nor did AFC Couty understand it to mean sexual activity.

After making this statement, SM rolled off AFC Couty onto her stomach. R. at 102. AFC Couty got on top of her, moved her underwear, and penetrated her vulva with his penis. R. at 102.

For several minutes, SM did not say anything to AFC Couty while they engaged in penetrative sex, such as "no," "stop," or "don't."[2] In fact, there was no verbal or physical indication of nonconsent during the sex. Instead, SM asked AFC Couty if they could change sexual positions. R. at 104, 645. The Government contends that the question, "can we try another position," was a way to get AFC Couty off her "so she could escape."[3] Ans. at 12. But this was not at all clear to AFC Couty, nor would it have been to any reasonable person. It was not until SM made her first and only indication of nonconsent—crossing her legs after changing positions—that AFC Couty understood that SM was not consenting. R. at 104, 124-25. When this happened, he immediately stopped. R. at 125. This demonstrates AFC Couty's reasonable mistake of fact as to consent.

After the sexual intercourse, even SM did not believe she was sexually assaulted; she thought it was a one-night stand. R. at 134. The Government argues that SM was just confused, citing to direct examination testimony before she was confronted by trial defense counsel with an inconsistent statement to the Air Force Office of Special Investigations (AFOSI). *Compare* R. at 130, *with* R. at 133-34; Ans. at 13. Despite the Government's argument, SM was not confused—she truly believed the sexual encounter was consensual until she received AFC Couty's apology letter days, if not weeks, later. R. at 134. Strangely, the Government tells this Court that an alleged victim's "internal understanding of the situation does nothing to change the facts of the sexual encounter." Ans. at 14. This does not make sense. In a sexual assault case about consent, the victim's "internal understanding" is paramount. Article 120(b)(2)(A); *cf.* Ans. at 9 (agreeing this

[2] As AFC Couty noted in his opening brief, SM testified that, during the sexual intercourse, the words "stop or get off of me . . . did not come to mind." R. at 124.

[3] Interestingly, when AFC Couty stopped having sex with SM, SM did not "escape." Instead, she spent the night in bed with AFC Couty. R. at 105. In fact, it was AFC Couty, not SM, who left the house first the next morning. R. at 126-27.

case is about consent). After all, where, as here, a victim consents to sexual intercourse there is no sexual assault.

WHEREFORE, AFC Couty requests this Court set aside the findings and sentence as to the sexual assault conviction for SM.

B. AFC Couty's conviction for sexual assault against AR is legally and factually insufficient.

The Government failed to prove that AR did not consent to the sexual intercourse with AFC Couty. Consent is understood from the totality of the circumstances and the facts of this case demonstrate actual consent. Article 120(g)(7)(C), UCMJ; *Rodela*, 82 M.J. at 527. Moreover, the Government failed to prove that AFC Couty did not have a reasonable mistake of fact as to consent. Therefore, his conviction for sexual assault against AR should be set aside as legally and factually insufficient.

AR and AFC Couty had a pre-existing sexual relationship. Prior to the alleged incident, AR and AFC Couty had a threesome with II. R. at 340. Then, on the night of the alleged assault, AR and AFC Couty exchanged sexually charged messages, including AR agreeing to send nude photographs to AFC Couty. R. at 345; Pros. Ex. 13. Eventually, the two met-up to have sex in an empty dormitory room. R. at 348; Pros. Ex. 13. Once in the room, the two made out and removed their clothes. R. at 349-50. AR got into bed and AFC Couty began to digitally penetrate her vulva. R. at 350-51. While AR testified that she told AFC Couty to stop fingering her because this was painful, R. at 350-51, 389, she never communicated this pain to AFC Couty.

When AR told AFC Couty to stop digitally penetrating her, she did so by saying "no no no" in quick succession. R. at 387-88. She used the same phrase during the later in time sexual intercourse that makes up charged specification. R. at 355. The Government claims that AFC Couty waited each time until the third "no" to stop—implying that he actively disregarded the first

two "no's." Ans. at 22-23. However, this ignores the way the "no's" were communicated to AFC Couty—in quick succession. R. at 387-88. Importantly, after being told no, AFC Couty stopped the sexual activity, indicating a mistake of fact as to consent for the charged conduct. R. at 348, 351, 355. AFC Couty's mistake of fact as to consent was reinforced by his response to AR saying "no"—AFC Couty stopped having sexual intercourse with AR and told her "okay . . . we don't have to do anything you don't want to do." R. at 356. The Government conveniently omits this fact in their brief, likely because it demonstrates AFC Couty's actual mistake of fact as to consent.

Instead of addressing AFC Couty's mistake of fact as to consent, the Government focuses on AR putting her shorts on between the digital penetration and second round of kissing, which led to the penetrative offense. Ans. at 24-25. The Government uses AR starting to dress to argue that AR could only consent to sexual intercourse if she remained completely naked. Ans. at 24-25. This is problematic in several ways. First, as the Government rightly notes earlier in its brief, people can change their mind about consent at any point during an encounter. Ans. at 12. That same logic applies to giving consent. Just because someone starts to get dressed does not render later-given consent invalid. Second, AR—who was still topless at the time—did not tell AFC Couty to stop or otherwise resist him when he kissed her neck and shoulder. R. at 395. Given the context of the entire situation—to include the couple's plan to go to this empty room specifically to have sex—this was an indicator of consent. Third, despite putting her pants back on prior to the kissing, the record demonstrates that AR assisted AFC Couty in taking them off before having sex with him. R. at 355, 396-98. These actions were indicators of consent or, at the very least, evidence of a reasonable mistake of fact as to consent.

WHEREFORE, AFC Couty requests this Court set aside the findings and sentence as to the sexual assault conviction for AR.

Respectfully submitted,

[redacted]

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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 Air Force Government Trial and Appellate Operations Division on 19 September 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 10 September 2024, counsel for Appellant submitted a motion for reconsideration concerning this court's prior denial of Appellant's motion for a twelfth enlargement of time out of time (EOT 12 (OOT)), which the court denied on 14 August 2024. The Government opposed both motions by Appellant.[1]

In his EOT 12 (OOT) motion—dated 12 August 2024 and filed the day before his eleventh enlargement of time (EOT 11) was about to expire—Appellant requested an additional 30 days to finalize the hiring of civilian appellate defense counsel and thereafter to submit a supplemental assignments of error brief. Rule 18.5 of this court's Rules of Practice and Procedure requires "[a]ny filing that is submitted out of time . . . shall articulate good cause for why the filing is out-of-time." A.F. CT. CRIM. APP. R. 18.5. Appellant specifically expressed in this motion that he has shown good cause because he "has an absolute right to representation by counsel on appeal," and "[t]hat right extends to the hiring of civilian appellate counsel at [his] own expense."

According to Appellant's motion for reconsideration, Appellant had contacted his military appellate defense counsel to inform him that he intended to, and was in the process of, hiring two civilian appellate defense counsel (Ms. AH and Ms. SK). Appellant's military appellate defense counsel, acting in accordance with the filing deadline ordered by the court for Appellant's EOT 11, immediately filed an assignments of error brief on behalf of Appellant on 13 August 2024, enumerating three assignments of error, including one

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[1] The Government's opposition to Appellant's motion for reconsideration was filed out of time. While commendable for its candor, we note that the Government's explanation for its out-of-time response as "an oversight by counsel" is generally unsatisfactory. We urge counsel to remain ever vigilant in consulting our rules pertaining to the filing deadlines for motions and responses. *See* A.F. CT. CRIM. APP. R. 23.2.

personally raised by Appellant.[2] The Government filed its answer brief to Appellant's assignment of errors on 12 September 2024, and Appellant filed his reply brief on 19 September 2024.

Appellant further asserts in his motion for reconsideration that "[t]his [c]ourt's denial of [his EOT 12 (OOT) motion] stripped Appellant of his constitutional and statutory right to appellate counsel of his choosing." Appellant made this claim notwithstanding the fact that Appellant never actually procured the services of his prospective civilian defense counsel of his choice, nor did this court's prior order forbid Appellant from employing whatever attorney he chose.

According to the record presented in the filings of the parties to this court, Appellant has made no allegations that his appellate military counsel was or is ineffective; nor has he ever requested that his military appellate defense counsel withdraw from the representation; nor has he ever indicated that he intended to release his military appellate defense counsel.

Both the Sixth Amendment of the Constitution[3] and Article 70, UCMJ, 10 U.S.C. § 870, provide appellants with the right to effective assistance of counsel upon appeal. Article 70(c), UCMJ, provides for the right to detailed appellate military counsel, and Article 70(d), UCMJ, provides for the right for an appellant to hire, at his own expense, a civilian defense counsel to represent him at his own expense. "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial . . . ." and on appeal, *United States v. Ash*, 413 U.S. 300, 309 (1973), and thereby "to assure fairness in the adversary criminal process," *United States v. Morrison*, 449 U.S. 361, 364 (1981). Nonetheless, while an appellant enjoys a right to choice of counsel, this right is not absolute as it was not "the essential aim of the Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

Our superior court has recognized the inherent authority of the Courts of Criminal Appeals (CCAs) to employ reasonable means to control their dockets and ensure the timely processing of appeals. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008) (citations omitted) (holding that "the [CCAs] have broad power to issue orders to counsel to ensure the timely progress of cases reviewed under Article 66[, UCMJ]"); *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006) (noting CCAs are expected to "document reasons for delay and to exercise the institutional vigilance that was absent in Moreno's case" as part of ensuring timely appellate review); *United States v. May*, 47

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[2] *See United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] U.S. CONST. amend. VI.

M.J. 478, 482 (C.A.A.F. 1998) (holding that CCAs are empowered to ensure military appellate counsel abide by their "obligation to comply with court orders and protect the interests of their client").

These supervisory powers of the CCAs remain robust even in consideration of an appellant's exercise of his choice of counsel. The Supreme Court of the United States has reiterated: "[w]e have recognized a [ ] court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (citing *Wheat*, 486 U.S. at 163–64; *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983)); *accord United States v. Watkins*, 80 M.J. 253, 358 (C.A.A.F. 2020). Of course, in balancing those interests, we are also aware that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (citation omitted) (analyzing denial of a continuance which resulted in non-availability of appellant's choice of civilian defense counsel in a trial context).

Appellant is correct that an erroneous deprivation of Appellant's choice of counsel is structural error, *see McCoy v. Louisiana*, 584 U.S. 414, 428 (2018) (citing *Gonzalez-Lopez*, 548 U.S. at 150), but herein lies the issue, our denial was *not* erroneous.

In denying Appellant's EOT 12 (OOT) request, this court was not engaging in arbitrary insistence of expeditiousness to the exclusion of all other factors. Rather, that decision came in the context of a progressive course of this court balancing its own legitimate docket management concerns with Appellant's interests in securing additional time to research and draft what he viewed as an efficacious brief on his behalf. Even assuming *arguendo* that this court's denial of Appellant's EOT 12 (OOT) request "severed" a nascent attorney-client relationship (which in fact was never fully formed), such a "deprivation" of Appellant's opportunity to *form* a late-breaking attorney-client relationship (vice actual *severance* of an existing attorney-client relationship) with his newly preferred civilian defense counsel some 419 days *after* docketing in his case was *not* erroneous. Choice of counsel is an important right, and this court will accommodate it within reasonable circumstances—but it is not absolute.

Here, the court's prior order was a reasonable application of the factors governing Appellant's choice of counsel on appeal for three primary reasons: (1) Appellant was on notice as to this court's position as to the reasonableness (or lack thereof) of continued protracted delays in his case as of at least 120

days *prior* to his EOT 12 (OOT) request;[4] (2) Appellant's Article 70, UCMJ, rights were already vindicated by his presumptively competent military appellate defense counsel who filed an assignment of errors brief on Appellant's behalf on 13 August 2024; and (3) not even an allegation of defective representation against Appellant's military appellate defense counsel (which might necessitate withdrawal and/or dismissal of that counsel) exists to justify prioritizing Appellant's exercise of his choice of counsel over all other competing interests at this late stage of his appellate process.

Beginning with Appellant's eighth enlargement of time (EOT 8) motion, which the Government opposed, this court advised Appellant via its order that "given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time." Thereafter, in its 7 May 2024 order granting (over government opposition) Appellant's ninth enlargement of time (EOT 9) motion, which the Government also opposed, this court advised Appellant that he "should not rely on subsequent requests for enlargement of time being granted" and that "any requests for future enlargements of time may necessitate a status conference prior to the court taking action on any forthcoming request."

Thereafter, on 11 July 2024, in response to Appellant's EOT 11 request, this court held a status conference with the parties to consider whether any "exceptional circumstances" existed to justify granting Appellant's EOT 11 request (which would mark 420 days of delay from the time Appellant's case was docketed with the court until the deadline for filing his brief). Despite Appellant's military appellate defense counsel's candid concession during the status conference that no "exceptional circumstances" existed, our order dated 12 July 2024 we nonetheless granted Appellant's EOT 11 request (over the Government's opposition) in our order dated 12 July 2024, albeit with the additional supervisory conditions (agreed to by Appellant's military appellate defense counsel) that Appellant submit a non-binding listing of anticipated assignments of error with the court not later than 15 days after the date of the court's order.

It is within that context that this court denied Appellant's EOT 12 (OOT) request on 14 August 2024. Doing so did not prevent Appellant from filing a

[4] The record before us also reflects that Appellant was aware of the status of his case with his military appellate defense counsel and the recurrent delays requested on his behalf, and the timelines therefor. In each EOT request beginning with Appellant's fifth enlargement of time (EOT 5), Appellant's military appellate defense counsel's pleading averred that "Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time."

brief (as his military appellate counsel filed one on Appellant's behalf on 13 August 2024). Nor did it "sever" an existing attorney-client relationship between Appellant and Ms. AH and Ms. SK—because none existed. The fact that Appellant chose as a practical matter not to retain Ms. AH and Ms. SK after this court denied his EOT 12 (OOT) motion was his own practical calculation—*not* an outcome mandated or required by any decision of this court. Nor did any action of this court prevent Appellant from retaining Ms. AH and Ms. SK at any point in time before the filing of his motion for EOT 12 (OOT).

Accordingly, this court reaffirms the rectitude of its prior denial of Appellant's EOT 12 (OOT) motion. While we are sensitive that the Appellant is obviously the primary stakeholder in his appeal, he is not the only stakeholder. We note that, as with trial, society at large also has an interest in the ultimate finality of verdicts and appellate cases.[5] This court's docket management is a component of effectuating the interest of all parties in the timely processing of appeals. Under the unique circumstances of this case this court is not required to yield all other interests in the timely processing of appeals to Appellant's untimely election. This court exercises not just the authority but is burdened with the responsibility to process criminal appeals in a timely and reasonable fashion. *See Moreno*, 63 M.J. at 137 ("Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.").

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

ORDERED:

[5] For example, while certainly subordinate to Appellant's rights to present an appellate defense, choice of counsel, and timely appellate processing, we note that Congress has codified a crime victim's right to "proceedings free from unreasonable delay"—we construe this to include both trial and appellate proceedings. *See* Article 6b(a)(7), 10 U.S.C. § 806b(a)(7).

Appellant's Motion for Reconsideration of Enlargement of Time (Twelfth) Out of Time is **DENIED**.[6]

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

[6] We continue to observe that neither our initial denial nor this denial of Appellant's request for reconsideration constrain Appellant from hiring the civilian defense counsel of his choice. The role that counsel might play in Appellant's ongoing appellate litigation would of course be a choice for Appellant and his counsel, but we note that under our rules, Appellant's case remains ongoing. If Appellant choses ultimately not to hire a civilian appellate defense counsel, that is solely a function of his determination of the utility of that hire, not a function of any implicit or explicit limitation on that right by this court.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR RECONSIDERATION OF ENLARGEMENT OF TIME (TWELFTH) – OUT OF TIME**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force *Appellant*	)	No. ACM 40484 10 September 2024

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

Pursuant to Rule 31.1 of this Court's Rules of Practice and Procedure, Appellant moves for reconsideration of this Court's Order denying his Motion for Enlargement of Time (EOT) (Twelfth) – Out of Time.[1] The denial effectively stripped Appellant of his right to counsel of his choosing for appeal, violating his constitutional and statutory rights. This Court should grant the Motion for EOT (Twelfth) – Out of Time to permit Appellant time to exercise his rights.

Statement of Facts

This motion adopts, by reference, the facts, law, and argument provided in Appellant's Motion for EOT (Twelfth). In addition, the following facts are provided.[2]

Undersigned counsel completed a review of Appellant's case and drafted an Assignments of Error brief prior to 12 August 2024, the day before Appellant's brief was due. But in the morning hours of 12 August 2024, Appellant called undersigned counsel and informed that he intended to hire civilian counsel to represent him on appeal. Appellant relayed that he had a

[1] This motion for reconsideration is not out of time. Rather, this is a reference to the filing that Appellant now seeks reconsideration of, which was filed out of time.
[2] Appellant has provided limited consent to disclose the confidential information contained in this section.

meeting with civilian counsel later the same day. After telephonically meeting with civilian counsel, Appellant contacted undersigned counsel re-iterating his intention to hire civilian counsel. Appellant stated he intended to hire Ms. Stephanie Kral and Ms. Abbigayle Hunter. But because Appellant is—and was then—in confinement, he had to coordinate with family members to acquire funds and sign a retention agreement with Ms. Kral and Ms. Hunter. Ostensibly due to the availability of Appellant's confinement counselor, the phone calls necessary to accomplish these final steps could not be completed on 12 August 2024.[3]

Thereafter, undersigned counsel filed the Motion for EOT (Twelfth) – Out of Time. That motion informed this Court of Appellant's intent to hire civilian counsel for his appeal, explaining that an EOT was necessary to allow Appellant time to retain Ms. Kral and Ms. Hunter, and to give civilian defense counsel time to review the record and prepare filings for this Court. Undersigned counsel contacted the Government Trial and Appellate Operations Division to inform them of the out of time motion.

On 13 August 2024—the same day that Appellant's brief was due to this Court—Appellant continued to work to retain Ms. Kral and Ms. Hunter. However, again due to the difficulties of contacting family and counsel, retention of civilian counsel was not executed by close of business on 13 August 2024. Nevertheless, Appellant continued to inform undersigned counsel that it was his desire and intent to retain civilian counsel to represent him on appeal. At approximately 1310, the Government filed their opposition to Appellant's motion. In so doing, the Government recognized that "Appellant just hired two new civilian appellate defense counsel." United States' Opposition to Appellant's Motion for Enlargement of Time, 13 August 2024.

[3] This was communicated directly to undersigned counsel by Appellant's counselor, Ms. Nikki Thomas; she left the office at 1300 PDT on 12 August 2024.

At approximately 1400 on 13 August 2024, undersigned counsel called the Court to ensure they had received the out of time EOT as well as the Government's opposition. Undersigned counsel also informed the Court that the Assignments of Error brief was due the same day; the Court confirmed it received the filings. By 1615, this Court had not acted on Appellant's Motion for EOT (Twelfth) – Out of Time. Undersigned counsel called the Court's main line three times but received no answer. When undersigned counsel called the Court's commissioner on her personal cell phone, undersigned counsel was informed that the Court had received the filings but could not say whether the Court would act on the motion before the end of the day.

Out of an abundance of caution—but understanding Appellant's intent to retain civilian counsel for appeal—undersigned counsel filed the Assignments of Error brief at 2022 hours. That filing explained, "Because the instant filing is due today, undersigned counsel is filing this assignment of errors brief out of an abundance of caution. However, should this Court grant the Motion for EOT (Twelfth), AFC Couty will likely seek leave of the Court to withdraw this filing." Brief on Behalf of Appellant, 13 August 2024, at 2 n.4.

On 14 August 2024, at 1221, this Court denied Appellant's Motion for EOT (Twelfth) – Out of Time. Order, 14 August 2024. This Court did not explain its rationale. *Id*. Once Appellant was informed that this Court denied his Motion for EOT (Twelfth), he chose not to retain civilian counsel because he saw it as a "waste of money"—paying for counsel who would be unable to represent him at this Court given the deadline had passed. Nevertheless, Appellant presently maintains his desire and intent to have civilian appellate defense counsel represent him on appeal.

Law and Argument

"The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." *United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008) (citing *Evitts v. Lucey*,

469 U.S. 387, 396-97 (1985)). In the military, appellants also have a statutory right to hire civilian appellate counsel to represent them on appeal. Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870. This Court's denial of the Motion for EOT (Twelfth) – Out of Time stripped Appellant of his constitutional and statutory right to appellate counsel of his choosing.

By 12 August 2024, Appellant had taken several steps to hire Ms. Kral and Ms. Hunter to represent him on appeal, in accordance with his constitutional and statutory rights. He met with Ms. Kral and discussed his appeal at length. On the same day, Appellant iterated an intent to hire Ms. Kral and Ms. Hunter to both Ms. Kral and undersigned counsel. Appellant attempted to work with family to secure funds to sign a retention agreement. At the same time, Appellant filed the Motion for EOT (Twelfth) with this Court to allow him time to hire Ms. Kral and Ms. Hunter.

Unfortunately, Appellant's counselor was unable to effectuate the contacts necessary to retain Ms. Kral and Ms. Hunter on 12 August 2024. The next day, Appellant contacted family and undersigned counsel to obtain funds and secure Ms. Kral's and Ms. Hunter's representation. However, this Court's decisions ultimately coerced Appellant into not hiring civilian counsel. For example, this Court's failure to act on the EOT by 13 August 2024 forced undersigned counsel to file an Assignments of Error brief without civilian counsel's review. Then, this Court's summary denial of the EOT a day later essentially mooted Appellant's decision to hire civilian counsel as the Assignments of Error brief was already filed, and civilian counsel would not have time to review the record and provide supplemental filings to this Court.

When, as here, courts impede a criminal defendant's right to counsel of his choosing, the error is structural. *McCoy v. Louisiana*, 584 U.S. 414, 428 (2018) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)). Structural errors impact the proceedings themselves, such that they cannot serve their function as vehicles of determining guilt and innocence, and "no criminal

punishment may be regarded as fundamentally fair" when it arises from a structurally defunct process. *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991). This is true both at trial and on appeal. *See Martinez v. Court of Appeal*, 528 U.S. 152, 160-61 (2000) (reasoning that the underlying concerns necessitating the Sixth Amendment right to representation at trial are equally present for an appellant on appeal). Further, the risks associated with denial of appellate counsel of one's choosing are exasperated when the appellate attorney provided to an appellant is employed by the same Government prosecuting him. *Id*. ("On appellate review, there is surely a . . . risk that the appellant will be skeptical whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty.")

It is unclear why this Court chose to summarily deny Appellant's Motion for EOT (Twelfth) – Out of Time. But ultimately the rationale does not matter because the resulting error is structural. *Hemphill v. New York*, 595 U.S. 140, 154-55 (2022) ("Courts may not overlook [the Constitution's] command, no matter how noble the motive."). Like at the trial level, the choice of attorney on appeal will affect how the case is pursued. *Cf. Gonzalez-Lopez*, 548 U.S. at 150. As such, "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id*.

Despite the deprivation of Appellant's constitutional and statutory rights, this Court can still remedy the harm: by granting the Motion for EOT (Twelfth) – Out of Time. Doing so would give Appellant time to retain Ms. Kral and Ms. Hunter and, in turn, give civilian appellate counsel time to review Appellant's record. This course of action would alleviate the deprivation of rights Appellant has suffered.[4]

WHEREFORE, Appellant respectfully requests that this Court grant the Motion for Reconsideration and grant Appellant's Motion for EOT (Twelfth) – Out of Time.

Respectfully submitted,

[redacted]

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

[4] Appellant understands that the Government's Answer is due on 12 September 2024. However, should this Court grant the Motion for EOT (Twelfth) – Out of Time, Appellant would immediately retain Ms. Kral and Ms. Hunter, who would themselves expeditiously review the record and prepare any filings necessary. Appellant would have no objection to the Government taking additional time to respond to either the initial brief or any additional filings made by Ms. Kral or Ms. Hunter.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 September 2024.

Respectfully submitted,

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES OUT OF TIME OPPOSITION TO MOTION FOR RECONSIDERATION
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY** United States Air Force *Appellant.*	)	No. ACM 40484 18 September 2024

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

Pursuant to Rule 23(c) and 23.2 of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Reconsider the Denial of Enlargement of Time (Twelfth), dated 10 September 2024. This opposition to Appellant's motion is filed out of time due to an administrative oversight by counsel.

Statement of the Facts

The above captioned case was docketed with this Court on 20 June 2023. Appellant requested twelve enlargements of time (EOT) in this case. Eleven EOTs were granted by this Court, but this Court denied the twelfth EOT. Appellant now moves for reconsideration on the twelfth EOT because he wanted to be represented by civilian appellate defense counsel of his choosing.

In Appellant's eleventh motion for enlargement of time, he did not mention a desire for civilian appellate defense counsel to represent him. (*Appellant's Motion for Enlargement of Time (Eleventh)*, dated 3 July 2024). Instead at the Court's status conference on 10 July 2024, military appellate defense counsel stated he was conducting research and identified potential

issues for appellate review. (*Order*, dated 27 July 2024). Appellate defense counsel did not mention Appellant wanted civilian representation. (Id.).

Appellant argued in his twelfth EOT, filed the day before his brief was due, that he wanted to secure civilian appellate defense counsel, but he had not actually secured new representation. (*Appellant's Motion for Enlargement of Time – Out of Time (Twelfth)*, dated 12 August 2024). Appellate defense counsel explained in the motion, "But in the morning hours of 12 August 2024, Appellant called undersigned counsel and informed that he intended to hire civilian counsel to represent him on appeal." (Id.) Appellant filed his Assignments of Error on 13 August 2024.

No notices of representation were filed with this Court by any civilian appellate defense attorney. This Court denied the EOT. (*Order*, dated 14 August 2024). Appellant filed a motion for reconsideration on 10 September 2024. (*Motion for Reconsideration of Enlargement of Time (Twelfth) – Out of Time*, dated 10 September 2024). The Government filed its Answer to Appellant's assignment of error brief on 12 September 2024. As of 10 September 2024 – the date of Appellant's motion for reconsideration – Appellant still had not secured civilian representation. (*Motion for Reconsideration of Enlargement of Time (Twelfth) – Out of Time*, dated 10 September 2024).

Argument

When evaluating a motion for reconsideration, this Court should consider whether Petitioner has shown a "manifest error of law," which is generally required for a reconsideration motion. Pryce v. Scism, 477 Fed. Appx. 867, 869 (3rd Cir. 2012). No such "manifest error of law" occurred. Appellant argues he was denied his constitutional and statutory rights to appellate defense counsel. (*Motion for Reconsideration of Enlargement of Time (Twelfth) – Out*

of Time, dated 10 September 2024 at 4). "The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." United States v. Brooks, 66 M.J. 221, 223 (*citing* Evitts v. Lucey, 469 U.S. 387 (1985)). Appellant was not denied his right to counsel.

Appellant received competent military appellate defense representation in accordance with Article 70(a), UCMJ. The Judge Advocate General appointed a qualified commissioned officer to represent Appellant. 10 U.S.C. § 870(a). Appellate defense counsel represented Appellant, reviewed the record of trial, and filed Appellant's Assignments of Error by the deadline set by this Court. Appellate defense counsel clearly discussed the case with his client because appellate defense counsel filed one assignment of error pursuant to United States v. Grostefon meaning Appellant wanted to address the issue on appeal even if appellate defense counsel did not believe it held any merit. 12 M.J. 431 (C.A.A.F. 1982). Appellant was not stripped of his constitutional or statutory right to appellate representation.

"The accused has the right to be represented before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court by civilian counsel if provided by him." 10 USCS § 870(d). Appellant knew he had the right to be represented by civilian appellate defense counsel because he eventually told his counsel, albeit in the last hours before his assignments of error were due, that he wanted civilian representation.

Appellant argues that his right to counsel was impeded by this Court. (*Motion for Reconsideration of Enlargement of Time (Twelfth) – Out of Time*, dated 10 September 2024 at 4). It was not. During the more than 400 days that his case was pending appeal with this Court, Appellant never hired civilian appellate defense counsel. The responsibility to find civilian representation remained with Appellant, and he failed to do so. 10 U.S.C. § 870(d). Appellant should not be allowed to delay his appellate review now because he made no effort to obtain the

specific representation that he apparently wanted. Appellant received proper appellate representation thus no manifest error of law occurred that would require reconsideration by this Court.

CONCLUSION

The United States opposes Appellant's motion to reconsider the denial of a twelfth enlargement of time. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion for reconsideration.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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CERTIFICATE OF FILING AND SERVICE

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40484**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Justin COUTY	)	
Air Force Cadet (AFC)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 22 November 2024, Appellant, through counsel, filed a Motion for Leave to File Supplemental Assignment of Error on the following issue: "WHETHER THIS COURT'S DENIAL OF APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH) DEPRIVED APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO COUNSEL."[1]

By way of background, on 14 August 2024 this court denied Appellant's twelfth motion for enlargement of time (EOT) (itself filed out of time on 12 August 2024). Thereafter, on 24 September 2024, in response to Appellant's motion for reconsideration on that denial, the court issued a six-page written order setting forth its rationale for the denial of Appellant's underlying motion.

Under the unique facts of this case, we find good cause to grant Appellant's motion.[2]

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

ORDERED:

Appellant's Motion for Leave to File Supplemental Assignment of Error is **GRANTED.**

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[1] The court notes that Appellant's twelfth EOT request referenced in Appellant's issue statement is incorrect. The enlargement of time at issue was filed out of time, on 12 August 2024, the day before Appellant's assignment of errors brief was due on 13 August 2024.

[2] We caution litigants against reading any precedential value into our finding "good cause" in this case. Under ordinary circumstances, this court remains skeptical of a party's own actions, or inactions, manufacturing factual predicates for supplemental filings.

Appellee's Answer to the supplemental AOE is due not later than **19 December 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON BEHALF BEHALF OF APPELLANT AND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY,** United States Air Force, *Appellant.*	)	No. ACM 40484
	)	22 November 2024

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

ADDITIONAL ASSIGNMENT OF ERROR

WHETHER THIS COURT'S DENIAL OF APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH) DEPRIVED APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO COUNSEL.

STATEMENT OF THE CASE

On 26 October 2022 and 17-21 January 2023, a military judge sitting as a general court-martial convicted Air Force Cadet (AFC) Justin Couty, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 920. R. at 55, 691. The military judge sentenced AFC Couty to a dismissal, a total of 60 months of confinement, total forfeitures, and a reprimand. R. at 734. The convening authority took no action on the findings or sentence adjudged in this case. Convening Authority Decision on Action – *United States v. AFC Couty*.

[1] Unless otherwise noted, all references in this filing to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

On 12 August 2024, AFC Couty filed a motion for Enlargement of Time (EOT) to hire civilian appellate defense counsel. Motion for Enlargement of Time (EOT) (Twelfth) – Out of Time, dated 12 August 2024 [hereinafter Motion for EOT (Twelfth)]. This Court did not act on that motion until August 14, 2024. Denial Order—Motion for EOT 12, dated 14 August 2024. On 13 August 2024, AFC Couty's initial assignments of error (AOE) brief was due. Because this Court had not acted on the motion for EOT, AFC Couty's military counsel filed the initial AOE brief out of an abundance of caution. Brief on Behalf of Appellant, dated 13 August 2024 [hereinafter Initial AOE Brief]. Two days after filing the Initial AOE Brief, this Court denied the EOT without explanation. Denial Order—Motion for EOT 12, dated 14 August 2024. AFC Couty moved for reconsideration of the denial, but this Court affirmed the denial of the EOT. *Compare* Motion for Reconsideration of EOT 12 – Out of Time, dated 9 September 2024 [hereinafter Motion to Reconsider], *with* Denial Order—Motion to Reconsider, dated 24 September 2024 [hereinafter Denial Order—Motion to Reconsider]. This Court has not yet issued its final decision on the merits of this case.

STATEMENT OF FACTS

AFC Couty's initial brief was due on 13 August 2024. Motion to Reconsider at 2. In the morning hours of 12 August 2024, AFC Couty contacted his assigned military counsel and informed that he intended to hire civilian counsel to represent him on appeal. Motion to Reconsider at 1-2. AFC Couty relayed that he had a meeting with civilian counsel later the same day. Motion to Reconsider at 1-2. After telephonically meeting with civilian counsel, AFC Couty contacted his assigned military counsel re-iterating his intent to hire civilian counsel. Motion to Reconsider at 2. Specifically, AFC Couty stated he intended to hire Ms. Stephanie Kral and Ms. Abbigayle Hunter. Motion to Reconsider at 2. But because AFC Couty is—and was then—in

confinement, he had to coordinate with family members to acquire funds and sign a retention agreement with Ms. Kral and Ms. Hunter. Motion to Reconsider at 2. Ostensibly due to the availability of Appellant's confinement counselor, the phone calls necessary to accomplish these final steps could not be completed on 12 August 2024. Motion to Reconsider at 2.

Thereafter, AFC Couty's assigned military counsel filed a motion for EOT. Motion for EOT (Twelfth). That motion informed this Court of AFC Couty's intent to hire civilian counsel for his appeal, explaining that an EOT was necessary to (1) give AFC Couty time to retain Ms. Kral and Ms. Hunter and (2) to give civilian defense counsel time to review the record and prepare filings. Motion for EOT (Twelfth). Military counsel also contacted the Government Trial and Appellate Operations Division to inform them of the out of time motion. Motion to Reconsider at 2.

On 13 August 2024, AFC Couty continued to work to retain Ms. Kral and Ms. Hunter. Motion to Reconsider at 2. However, due to continued difficulties contacting family and counsel, retention of civilian counsel was not executed by close of business. Motion to Reconsider at 2. Nevertheless, AFC Couty continued to inform his military counsel that it was his desire and intent to retain civilian counsel to represent him on appeal. Motion to Reconsider at 2. At approximately 1310, the Government filed their opposition to Appellant's motion. Government Opposition to EOT 12, dated 13 August 2024 [hereinafter Government Opposition]. In so doing, the Government recognized that "[AFC Couty] just hired two new civilian appellate defense counsel." Government Opposition.

At approximately 1400 on 13 August 2024, military counsel called this Court to ensure it had received the motion for EOT as well as the Government's opposition. Motion to Reconsider at 3. Military counsel also informed this Court that the initial brief was due the same day. Motion

to Reconsider at 3. This Court confirmed it received the filings. Motion to Reconsider at 3. By the close of business on 13 August 2024, this Court had not acted on the EOT. Motion to Reconsider at 3.

Out of an abundance of caution—but understanding AFC Couty's intent to retain civilian counsel for appeal—military counsel filed the initial brief at approximately 2030 hours. Motion to Reconsider at 3. That filing explained, "Because the instant filing is due today, undersigned counsel is filing this assignment of errors brief out of an abundance of caution. However, should this Court grant the [Motion for EOT (Twelfth)], AFC Couty will likely seek leave of the Court to withdraw this filing." Motion to Reconsider at 3.

The next day, this Court denied AFC Couty's EOT. Denial Order—Motion for EOT 12. This Court did not explain its rationale. Denial Order—Motion for EOT 12. After AFC Couty was informed that this Court denied the EOT, he chose not to retain civilian counsel because he saw it as a "waste of money"—paying for counsel who would be unable to represent him because the deadline for the initial brief had passed. Motion to Reconsider at 3. Nevertheless, AFC Couty maintained a desire and intent to have civilian appellate defense counsel represent him on appeal. Motion to Reconsider at 3.

AFC Couty's military counsel filed a motion for reconsideration of this Court's denial. Motion to Reconsider. This Court again denied the motion for EOT. Denial Order—Motion to Reconsider. In its denial order, this Court agreed that AFC Couty has a constitutional and statutory right to appellate counsel. Denial Order—Motion to Reconsider at 2-3. Nonetheless, this Court reasoned that its "legitimate docket management concerns" outweighed AFC Couty's constitutional and statutory right to appellate counsel of his choice and that the denial was justified under the circumstances. Denial Order—Motion to Reconsider at 3.

GOOD CAUSE FOR SUPPLEMENTAL FILING

There is good cause to grant this motion for supplemental filing because the factual predicate for this additional assignment of error did not exist at the time of AFC Couty's Initial AOE. AFC Couty's Initial AOE Brief was due on 13 August 2024. Prior to filing the initial AOE brief, AFC Couty filed a Motion for Enlargement of Time (EOT) (Twelfth). That motion was denied on 14 August 2024, a day after the initial AOE brief was due and filed. On 9 September 2024, AFC Couty moved this Court to reconsider its denial. This Court again denied the motion on 24 September 2024. Therefore, good cause exists to grant this motion for leave to file a Supplemental Brief on Behalf of Appellant.

ARGUMENT

AFC COUTY'S CONSTITUTIONAL AND STATUTORY RIGHTS TO COUNSEL WERE VIOLATED WHEN THIS COURT DENIED AFC COUTY'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH).

A. Standard of Review

Denial of counsel to a criminal appellant is a constitutional violation. *See United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008) (citing U.S. CONST. amend. VI). Questions of constitutional law are reviewed de novo. *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015). In the military, appellants also have a statutory right to appellate counsel. 10 U.S.C. § 870. The scope and extent of this right is a question of law reviewed de novo. *See United States v. Wilson*, 72 M.J. 347, 350 (C.A.A.F. 2013) (reviewing a speedy trial issue under a de novo standard because it implicates both a statutory and constitutional right).

B. Law and Analysis

This Court's denial of the Motion for EOT (Twelfth) stripped AFC Couty of his right to appellate counsel. This contradicts long-standing precedent from the Supreme Court and the

Court of Appeals for the Armed Forces (CAAF). "The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." *Brooks*, 66 M.J. at 223 (citing *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985)). In the military, appellants also have a statutory right to hire civilian appellate counsel to represent them on appeal. 10 U.S.C. § 870.

This Court failed to act on AFC Couty's initial motion for EOT by the close of business on 13 August 2024. Because the initial brief was due the same day, this Court's failure to act forced military counsel to file the brief without review from AFC Couty's preferred civilian counsel. Then, this Court's summary denial of the motion for EOT mooted AFC Couty's decision to hire civilian counsel because the AOE brief was already filed. Even if AFC Couty had hired his preferred civilian counsel on 12 August 2024, they would not have had time to review the record and provide filings to this Court because the motion for EOT was denied.

This Court's decision to deny the EOT deprived AFC Couty his right to appellate counsel. This contradicts precedent from the CAAF and the Supreme Court. *Brooks*, 66 M.J. at 223; *see Evitts*, 469 U.S. at 397 (reasoning that there is a constitutional right to counsel on appeal). When courts take action that impedes a criminal defendant's right to counsel, such action violates the constitution. *McCoy v. Louisiana*, 584 U.S. 414, 428 (2018) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)). This is true both at trial and on appeal. *See Martinez v. Court of Appeal*, 528 U.S. 152, 160-61 (2000) (reasoning that the underlying concerns necessitating the Sixth Amendment right to representation at trial are equally present for an appellant on appeal).

This Court justified the denial of counsel based on its "broad power . . . to ensure timely progress of cases." Motion to Reconsider Denial Order at 2. This Court noted that "society at large . . . has an interest in the ultimate finality of verdicts and appellate cases." Motion to Reconsider Denial Order at 5. But in coming to this conclusion, this Court misunderstood the CAAF's

precedent. While the courts of criminal appeals (CCAs) have power to manage their dockets, that power cannot come at the expense of an appellant's rights. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). In *Roach*, this Court decided a case before it received briefing from the appellant. *Id*. at 411. This Court decided the Roach case without filings because of apparent delays in the case. *Id*. at 419. The CAAF reversed, reasoning that when "there is no indication . . . that Appellant personally bears any responsibility" for delays in a case, the length of any delay cannot be held against an appellant's rights. *Id*. Like in *Roach*, there is no evidence in this case that AFC Couty is responsible for any delay. Therefore, depriving AFC Couty the right to counsel merely because there were delays in this case contradicts binding CAAF precedent.

Further, while this Court rightly noted there are some limits to the right to counsel, Denial Order—Motion to Reconsider at 2 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)), those limits are not applicable. AFC Couty did not seek to hire un-licensed, disbarred, or otherwise unqualified representatives. *Wheat*, 486 U.S. at 159. AFC Couty did not try to hire lawyers he could not afford. *Id*. And, AFC Couty did not try to hire to hire conflicted counsel. *Id*.

AFC Couty has a constitutional and statutory right to counsel. This Court's decision to deny the Motion for EOT (Twelfth) effectively stripped AFC Couty of that right. Therefore, this Court should grant the Motion for EOT (Twelfth), or otherwise provide such relief so that AFC Couty's right to counsel is not infringed.

WHEREFORE, AFC Couty requests this Court grant his Motion for Leave to File a Supplemental Brief on Behalf of Appellant and grant other such appropriate relief to ensure AFC Couty can hire civilian counsel to assist in his appeal.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY** United States Air Force *Appellant.*	)	No. ACM 40484 2 December 2024

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

Pursuant to Rules 18(d), 18.4, and 23(c) of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for leave to file supplemental assignments of error, dated 22 November 2024. Appellant fails to establish good cause to grant this motion, and it should be denied to reinforce this Court's rules on timeliness and to discourage further instances of piecemeal appellate litigation.

Statement of the Facts

The above captioned case was docketed with this Court on 20 June 2023. Appellant requested twelve enlargements of time (EOT) in this case. Eleven EOTs were granted by this Court, but this Court denied the twelfth EOT. Appellant moved for reconsideration on the twelfth EOT because he wanted to be represented by civilian appellate defense counsel of his choosing.

In Appellant's eleventh motion for enlargement of time, he did not mention a desire for civilian appellate defense counsel to represent him. (*Appellant's Motion for Enlargement of*

Time (Eleventh), dated 3 July 2024). Instead at the Court's status conference on 10 July 2024, military appellate defense counsel stated he was conducting research and identified potential issues for appellate review. (*Order*, dated 27 July 2024). Military appellate defense counsel did not mention Appellant wanted civilian representation. (Id.).

Appellant argued in his twelfth EOT, filed out-of-time on the day before his brief was due, that he wanted to secure civilian appellate defense counsel, but he had not actually secured new representation. (*Appellant's Motion for Enlargement of Time – Out of Time (Twelfth)*, dated 12 August 2024). Appellate defense counsel explained in the motion, "But in the morning hours of 12 August 2024, Appellant called undersigned counsel and informed that he intended to hire civilian counsel to represent him on appeal." (Id.) Military appellate defense counsel filed Appellant's assignments of error on 13 August 2024.

This Court denied Appellant's twelfth EOT. (*Order*, dated 14 August 2024). Appellant filed a motion for reconsideration on 10 September 2024. (*Motion for Reconsideration of Enlargement of Time (Twelfth) – Out of Time*, dated 10 September 2024). The Government filed its Answer to Appellant's assignment of error brief on 12 September 2024. This Court denied Appellant's motion for reconsideration. (*Order*, dated 24 September 2024).

No civilian appellate defense counsel filed a notice of representation with this Court at any point since docketing, and more importantly no notices of civilian representation have been filed since Appellant filed his motion for reconsideration. The same military appellate defense counsel that filed the initial assignments of error filed the motion for leave to file a supplemental assignment of error for Appellant. (*Motion for Leave to File and Supplemental Brief on Behalf of Appellant*, dated 22 November 2024). Appellant filed his motion for leave to file a supplemental brief on 22 November 2024, two months after this Court denied his motion for

reconsideration and three months after his assignments of error were due to this Court. During the two months since the denial of his motion for reconsideration, Appellant neither released his military defense counsel nor retained civilian defense counsel.

Argument

Appellant has not shown good cause to file a supplemental assignment of error where he created the factual predicate forming the basis for the assignment of error by failing to retain civilian representation – as was his choice under Article 70, UCMJ. Rule 18(d) requires that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." Consistent with Rule 18.4, this Court may permit supplemental filings "submitted by motion for leave to file in accordance with Rule 23(d)." In United States v. Albarda, this Court required the appellant "to show good cause to warrant acceptance" of a motion for leave to file a supplemental assignment of error. 2021 CCA LEXIS 75, at *29 n.7 (A.F. Ct. Crim. App. 22 February 2021) (unpub. op.). Appellant has not shown good cause for this Court to accept the supplemental filing.

Appellant claims he has good cause to raise the supplemental assignment of error now because "the factual predicate for this additional assignment of error did not exist at the time of AFC Couty's Initial AOE." (*App. Motion for Leave* at 5). He does not have good cause because he created the factual predicate here, not the Court or the government. Appellant waited 419 days to tell his military appellate defense counsel that he wanted civilian representation. Then when he did explain his desire to be represented by someone else, he never took affirmative steps to retain civilian counsel or release his military representation. And by the time he told his military appellate defense counsel that he wanted to hire civilian counsel, the deadline to file a timely motion for enlargement of time had already passed.

"The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." United States v. Brooks, 66 M.J. 221, 223 (*citing* Evitts v. Lucey, 469 U.S. 387 (1985)). Appellant argues he was denied his constitutional and statutory rights to appellate defense counsel. (*App. Motion for Leave* at 5). But the only person to blame for a denial of civilian counsel is himself. He failed to retain a civilian attorney – as was his responsibility to do if he wanted such representation. "The accused has the right to be represented before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court by civilian counsel ***if provided by him***." 10 U.S.C. § 870(d) (emphasis added). As of the date of his motion for leave to file the supplemental brief, 521 days elapsed from docketing, but he never obtained civilian counsel in that almost year and a half.

Appellant knew he could choose civilian representation on appeal, and he was told that in the Post-Trial and Appellate Rights Advisement at trial. (App. Ex. XXIX at 7). He eventually told his military appellate defense counsel, albeit in the last hours before his assignments of error were due, that he wanted civilian representation. Now in his supplemental filing, he reiterates that he was denied civilian representation, but in the two months between this Court's denial of his motion for reconsideration and the current filing, he again failed to obtain civilian counsel.

This Court, to ensure speedy post-trial processing, warned Appellant after eight EOTs that additional delays would be scrutinized. (*Order*, dated 8 April 2024). In the Court's order granting the ninth EOT, the Court said, "Appellant should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits." (*Order*, dated 7 May 2024). The order granting the tenth EOT contained a stronger warning, "Appellant's counsel is further advised that any future requests for enlargements of time will not be granted *absent exceptional circumstances*." (*Order*, dated 13 June 2024) (emphasis in the original).

Then this Court denied the twelfth EOT. (*Order*, dated 14 August 2024). Despite these warnings about the time available for him to file his appeal, Appellant did not seek different representation that he now claims he wanted.

In addition to the factual predicate issue above, Appellant waited months to file the supplemental brief and gave no reason for the delay. Appellant filed his motion for leave to file a supplemental brief on 22 November 2024, two months after this Court denied his motion for reconsideration and more than three months after his assignments of error were actually due to this Court. His claim that he was denied civilian counsel arose at least two months ago, but Appellant has not shown good cause for waiting so long to file the supplemental brief.

Appellant received competent military appellate defense representation in accordance with Article 70(a), UCMJ – he has not claimed otherwise or articulated any prejudice due to the military appellate representation provided to him. The Judge Advocate General appointed a qualified commissioned officer to represent Appellant. 10 U.S.C. § 870(a). Appellate defense counsel represented Appellant, reviewed the record of trial, and filed Appellant's Assignments of Error by the deadline set by this Court. Appellate defense counsel clearly discussed the case with his client because appellate defense counsel filed one assignment of error pursuant to United States v. Grostefon meaning Appellant wanted to address the issue on appeal even if appellate defense counsel did not believe it held any merit. 12 M.J. 431 (C.M.A. 1982). Appellant was not stripped of his constitutional or statutory right to appellate representation – his military counsel did and continues to represent him.

Appellant did not "show good cause to warrant acceptance" of the supplemental filing. Thus, this Court should deny Appellant's motion.

CONCLUSION

The United States opposes Appellant's motion to file a supplemental assignment of error. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion to file a supplemental assignment of error.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 2 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	Before Panel No. 3
Air Force Cadet **JUSTIN COUTY** United States Air Force *Appellant.*	)	No. ACM 40484 18 December 2024

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

SUPPLEMENTAL ISSUE PRESENTED

WHETHER THIS COURT'S DENIAL OF APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH) DEPRIVED APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO COUNSEL.

STATEMENT OF CASE

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

STATEMENT OF THE FACTS

The above captioned case was docketed with this Court on 20 June 2023. Appellant requested twelve enlargements of time (EOT) in this case. Eleven EOTs were granted by this Court, but this Court denied the twelfth EOT. Appellant moved for reconsideration on the twelfth EOT because he wanted to be represented by civilian appellate defense counsel of his choosing. The motion was denied.

In Appellant's eleventh motion for EOT, he did not mention a desire for civilian appellate defense counsel to represent him. (*Appellant's Motion for EOT (Eleventh)*, dated 3 July 2024).

Instead at the Court's status conference on 10 July 2024, military appellate defense counsel stated he was conducting research and identified potential issues for appellate review. (*Order*, dated 27 July 2024). Military appellate defense counsel did not mention Appellant wanted civilian representation. (Id.).

Appellant argued in his twelfth EOT, filed out-of-time on the day before his brief was due, that he wanted to secure civilian appellate defense counsel, but he had not actually secured new representation. (*Appellant's Motion for EOT – Out of Time (Twelfth)*, dated 12 August 2024). Appellate defense counsel explained in the motion, "But in the morning hours of 12 August 2024, Appellant called undersigned counsel and informed [him] that he intended to hire civilian counsel to represent him on appeal." (Id.) Military appellate defense counsel filed Appellant's assignments of error on 13 August 2024.

This Court denied Appellant's twelfth EOT. (*Order*, dated 14 August 2024). Appellant filed a motion for reconsideration on 10 September 2024. (*Motion for Reconsideration of EOT (Twelfth) – Out of Time*, dated 10 September 2024). The Government filed its Answer to Appellant's assignment of error brief on 12 September 2024. This Court denied Appellant's motion for reconsideration. (*Order*, dated 24 September 2024).

No civilian appellate defense counsel filed a notice of representation with this Court at any point since docketing, and more importantly no notices of civilian representation have been filed since Appellant filed his motion for reconsideration and supplemental assignment of error. The same military appellate defense counsel that filed the initial assignments of error filed the supplemental assignment of error for Appellant. (*Motion for Leave to File and Supplemental Brief on Behalf of Appellant*, dated 22 November 2024). Appellant filed his motion for leave to file a supplemental brief on 22 November 2024, two months after this Court denied his motion

for reconsideration and three months after his assignments of error were due to this Court. During the two months since the denial of his motion for reconsideration, Appellant neither released his military defense counsel nor retained civilian defense counsel.

ARGUMENT

APPELLANT WAS REPRESENTED BY QUALIFIED APPELLATE DEFENSE COUNSEL THUS HIS APPELLATE RIGHT TO COUNSEL WAS NOT VIOLATED.

Standard of Review

This Court reviews issues of constitutional law de novo. United States v. Castillo, 74 M.J. 160, 165 (C.A.A.F. 2015).

Law and Analysis

Neither Appellant's Sixth Amendment constitutional right nor his Article 70, UCMJ, right to appellate representation was violated. "The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." United States v. Brooks, 66 M.J. 221, 223 (*citing* Evitts v. Lucey, 469 U.S. 387 (1985)). Appellant's rights were respected because he was represented by qualified military appellate counsel in accordance with Article 70(a), UCMJ.

Appellant boldly states, "This Court's denial of the Motion for EOT (Twelfth) [filed out of time] stripped AFC Couty of his right to appellate counsel." (App. Supp. Br. at 5). Appellant cites to McCoy v. Louisiana, 584 U.S. 414 (2018), and argues that "when courts take action that impedes a criminal defendant's right to counsel, such action violates the constitution." While that may have been the case for McCoy where the trial court allowed McCoy's defense counsel to argue that he was guilty of murder over the appellant's "insistent objections," that is not the case we have here. This Court did not impede Appellant's right to counsel by denying the twelfth EOT because (1) Appellant was represented by qualified military appellate defense

counsel and (2) Appellant never formed an attorney-client relationship with a civilian appellate defense attorney.

First, Appellant received competent military appellate defense representation in accordance with Article 70(a), UCMJ – he has not claimed otherwise or articulated any prejudice due to the military appellate representation provided to him. The Judge Advocate General appointed a qualified commissioned officer to represent Appellant. 10 U.S.C. § 870(a). Appellate defense counsel represented Appellant, reviewed the record of trial, and filed Appellant's Assignments of Error by the deadline set by this Court. Appellate defense counsel clearly discussed the case with his client because appellate defense counsel filed one assignment of error pursuant to United States v. Grostefon, meaning Appellant wanted to address the issue on appeal even if appellate defense counsel did not believe it held any merit. 12 M.J. 431 (C.M.A. 1982). Appellant was not stripped of his constitutional or statutory right to appellate representation – his military counsel did and continues to represent him.

Second, Appellant never provided any evidence that he formed an attorney-client relationship with a civilian defense counsel that was then affected or severed by this Court's decision denying Appellant's out of time EOT (twelfth). Instead, he provided evidence to the contrary when he said that he did not create a relationship at all because he did not have time before the filing was due. (App. Supp. Br. at 4). Based on Appellant's own arguments, no relationship with civilian appellate defense counsel was created. If no relationship existed, then this Court's denial of Appellant's motion for EOT could not have severed or otherwise affected that relationship.

Appellant created the factual predicate here, not the Court or the government. Appellant waited 419 days to tell his military appellate defense counsel that he wanted civilian

representation. Then when he did explain his desire to be represented by someone else, he never took affirmative steps to retain civilian counsel or release his military representation. And by the time he told his military appellate defense counsel that he wanted to hire civilian counsel, the deadline to file a timely motion for EOT had already passed.

The only person to blame for a denial of civilian counsel is Appellant. He failed to retain a civilian attorney – as was his responsibility to do if he wanted such representation. "The accused has the right to be represented before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court by civilian counsel ***if provided by him***." 10 U.S.C. § 870(d) (emphasis added). From docketing to the date of his motion for leave to file the supplemental brief, 521 days elapsed, but he never obtained civilian counsel in that almost year and a half.

Appellant knew he could choose civilian representation at his own expense on appeal, and he was told that in the Post-Trial and Appellate Rights Advisement at trial. (App. Ex. XXIX at 7). He eventually told his military appellate defense counsel, albeit in the last hours before his assignments of error were due, that he wanted civilian representation. Now in his supplemental filing, he reiterates that he was denied civilian representation. But in the two months between this Court's denial of his motion for reconsideration and the supplemental assignment of error, he again failed to obtain civilian counsel.

This Court, to ensure speedy post-trial processing, warned Appellant after eight EOTs that additional delays would be scrutinized. (*Order*, dated 8 April 2024). In the Court's order granting the ninth EOT, the Court said, "Appellant should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits." (*Order*, dated 7 May 2024). The order granting the tenth EOT contained a stronger warning, "Appellant's

counsel is further advised that any future requests for enlargements of time will not be granted *absent exceptional circumstances*." (*Order*, dated 13 June 2024) (emphasis in the original). Then this Court denied the twelfth EOT. (*Order*, dated 14 August 2024). Despite these warnings about the time available for him to file his appeal, Appellant did not seek different representation that he now claims he wanted.

Neither Appellant's constitutional nor statutory right to appellate counsel were violated. Appellant created the factual predicate for this assignment of error and should not gain a windfall of appellate relief because he failed to obtain civilian representation while awaiting appellate review. Thus, this Court should deny Appellant's supplemental assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's supplemental assignment of error.

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CERTIFICATE OF FILING AND SERVICE

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

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