UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. DOROTEO ACM: 40363

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

I hereby certify that I am admitted to practice before this court.

3/2/2023
Date

Scott Hockenberry
Signature

Digitally signed by Scott Hockenberry
Date: 2023.03.02 05:37:07 -05'00'

Scott Hockenberry — P72357 (MI)
Print Name — Bar Number

12235 Arabian Place
Address

Woodbridge — VA — 22192
City — State — Zip Code

586-930-8359 — hockenberry@militaryattorney.co
Phone Number — E-Mail

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. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 20 December 2022

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, Senior Airman Samuel A. Doroteo, the Appellant, hereby moves for a first enlargement of time to file an Assignments of Error brief. SrA Doroteo requests an enlargement for a period of 60 days, which will end on **2 March 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, SrA Doroteo respectfully requests this Honorable Court grant this requested first enlargement of time for the submission of an Assignments of Error brief.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

Joint Base Andrews NAF, MD 20762-6604
(240) 612-4780
eshawn.rawlley.1@us.af.mil

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 20 December 2022.

Respectfully submitted,

USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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20 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 20 December 2022.

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Operations Division
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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. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 23 February 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a second enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **1 April 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact

in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined at Naval Consolidated Brig Miramar, San Diego, California.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing nineteen prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Due to their workload and by no fault of Appellant, counsel are unable to complete their review of the record of trial and prepare an Assignments of Error brief before the Court's current deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested second enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
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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 23 February 2023.

Respectfully submitted,

[redacted]

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24 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 February 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, specifically, Appellate Exhibits IV, V, XIV, XV, XVI, XVII, XXX, and XXXVIII; transcript pages 26–53, 93–122, 144–196, 248–256, and 395–512; and the audio of closed sessions of Appellant's court-martial.

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

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

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

Accordingly, it is by the court on this 1st day of March, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED.** Appellate defense counsel and appellate government counsel are authorized to examine **Appellate Exhibits IV, V, XIV, XV, XVI, XVII, XXX, and XXXVIII; transcript pages 26–53, 93–122, 144–196, 248–256, and 395–512; and the audio of closed sessions of Appellant's court-martial**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 24 February 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves this Court to permit his counsel's examination of certain sealed exhibits and sealed portions of the transcript in this case.

Facts

On 25 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 23 June 2022. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). *Id*. One specification of Charge I was withdrawn and dismissed without prejudice. *Id*. On 26 May 2022, the court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 10 June 2022.

The charges against Appellant stemmed from his alleged conduct with several individuals: EV, AN, LD, KB, and RY. ROT Vol. 1, Entry of Judgment, 23 June 2022. Appellant was convicted only for conduct involving AN, KB, and RY. *Id*. The military judge ordered the following exhibits sealed:

> (a) Appellate Exhibit (AE) IV, Defense Motion to Admit Mil. R. Evid. 412 Evidence (3 November 2021; 20 pages)
>
> (b) AE V, Government Response to Defense Motion to Admit Mil. R. Evid. 412 Evidence (10 November 2021; 14 pages)
>
> (c) AE XIV, KB's Response to Defense Motion to Admit Mil. R. Evid. 412 Evidence (9 November 2021; 10 pages)
>
> (d) AE XV, AN's Response to Defense Motion to Admit Mil. R. Evid. 412 Evidence (9 November 2021; 7 pages)
>
> (e) AE XVI, LD's Response to Defense Motion to Admit Mil. R. Evid. 412 Evidence (9 November 2021; 9 pages)
>
> (f) AE XVII, EV's Response to Defense Motion to Admit Mil. R. Evid. 412 Evidence (9 November 2021; 10 pages)
>
> (g) AE XXX, Military Judge's Ruling on Defense Motion to Admit Mil. R. Evid. 412 Evidence (9 January 2022; 24 pages)
>
> (h) AE XXXVIII, Military Judge's Ruling on Defense Motion to Admit

Mil. R. Evid. 412 Evidence (14 June 2022; 24 pages)

R. at 25, 615. The military judge also ordered the following portions of the transcript sealed: pages 26-53, 93-122, 144-196, 248-256, and 395-512. R. at 197. The audio recordings of these closed sessions are also sealed. *See* ROT Vol. 1. From what counsel can discern from the unsealed portions of the trial transcript, the defense's motion to admit Mil. R. Evid. 412 evidence was litigated during these closed sessions. However, except for pages 248-256 which appear to concern KB, which alleged victim was discussed during these closed sessions is not as clear.

Law

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

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

(C.A.A.F. 1998).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence…[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with those imposed by the state bars to which counsel belong.[5]

The contents of a record of trial shall include a substantially verbatim recording of the court-martial proceedings except sessions closed for deliberation and voting. R.C.M. 1112(b)(1). A record of trial is substantially incomplete if it does not include a substantially verbatim recording of the court-martial proceedings. *United States v. Valentin-Andino*, ___ M.J. ___, No. ACM 40185, 2022 CCA LEXIS 45, at *8 (A.F. Ct. Crim. App. 30 Jan. 2023).

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

[3] *Id.* at Rule 1.3.

[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).

[5] Counsel of record are licensed to practice law in Maryland and Massachusetts.

Analysis

Each of the sealed exhibits identified in paragraphs (a) through (h) in the Facts section above is a motion filed by a party, a response filed by a party (or a party with limited standing), or a ruling issued by the military judge. Thus, it is evident the parties "presented" and "reviewed" them at trial. However, Appellant does not seek permission from this Court to view AE XVI or AE XVII at this time, as they are responses to the defense's motion to admit Mil. R. Evid. 412 evidence filed on behalf of two alleged victims, EV and LD, whose allegations did not yield convictions.

Appellant does seek this Court's permission to review the remaining sealed exhibits (AE IV, AE V, AE XIV, AE XV, AE XXX, and AE XXXVIII), the sealed closed session portions of the trial transcript, and the audio recordings of the closed sessions. Appellant and his counsel cannot confirm whether these exhibits or closed sessions cover information about EV and LD that was elsewhere sealed. But Appellant tailors this request to encompass only those sealed exhibits and transcript portions pertaining to the admission of Mil. R. Evid. 412 evidence relevant to AN's, KB's and RY's allegations.[6]

It is reasonably necessary for Appellant's counsel to review these sealed exhibits, transcript portions, and audio recordings for counsel to competently conduct a professional evaluation of Appellant's case and to uncover all issues which

[6] Appellant reserves the right to request by motion, at a later time, access to exhibits and transcript portions pertaining to the admission of Mil. R. Evid. 412 evidence relevant to EV's and LD's allegations should he or his counsel believe they are relevant to an assignment of error.

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

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit his counsel's examination of the aforementioned sealed exhibits, transcript portions, and audio recordings contained within the original record of trial.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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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 24 February 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
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24 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40363 Panel No. 1

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

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
(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 28 February 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 2 March 2023, counsel for Appellant submitted a consolidated Motion for Leave to File and Motion to Copy, Retain, and Transmit Sealed Materials. Specifically, counsel for Appellant seek to copy, retain, and transmit to assigned appellate defense counsel, Mr. Bradley Simon and Mr. Scott Hockenberry, by secure means, the sealed exhibits and trial transcript portions in the original record of trial of this case—specifically, Appellate Exhibits IV, V, XIV, XV, XVI, XVII, XXX, and XXXVIII; transcript pages 26–53, 93–122, 144–196, 248–256, and 395–512; and audio of closed sessions of Appellant's court-martial. Counsel live outside the National Capital Region. Appellate counsel propose that they will scan hard copies of sealed materials and securely transmit those scans via encryption and password-protection to military appellate counsel's military email address. They will then securely transmit those scans to civilian appellate defense counsel via DoD SAFE or via U.S. mail, Federal Express, or similar secure shipment means.

Government counsel consents to this motion with respect to Mr. Simon but argues Mr. Hockenberry should travel to JB Andrews to view the materials in person. We find Appellant's motion fails to provide sufficient justification in support of the request to transmit sealed materials to Mr. Hockenberry.

Accordingly, it is by the court on this 3d day of March 2023,

ORDERED:

Appellant's Motion for Leave to File and Motion to Copy, Retain, and Transmit Sealed Material are **GRANTED IN PART**. Appellate defense counsel are permitted to scan a hard copy of the sealed portion of Appellate Exhibits IV, V, XIV, XV, XVI, XVII, XXX, and XXXVIII; transcript pages 26–53, 93–122, 144–196, 248–256, and 395–512; and copy audio of closed sessions of Appel-

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

It is further ordered:

Appellant's motions are **DENIED** with respect to transmitting the sealed materials to Mr. Hockenberry.

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR LEAVE TO FILE MOTION TO COPY, RETAIN, AND TRANSMIT SEALED EXHIBITS** Before Panel No. 1 No. ACM 40363 2 March 2023

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

Pursuant to Rule 23(d) of Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file a motion to copy, retain, and transmit to civilian counsel, sealed material contained in the original record of trial. Pursuant to the same rule, the motion for leave to file the pleading and the pleading have been combined herein.

On 24 February 2023, Appellant moved this Court to permit his counsel's examination of the following sealed exhibits and trial transcript portions in the original record of trial of this case: Appellate Exhibits IV, V, XIV, XV, XVI, XVII, XXX, and XXXVIII, transcript pages 26-53, 93-122, 144-196, 248-256, and 395-512, and audio of closed sessions of Appellant's court-martial. Appellant's Motion to Examine Sealed Materials, 24 February 2023. On 1 March 2023, this Court granted Appellant's motion. Order of the Court, 1 March 2023. None of the sealed materials in this case appear to be contraband.

Appellant is represented by undersigned counsel and by Mr. Bradley Simon, 1710 Donerail Street, San Antonio, Texas 78248 and Mr. Scott Hockenberry, 12235 Arabian Place, Woodbridge, Virginia 22192. Given the volume of sealed material in this case and their likely relevance and materiality to Appellant's appeal, and given the physical distance of Mr. Simon's and Mr. Hockenberry's places of business from this Court at Joint Base Andrews, Maryland, Appellant requests this Court's permission for undersigned counsel to copy and securely transmit the sealed materials to his civilian counsel, and for counsel to securely retain these materials for reference during the pendency of Appellant's appeal.

If this Court grants Appellant's request, undersigned counsel proposes the following procedure for effecting the Court's order, subject to any directive by this Court. Undersigned counsel will scan hard copies of sealed materials and securely transmit those scans via encryption and password-protection to undersigned counsel's military email address. Undersigned counsel will then securely transmit those scans to civilian co-counsel via encryption and password-protection (using DoD SAFE, for example). Undersigned counsel will copy the sealed audio recordings to the hard drive of undersigned counsel's military-issue computer, then transfer the recordings to civilian co-counsel via encryption and password-protection. Appellant is uncertain whether any of the sealed appellate exhibits contain discs as attachments; if they do, undersigned counsel will transfer the contents of those discs to the hard drive of his military-issue computer, then transfer the recordings to civilian co-counsel via encryption and password-protection.

In the event the above methods of transmission are unworkable, Appellant requests undersigned counsel be permitted to send sealed materials to civilian co-counsel via U.S. mail, Federal Express, or similar secure shipment means. Undersigned counsel will retain all sealed materials exclusively on the Air Force Appellate Defense Division's secure drive. Civilian co-counsel will securely store sealed materials in accordance with their respective law practice's protocols for the retention of sealed material.

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

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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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 2 March 2023.

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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2 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO TRANSMIT SEALED MATERIALS ACM 40363 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Transmit Sealed Materials.

The United States does not oppose Appellant's requests to transmit sealed materials to Mr. Simon, who lives and works in San Antonio, Texas, provided that the Court orders transmission to occur by secure means and that appellate defense counsel is solely responsible for confirming the destruction of the sealed material at the end of appellate review.

The United States opposes transmittal of the sealed materials to Mr. Hockenberry. Appellant has not established why Mr. Hockenberry cannot travel to the Court to view the sealed documents in person. Woodbridge, Virginia, where Mr. Hockenberry has his places of business, is approximately a 35-minute drive from Joint Base Andrews. This Court should not allow the reproduction, proliferation and transmission of sensitive, sealed materials when it would not be unduly burdensome for civilian appellate defense counsel to travel to the Court to review the documents. To allow such copying and transmittal would undermine the purpose for sealing and allowing limited reproduction of the documents in the first place.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	**APPELLANT'S MOTION FOR RECONSIDERATION OF PARTIAL DENIAL OF MOTION TO COPY, RETAIN, AND TRANSMIT SEALED MATERIALS** Before Panel No. 1 No. ACM 40363 9 March 2023

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

Pursuant to Rule 31(c) and Rule 31.1 of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, the Appellant, hereby respectfully moves this Court to reconsider its 3 March 2023 interlocutory order partially denying Appellant's Motion to Copy, Retain, and Transmit Sealed Materials.[1] Good cause exists to grant this motion as Appellant demonstrates herein that this course of action is more sensible and economical under the circumstances.

On 2 March 2023, Appellant moved this Court to permit undersigned counsel to copy, retain, and transmit to assigned appellate defense counsel, Mr. Bradley Simon and Mr. Scott Hockenberry, by secure means, the sealed exhibits and trial transcript the original record of trial—specifically, Appellate Exhibits IV, V, XIV, XV, XXX, and XXXVIII; transcript pages 26-53, 93-122, 144-196, 248-256, and 395-512; and audio of closed sessions of the court-martial. Appellant's Motion for Leave

DENIED
13 MAR 2023

[1] In accordance with A.F. CT. CRIM. APP. R. 31.1, counsel represents that, to counsel's knowledge, no other court has acquired jurisdiction over this case, and this Court retains jurisdiction over this case pursuant to Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3) (2019).

to File Motion to Copy, Retain, and Transmit Sealed Materials, 2 March 2023. The United States consented to Appellant's motion with respect to Mr. Simon, but argued Mr. Hockenberry's place of business is "approximately a 35-minute drive from" this Court and that "it would not be unduly burdensome" for him to travel to the Court to review sealed documents. United States' Response to Appellant's Motion to Transmit Sealed Materials, 2 March 2023. The United States further argued that permitting undersigned counsel to transmit sealed materials to Mr. Hockenberry would "undermine the purpose for sealing and allowing limited reproduction of the documents in the first place." *Id.*

In denying Appellant's motion in part, this Court concluded, "Appellant's motion fails to provide sufficient justification in support of the request to transmit sealed materials to Mr. Hockenberry" and denied the motion with respect to Mr. Hockenberry. Order of the Court, 3 March 2023.

Additional Facts

Appellant reiterates the facts articulated in Appellant's Motion for Leave to File Motion to Copy, Retain, and Transmit Sealed Materials, 2 March 2023, and adds the following: Mr. Hockenberry and Mr. Simon, while geographically separated, are employed by the same law firm, Daniel Conway & Associates. Mr. Hockenberry is primary counsel for the defense. *See* A.F. CT. CRIM. APP. R. 11(b).

Law

A motion for reconsideration must make a showing of good cause before this Court will reconsider a court order. A.F. CT. CRIM. APP. R. 31.1. In any case where the appellant has specifically requested named civilian counsel, the Air Force

Appellate Defense Division will communicate with civilian counsel to coordinate representation of the appellant. A.F. CT. CRIM. APP. R. 11.2. Appellate counsel shall not disclose sealed materials in the absence of prior authorization of the appellate court before which a case is pending review under R.C.M 1203 and 1204. R.C.M. 1113(b)(3)(C). "Disclosure" includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way. R.C.M. 1113(b)(5).

Analysis

To provide Appellant competent representation, Mr. Hockenberry must review the sealed materials and discuss them with Appellant, his fellow associate Mr. Simon, and undersigned counsel at the soonest opportunity. While Mr. Hockenberry would need to make an hour-long round trip to the Court to examine these materials, undersigned counsel is a short walk away from the Court and the appellate records division and is familiar with this Court's and that division's staff, practices, and procedures. Mr. Hockenberry's examination of sealed materials in this case will require advance coordination with the Court; since the materials are voluminous, and since Mr. Hockenberry has not been granted permission to copy them, he will have to coordinate and make this hour-long trip each time he wishes to reference the sealed materials[2] while he assists in the preparation of an Assignments of Error brief.

Appellant respectfully submits there is no compelling justification for treating

[2] While undersigned counsel has not yet viewed the sealed materials, it is apparent they pertain to the admission of Mil. R. Evid. 412 evidence. There is a high likelihood that these materials will be heavily implicated in an Assignments of Error brief appealing a conviction on five specifications of violations of Article 120, UCMJ, 10 U.S.C. § 920. *See* Record of Trial, Vol. 1, Entry of Judgment, 23 June 2022.

one member of his defense team differently than the others, and that whereas this Court has permitted undersigned counsel to transmit sealed materials to Mr. Simon, it is sensible and economical to permit the same for Mr. Hockenberry. This course of action will prevent undue delay in the submission of an Assignments of Error brief from Mr. Hockenberry having to spend hours coordinating with and traveling to this Court to view sealed materials (and even more time in the Court's examination room) each time he wishes to reference the materials. This Court can be confident that as an officer of the Court, Mr. Hockenberry will handle these sealed materials in accordance with his practice's protocols and this Court's order. Permitting undersigned counsel to securely transit electronic copies of the sealed materials—none of which appear to contain contraband—to Mr. Hockenberry will not frustrate the intent of the Rules for Courts-Martial to protect against the unnecessary disclosure of sealed materials.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion to reconsider the partially denied Motion to Copy, Retain, and Transmit Sealed Materials, grant it in full, and permit undersigned counsel to securely transmit the sealed materials in this case to Mr. Hockenberry in accordance with this Court's order.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
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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 9 March 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
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9 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO MOTION FOR RECONSIDERATION ACM 40363 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for reconsideration. Appellant has not shown good cause for why another copy of the sealed material should be placed into circulation. Appellant concedes that Mr. Hockenberry having to come to the Court would only constitute about an hour-long round trip. This is about the typical amount of time that personnel stationed at Joint Base Andrews spend commuting to base. It is not unreasonable to require Mr. Hockenberry to commute this distance to the Court to review the records – even if he has to travel more than once. Appellant has offered no details about Mr. Hockenberry's schedule that would make it impossible or even difficult for him to commute to the Court in order to timely represent Appellant. While it no doubt would be more convenient for all counsel on this case to be able to retain their own personal copy of the sealed materials, this Court should not set the precedent of allowing such a practice for counsel who live and work within easy commuting distance of the Court. Only Mr. Simon, who would have to commute to the Court by plane or a multi-day car trip, has shown good cause to retain his own personal copy of the sealed materials in this case.

Every time sealed material is transmitted outside the Court, there is a chance of inadvertent mishandling or disclosure. This Court should take all precautions to prevent this from occurring by

limiting the creation and transmittal of additional copies of sealed materials to situations where it is truly necessary to ensure timely representation of an appellant.

WHEREFORE, the United States respectfully opposes Appellant's motion for reconsideration.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 9 March 2023.

[redacted]

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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 24 March 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a third enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **1 May 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One

specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined at Naval Consolidated Brig Miramar, San Diego, California.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing nineteen prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Appellant's counsel have reviewed portions of the record of trial, but have not completed their review nor advised Appellant appropriately. Due to their workload and by no fault of Appellant, counsel are unable to complete their review of the record of trial and prepare an Assignments of Error brief before the Court's current deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested third enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
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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 24 March 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
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27 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 27 March 2023.

[redacted]

MARY ELLEN PAYNE
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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. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 24 April 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a fourth enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **31 May 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One

specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined at Naval Consolidated Brig Miramar, San Diego, California.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing nineteen prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Mr. Hockenberry has completed his review of the trial transcript and continues to review the remainder of the record of trial. Undersigned counsel represents sixteen clients with nine Assignments of Error briefs pending before this Court. This case is counsel's second priority, behind *United States v. Estep* (No. ACM 40336). Undersigned counsel has completed review of the record of trial in *Estep* and will begin his review of the record of trial in this case during the week of this filing (24-28 April 2023). Due to their workload and by no fault of Appellant, counsel are unable to complete their review of the record of trial, advise Appellant, and prepare an Assignments of Error brief before the Court's current deadline. Counsel have advised Appellant of his right to speedy appellate review, and Appellant concurs with this request.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fourth enlargement of time for the submission of an Assignment of Errors

brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
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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 24 April 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
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24 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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United States Air Force
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 May 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 30th day of May, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **30 June 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of his 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 *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 24 May 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a fifth enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **30 June 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact

in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined at Naval Consolidated Brig Miramar, San Diego, California.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing nineteen prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Mr. Hockenberry has completed his review of the trial transcript and continues to review the remainder of the record of trial. Undersigned counsel represents sixteen clients with eleven matters pending before this Court. This case is counsel's first priority.

Undersigned counsel represented in Appellant's last request for an enlargement of time that he would begin review of the record of trial in this case during the week of 24-28 April 2023. Candidly, counsel was not able to begin his review until the week of 1-5 May 2023. Moreover, since starting his review, undersigned counsel has had to turn his attention to two supplements to petitions before the Court of Appeals for the Armed Forces (CAAF), and prioritized submitting an Assignments of Error brief in *United States v. Valentin-Andino* (No. ACM 40185 (f rev)) to preserve a speedy appellate review issue in that case. Counsel has also had to prepare a Reply brief in *United States*

v. Bennett (No. ACM S32733). Counsel anticipates filing both pleadings on 25 May 2023, after which he will return his focus to completing review of the record of trial in this case and preparing an Assignments of Error brief.

Through no fault of Appellant, his counsel are unable to complete their review of the record of trial and prepare an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fifth enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
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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 24 May 2023.

Respectfully submitted,

[redacted]

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25 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 23 June 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a sixth enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **30 July 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One

specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined at Naval Consolidated Brig Miramar, San Diego, California.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing nineteen prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Mr. Hockenberry has completed his review of the record of trial and is currently drafting an Assignments of Error brief. Undersigned counsel is reviewing the record of trial while assisting Mr. Hockenberry with the drafting of the Assignments of Error brief. Undersigned counsel represents fourteen clients with twelve matters pending before this Court. This case is counsel's first priority.

Since Appellant's last request for an enlargement of time, undersigned counsel filed: an Assignments of Error brief in *United States v. Valentin-Andino*, No. ACM 40185 (f rev), a Reply brief in *United States v. Bennett*, No. ACM S32733, a Reply brief in *United States v. McAlhaney*, No. ACM 39979 (rem), and a Reply brief in *United States v. Estep*, No. ACM 40336. Undersigned counsel was on a temporary duty assignment from 17 to 19 June 2023 and attended a course from 12 to 14 June 2023, during which times he could not tend to his primary duties.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested sixth enlargement of time for the submission of an Assignment of Errors brief for good cause shown.

Respectfully submitted,

[redacted]
AF
Appellate Defense Counsel
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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 23 June 2023.

[redacted]
SAF
Appellate Defense Counsel
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23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 23 June 2023.

[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. 1
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 20 July 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a seventh enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **29 August 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact

in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing 19 Prosecution Exhibits, three Defense Exhibits, 151 Appellate Exhibits, and two Court Exhibits. Mr. Hockenberry has completed his review of the record of trial and is currently drafting an Assignments of Error brief. Undersigned counsel is reviewing the record of trial. Undersigned counsel currently represents 15 clients and is presently assigned eight cases pending brief before this Court. This case is counsel's third priority case, behind:

1. *United States v. McAlhaney*, No. ACM 39979 (rem). The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 21 August 2023.
2. *United States v. Alton*, No. ACM 40215. The CAAF denied review on 17 July 2023; the appellant intends to seek reconsideration of that decision, due on 27 July 2023.

Since Appellant's last request for an enlargement of time, the previously assigned counsel has transitioned out of the Appellate Defense Division and the

undersigned counsel has transitioned into the Appellate Defense Division, taking over the previously assigned counsel's docket. The undersigned counsel's first full day in the office was 17 July 2023 and counsel has previously approved leave scheduled from 27 July 2023 through 30 July 2023. Counsel is completing all in-processing requirements.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4780
Megan.crouch.1@us.af.mil

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 20 July 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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21 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 21 July 2023.

[redacted]

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 40363**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 14 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government 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 16th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 September 2023**.

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
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 14 August 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for an eighth enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **28 September 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 285 days have elapsed. On the date requested, 330 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a

reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing 19 Prosecution Exhibits, three Defense Exhibits, 151 Appellate Exhibits, and two Court Exhibits. Mr. Scott Hockenberry, Appellant's civilian counsel, has completed his review of the record of trial and is currently drafting an Assignments of Error brief. Undersigned counsel began her review of the record of trial. Undersigned counsel currently represents 21 clients and is presently assigned 11 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. McAlhaney*, No. ACM 39979 (rem). The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 26 August 2023.
2. *United States v. Falls Down,* No. ACM 40268. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 2 October 2023.
3. *United States v. Estep*, No. ACM 40336. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 6 October 2023.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a petition for reconsideration before the CAAF in *United States v. Alton* (No. ACM 40215) and has been preparing a petition for grant of review before the CAAF in *United States v. McAlhaney*. Counsel also reviewed two records of trial and advised the members regarding their opportunity to appeal directly to the Air Force Court of Criminal Appeals. Additionally, counsel completed all in-processing requirements and was out of the office for one and a half duty days for previously

scheduled leave.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4780
Megan.crouch.1@us.af.mil

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 14 August 2023.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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15 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 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 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's Military 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 15 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,* v. Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force, *Appellant.*	))))))))))	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 3 No. ACM 40363 22 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to Headquarters Air Force. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant. Capt Megan R. Crouch has been detailed to represent Appellant in undersigned counsel's stead and made her notice of appearance in this case. Appellant has also retained Mr. Scott Hockenberry and Mr. Brad Simon. Counsel have completed a thorough turnover of the record.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762
(703) 697-4379
eshawn.rawlley.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I filed an electronic copy of the foregoing with the Court and on the Government Trial and Appellate Operations Division on 22 August 2023.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762
(703) 697-4379
eshawn.rawlley.1@us.af.mil

Counsel for Appellant

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
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 14 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for a ninth enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **28 October 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 316 days have elapsed. On the date requested, 360 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a

reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined.

The trial transcript is 2,149 pages long and the record of trial is comprised of fourteen volumes containing 19 Prosecution Exhibits, three Defense Exhibits, 151 Appellate Exhibits, and two Court Exhibits. Undersigned counsel currently represents 19 clients and is presently assigned 11 cases pending brief before this Court. This case is counsel's second priority case, behind:

1. *United States v. Falls Down,* No. ACM 40268. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 2 October 2023.

Since Appellant's last request for an enlargement of time, undersigned counsel has continued her review of Appellant's record of trial. Additionally, she filed a petition and supplement for grant of review before the CAAF in *United States v. McAlhaney (*Dkt. No. 23-0234/AF, No. ACM 39979 (rem)) and began preparing a petition and supplement for grant of review in *United States v. Falls Down* (No. ACM 40268). Undersigned counsel was out of the office for five duty days (attending a two-day Newcomers Training; attending the Joint Appellate Advocacy Training; and taking leave for one day) and has approved leave from 14 September through 18 September 2023.

Mr. Scott Hockenberry, Appellant's civilian counsel, has completed his review of the record of trial, is currently drafting an Assignments of Error brief, and has coordinated requests for information with the Appellant's trial defense counsel.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

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

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4780
Megan.crouch.1@us.af.mil

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 14 September 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4780
Megan.crouch.1@us.af.mil

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 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 Military 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 18 September 2023.

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 (TENTH)**
v.	)	Before Panel No. 3
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 19 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 (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for an enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **27 November 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a

reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined.

The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 Prosecution Exhibits, 3 Defense Exhibits, 151 Appellate Exhibits, and 2 Court Exhibits. Undersigned counsel currently represents 19 clients and is presently assigned 13 cases pending brief before this Court. This case is counsel's second priority case, behind:

1. *United States v. Davis,* No. ACM 40370. The record of trial is comprised of 11 volumes containing 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and 1 court exhibit; the transcript is 1258 pages. Undersigned counsel has completed her review of the transcript and record of trial and is preparing to travel for and give oral argument on 15 November 2023.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a petition and supplement for grant of review before the Court of Appeals for the Armed Forces in *United States v. Falls Down* (No. ACM 40268) on 27 September 2023. She then completed a review of the transcript (to include sealed pages within the transcript) for Appellant's case (*United States v. Doroteo*). On 2 October 2023, undersigned counsel was detailed to represent SrA Tyrion Davis at this Court's ordered oral argument (*United States v. Davis,* No. ACM 40370). She was not the original counsel who prepared the written briefs, nor had she reviewed the record of trial or the written filings prior to being detailed to represent SrA Davis. On 5 October 2023, this Court notified the parties for *United States v. Davis* that the oral argument would take place on 15 November 2023. As a result, undersigned counsel shifted *United States v. Davis* to her number one priority case and moved *United States v. Doroteo* to her number two priority case. Counsel completed her review of

the unsealed transcript, record of trial, and written filings for *United States v. Davis* on 17 October 2023. She also prepared for, and participated in, two moot oral arguments for JAJA colleagues (*United States v. Driskill* and *United States v. Rocha*) and advised one member regarding his opportunity to appeal directly to the Air Force Court of Criminal Appeals.

During undersigned counsel's requested enlargement of time, counsel is scheduled to attend the University of North Carolina (UNC) Appellate Advocacy Training in Chapel Hill, NC, from 25-27 October 2023. Counsel registered for this training on 22 August 2023, and as part of her registration, submitted to the UNC School of Government that she would use *United States v. Csiti* as her case for training. This case provides undersigned counsel the best opportunity to learn at the UNC Training because as sole counsel in this case, she has the greatest latitude to explore and raise issues for the Appellant. On 18 October 2023, undersigned counsel began reviewing the transcript for *United States v. Csiti* (No. ACM 40386) in preparation for the UNC Training.

Undersigned counsel will also attend the Appellate Judges Education Institute 2023 Summit from 2-5 November 2023. She has two moot oral arguments scheduled for *United States v. Davis* on 1 November 2023 and 9 November 2023. There is a federal holiday (Veterans Day) on 10 November 2023 and a family day for AF/JA on 13 November 2023. Undersigned counsel will be in Chicago, IL, from 13-15 November to represent SrA Davis at oral argument before this Court. Finally, counsel is scheduled to take leave from 28-30 October 2023 to attend an out-of-state funeral for a family member.

Mr. Scott Hockenberry, Appellant's civilian counsel and lead counsel for this case, has completed his review of the record of trial, is currently drafting an Assignments of Error brief, and has coordinated requests for information with the Appellant's trial defense counsel.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to

speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4780
Megan.crouch.1@us.af.mil

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 19 October 2023.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Megan.crouch.1@us.af.mil

23 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 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 390 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 23 October 2023.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 17 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) 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 21st day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **27 December 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

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 (ELEVENTH)**
v.	)	Before Panel No. 3
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 17 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 (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for an enlargement of time to file an Assignment of Errors brief. SrA Doroteo requests an enlargement for a period of 30 days, which will end on **27 December 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a

reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum. Appellant is currently confined.

The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 Prosecution Exhibits, 3 Defense Exhibits, 151 Appellate Exhibits, and 2 Court Exhibits. Undersigned counsel has completed her review of the transcript, to include sealed portions, and is finishing her review of the remaining record of trial.

Undersigned counsel currently represents 21 clients and is presently assigned 15 cases pending brief before this Court. This case is counsel's second priority case, behind:

1. *In re Banker*, Misc. Dkt. No. 2022-01. The transcript of the *DuBay* hearing is 311 pages and the record is two volumes. Mr. Banker's writ-appeal is due to the Court of Appeals for the Armed Forces on 14 December 2023.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the record of trial for *United States v. Csiti*, No. ACM 40386, in preparation for the University of North Carolina Appellate Advocacy Training. Counsel registered for this training on 22 August 2023, and as part of her registration, submitted to the UNC School of Government that she would use *United States v. Csiti* as her case for training. This case provided undersigned counsel the best opportunity to learn at the UNC Training because as sole counsel in this case, she has the greatest latitude to explore and raise issues for the appellant in *United States v. Csiti*. Undersigned counsel attended the UNC Training in Chapel Hill, NC, from 25-27 October 2023. Upon returning from the UNC training, counsel immediately took leave form 28-30 November 2023 to attend an out-of-state funeral for a family member. Counsel then attended the Appellate Judges Education Institute 2023 Summit from 2-5 November 2023. From 6-15 November 2023, counsel prepared for,

and participated in, an oral argument ordered by this Court for *United States v. Davis*, No. ACM 40370, in Chicago, IL.

Mr. Scott Hockenberry, Appellant's civilian counsel and lead counsel for this case, has completed his review of the record of trial, and is continuing to draft Appellant's Assignments of Error brief.

Through no fault of Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

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

Respectfully submitted,

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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 17 November 2023.

Respectfully submitted,

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17 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40363 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 Military 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
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Appellate Operations Division
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 17 November 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**BRIEF ON BEHALF OF APPELLANT**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 15 December 2023

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

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Assignments of Error

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION, WHERE THE EVIDENCE RAISED A PRIOR INTIMATE RELATIONSHIP BETWEEN APPELLANT AND THE VICTIM, APPELLANT ASKED FOR CONSENT, THE VICTIM DISCLAIMED ANY VERBAL OR PHYSICAL RESISTANCE PRIOR TO THE OFFENSES APPELLANT WAS CONVICTED OF, THE VICTIM ACKNOWLEDGED THAT APPELLANT STOPPED AS SOON AS SHE ASKED HIM TO AT THE CONCLUSION OF THE LAST OFFENSE, AND A THIRD-PARTY WAS SLEEPING IN THE SAME ROOM AT THE TIME OF THE OFFENSES.

II. WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL, OVER DEFENSE OBJECTION, THAT THEY MAY CONSIDER THE CHARGED MISCONDUCT IN SPECIFICATIONS 1 THROUGH 5 OF CHARGE I AS EVIDENCE OF A "COMMON PLAN OR SCHEME" OF CRIMINALITY UNDER MIL. R. EVID. 404(b), AND ALLOWING THE GOVERNMENT TO ARGUE THE SAME.

III. WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 4 AND 5 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE, *INTER ALIA*, THERE WAS NO CORROBORATION, THE VICTIM TOLD A NUMBER OF DEMONSTRATED LIES ABOUT HER SEXUAL INTERACTIONS WITH APPELLANT, AND THE VICTIM CONFESSED TO A FRIEND THAT SHE HAD FALSELY ACCUSED APPELLANT OF SEXUAL ASSAULT FOR REPUTATIONAL REASONS.

IV. WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA A POST-TRIAL *BRADY* DISCLOSURE FROM TRIAL COUNSEL.

V. WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED WHERE APPELLANT'S ACCUSER PROVIDED FALSE OR MISLEADING TESTIMONY ABOUT HER HISTORY OF INTIMACY WITH APPELLANT, THE GOVERNMENT KNEW OR

SHOULD HAVE KNOWN THE TESTIMONY WAS FALSE BECAUSE THE TESTIMONY CONTRADICTED THE ACCUSER'S ADMISSIONS TO THE GOVERNMENT IN A PRETRIAL INTERVIEW, AND THE GOVERNMENT ALLOWED THE TESTIMONY TO GO UNCORRECTED AND FAILED TO INFORM THE DEFENSE OF THE PRETRIAL ADMISSIONS.

VI. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING AS AN "EXCITED UTTERANCE," A TEXT MESSAGE IDENTIFYING APPELLANT, SENT BY A NON-PARTICIPATING COMPLAINING WITNESS TO A THIRD-PARTY, AT THE CONCLUSION OF TWENTY-FOUR MINUTES OF TEXTING BACK-AND-FORTH.

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VIII. WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 6 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED APPELLANT TOUCHED THE VICTIM'S BREAST BUT SHE TESTIFIED THE CHARGED TOUCHING DID NOT OCCUR.

IX. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO USE A PRIOR STATEMENT BY THE VICTIM, CORROBORATED BY PHYSICAL EVIDENCE, ENDORSING ADDITIONAL CONSENSUAL SEXUAL CONDUCT DURING THE CHARGED ENCOUNTER, WHICH WAS IRRECONCILABLE WITH HER TRIAL TESTIMONY.

X. WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

XI. WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Statement of the Case

On 9 August 2021,[1] 16-17 November 2021, 10 January 2022, and 16-26 May 2022, Senior Airman (SrA) Samuel A. Doroteo (Appellant) was tried by officer and enlisted members at a general court-martial at Ramstein Air Force Base, Germany. Appellant pleaded not guilty to all charges and specifications; the members returned a mixed verdict. (R. at 760; R. at 2039-40).

Appellant was convicted, contrary to his pleas, of two specifications of sexual assault and three specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. Appellant was acquitted of two specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, UCMJ, and one specification of attempted abusive sexual in violation of Article 80, UCMJ, 10 U.S.C. § 880. One specification of abusive sexual contact in violation of Article 120, UCMJ, was withdrawn and dismissed without prejudice. (R. at 2039-40; Charge Sheet.)

The members sentenced Appellant to seven (7) years confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, a reprimand, and a dishonorable discharge. (R. at 2147). The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. (Convening Authority Action).[2] [3]

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[1] While the record of trial cover sheets indicate arraignment occurred on 16 August 2021, the record itself shows Appellant was arraigned on 9 August 2021. (Record (R.) at 1-11).

[2] The record does not contain documentation that appellant was served with R.C.M. 1106A (victim clemency) matters. Appellate defense counsel confirmed with trial defense counsel that, though not documented in the record, these matters were properly served. Appellant waives any objections on this basis.

[3] On the same subject of record completeness, Appellate Exhibit (App. Ex.) CXLVIII ("Defense Motion for Finding of Not Guilty (RESERVED)") appears to contain the wrong document.

Statement of Facts

Appellant was charged with offenses against five different female Airmen. He was acquitted of all offenses against two of the charged victims and convicted of one or more offense against the other three. This facts section is divided by victim.

1. *Charge I, Specifications 1, 2, and 3 (Offenses against EV[4])*

Appellant was acquitted of all offenses against Staff Sergeant (SSgt) EV and, as such, only a high-level overview of the facts is provided here.

After a night of drinking between Airmen in a complex web of relationships (to include EV, EV's husband, EV's boyfriend with whom she was carrying out an affair, and Appellant), EV, her husband, and Appellant ended up back at Appellant's hotel room. (R. at 1352-58). EV endorsed intermittent memories of the remainder of the night. (R. at 1360). Once back in Appellant's hotel room, EV testified that she went into the bathroom and was crying. (R. at 1359). EV asked her husband to leave while in the bathroom, due to tensions in their marriage and in her relationship with her boyfriend. (R. at 1359). EV eventually came out of the bathroom, asked to confirm her husband had left, and accepted Appellant's invitation to spend the night in his hotel room. (R. at 1361-62). EV testified that Appellant proceeded to touch her breasts and engage in a series of sexual acts in various positions. (R. at 1363-66). EV endorsed no verbal or physical

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Rather than the defense motion, the record contains the government response, stamped as App. Ex. CXLVIII. However, the missing Defense Motion (dated 2 June 2022) is contained elsewhere in the record as an attachment to Appellant's submission of matters, titled "Request for Deferral under RCM 1103", dated 5 June 2022. Appellate defense counsel confirmed with trial defense counsel that the attached document is the same as the missing document. As the substance is identical, Appellant consents to consideration of the attached document in lieu of the missing appellate exhibit and waives any objection to record completeness on this basis.

[4] Due to a change of name, EV is referred to as ER in places throughout the record.

resistance and acknowledged taking her own pants off. (R. at 1363-66, 1380-89). Appellant did not use any force. (R. at 1386). Appellant asked for consent. (R. at 1386). EV did not remember how she responded to Appellant's request for consent. (R. at 1386-87). EV specifically testified that she could not remember if she might have responded in the affirmative to Appellant's request for consent. (R. at 1386-87). EV acknowledged that she "had no idea" how she responded to Appellant's request for consent. (R. at 1386-87).

The next morning EV's boyfriend asked if she and Appellant had sex. (R. at 1389). EV lied to him and said they had not. (R. at 1389).

2. Charge I, Specifications 4 and 5 (Offenses against KB)

Airman First Class (A1C) KB first met Appellant in October of 2019 when she went out with him to a club to see some friends. (R. at 1503-05). They continued to hang out and formed a friend group consisting of KB, Appellant, and SrA BB. (R. at 1506-07). Appellant was charged with assaultive conduct against KB on three occasions as outlined below.[5]

a. October 2019 Sexual Assault Allegation (Not Guilty)

On a subsequent occasion in October of 2019, KB, Appellant, and BB were hanging out in KB's dorm room, drinking and watching Netflix. (R. at 1509-10). The three of them were sitting on KB's bed together until BB left the room. (R. at 1510-11). After BB left, KB laid down. (R. at 1511). KB testified that Appellant then got on top of her. (R. at 1511-12). KB perceived that Appellant wanted to have sex but testified that internally she did not want to have sex with him. (R. 1512). Appellant stated that he wanted to have sex with KB. (R. at 1512). KB testified she

[5] Appellant was acquitted of the October 2019 allegation but convicted of the January 2020 and March 2020 allegations.

told Appellant: "'I don't want to have sex with you.'" (R. at 1513). KB testified that Appellant did not listen to her but continued and engaged in sexual intercourse with her. (R. at 1513-14). At some point KB realized Appellant was no longer in the room. (R. at 1515).

KB testified that she reported this incident to BB the next day. (R. at 1515, 1540). KB adamantly denied that, when she reported this incident to BB the following day, she told BB that she ended up having sex with Appellant because she did not want to disappoint anybody, or because she didn't want to disappoint Appellant. (R. at 1540-41). KB denied telling BB that she let Appellant have sex with her. (R. at 1541-42). KB denied telling BB that the reason she had sex with Appellant was to satisfy Appellant. (R. at 1542).

BB's version was quite different. BB confirmed that KB had told her about this encounter. (R. at 1603). BB asked KB whether she had sex with Appellant. (R. at 1604). KB confirmed they had sex. (R. at 1604). BB understood that KB was not "super happy" about having "hooked up" with Appellant. (R. at 1604). KB told BB that Appellant was "more the relationship-type and she wasn't into it." (R. at 1604). Nevertheless, KB told BB that she had sex with Appellant because she didn't want to disappoint anyone and, more specifically, didn't want to disappoint Appellant. (R. at 1604, 1615-16). BB confirmed that KB stated she let Appellant have sex with her. (R. at 1604, 1616). BB confirmed that KB stated she had sex with Appellant in order to make him satisfied. (R. at 1604, 1616). "Make him satisfied" were KB's words. (R. at 1604, 1616). BB was abundantly clear that KB never reported saying "no," "stop," or "anything of that nature." (R. at 1605, 1616). BB understood that KB chose to have sex with Appellant. (R. at 1614, 1616).

KB testified that she also reported this incident to another friend, SrA AV. (R. at 1543). AV confirmed that KB had told her about this encounter in the early fall of 2019. (R. at 1773). Initially, KB told AV that Appellant had sex with her without her consent. (R. at 1777). However,

there was also a second conversation. (R. at 1773). KB specifically said, in the second conversation, that the encounter with Appellant had been consensual. (R. at 1773-74, 1777). KB confessed that: "what she previously stated was not accurate. It wasn't true." (R. at 1774, 1777).

KB denied confessing to AV that she was telling people she had not consented to sex with Appellant because she didn't want people to know that she was hooking up with Appellant (or men in general), because KB identified as a lesbian. (R. at 1543-44). AV, however, confirmed that KB had confided to her that "she didn't want people to know that she was having sex with [Appellant] or had sex with him because she was supposed to be into females." (R. at 1774). AV confirmed that, in the follow-up conversation, KB "admitted to lying to [AV] to protect her reputation." (R. at 1777).

KB denied finding Appellant attractive. (R. at 1510). KB denied wanting to pursue a romantic relationship with him. (R. 1510). KB denied dating Appellant after the October 2019 assault allegation. (R. at 1517). KB specifically denied carrying on an intimate relationship with Appellant after the October 2019 assault allegation. (R. at 1548). BB testified that she had witnessed KB kissing Appellant in October or November of 2019. (R. at 1606-08). They were hanging out in the living room of Appellant's house (after KB had moved in with Appellant). (R. at 1606). They were drinking and BB suggested that KB should go make out with Appellant. (R. at 1607). KB agreed, walked across the room, sat in Appellant's lap, and started making out with him. (R. at 1607). This "make out" session lasted a long time, approximately two minutes. (R. at 1607). Appellant had not initiated it or asked for it. (R. at 1607-08). When asked whether, in late October 2019, she had sat on Appellant's lap and kissed Appellant while hanging out with a group including BB, KB denied any recollection of doing so. (R. at 1548).

KB further denied "making out" with Appellant in December of 2019 while hanging out with a group including AV. (R. at 1548-59). AV testified that she had witnessed KB kissing Appellant in December of 2019. (R. at 1771). AV, KB, and Appellant were hanging out in the living room. (R. at 1772). AV witnessed KB and Appellant kissing. (R. at 1772-73). There was nothing forceful or unwanted about it. (R. at 1773). It was a "pretty long make out session" lasting of "ten to 15 seconds" at least. (R. at 1773).

KB denied making out with Appellant on additional subsequent occasions or telling SSgt MB words to the effect of "'OMG, I just kissed Sam.'" (R. at 1551). MB, however, testified that KB had in fact told her that about consensually kissing Appellant, using words to this effect. (R. at 1573). MB testified he had knowledge of KB and Appellant sneaking back to the group together after kissing. (R. at 1573). MB remembered this happening "up until March of 2020." (R. at 1573).

KB testified that she felt unsettled being around Appellant and, as described above, that he had sexually assaulted her within a "couple weeks" of their first meeting. (R. at 1546). Nonetheless, in the same month (October 2019) she alleged the assault occurred, KB made the decision to move into Appellant's house. (R. at 1546-47). She made this decision despite having a dorm room on base that met her needs. (R. at 1547). Subsequently, Appellant moved from one house to another, and KB moved into Appellant's new house, despite still having her dorm room on base. (R. at 1550, 1609).

At no point her testimony did KB acknowledge any consensual intimate contact with Appellant (this becomes important later with regard to the discovery violation).

b. January 2020 Sexual Assault Allegation (Guilty)

In January of 2020, KB had now moved into Appellant's new house and was staying in a room in his attic. (R. at 1517-18). MB also lived in the same room in the attic of Appellant's house. (R. at 1518, 1521). On the evening in question, KB, Appellant, MB, and BB were all drinking together at the house. (R. at 1522). While the group was drinking, KB testified she "began to get in [her] feelings," which she explained meant she grew very emotional thinking about sad things in her life. (R. at 1523-24). She went into the bathroom to cry. (R. at 1523). First BB, and then Appellant, took KB to bed and the next thing she knew she was in the attic (her room). (R. at 1523-24). There was "[n]ot a lot" of light in the attic. (R. at 1526). MB, the other individual who lived in the attic was in the same room, sleeping. (R. at 1525). KB testified that Appellant attempted to comfort her and then attempted to turn the interaction sexual. (R. at 1525-26). Appellant asked to have sex with her. (R. at 1527). In KB's mind she was thinking she did not want to have sex. (R. at 1527). KB could not remember if she said anything in response to Appellant's request to have sex. (R. at 1527). KB similarly could not remember if she did anything physically to Appellant. (R. at 1527). Thereafter, Appellant had sexual intercourse with KB. (R. at 1528). After the intercourse, Appellant left. (R. at 1528). MB was in the room sleeping the entire time, and continued to sleep after Appellant left. (R. at 1528). KB testified that she reported this incident to BB and MB. (R. at 1529, 1544). After this second alleged assault, KB continued to spend time with Appellant. (R. at 1529-30).

c. March 2020 Abusive Sexual Contact Allegation (Guilty)

KB testified that, in March of 2020, a group of friends, including her and Appellant, went out "to drink and have fun." (R. at 1530). After the night out, several of the Airmen came back to KB's dorm room. (R. at 1531). Subsequently, KB and MB laid down in KB's bed, Appellant laid down on the floor, and everyone else left KB's dorm room. (R. at 1531-33). KB testified that

Appellant pulled her down to the floor. (R. at 1534). KB testified that internally she didn't want to do anything with Appellant but she did not remember whether she did anything "outside" or "physically" (i.e. she did not remember whether she communicated anything to Appellant). (R. at 1534). After pulling her to the floor, KB testified that Appellant's body was positioned on top of her body and she felt his penis on her "inner thigh." (R. at 1534-35). At this point, KB testified she said: "I don't want to have sex with you." (R. at 1536). Appellant "listened and got off [KB]" and KB went back to bed and went to sleep. (R. at 1536-37).

KB denied that, even after this third incident, she showed MB a video on her phone of herself and Appellant. (R. at 1552). In fact, KB denied *ever* showing MB such a video. (R. at 1552). To the contrary, MB testified that in the March 2020 timeframe, KB showed him a video on her phone of her and Appellant holding hands, laughing, and dancing. (R. at 1574).

KB denied that, after this incident, she told MB that she was "crushing on" Appellant. (R. at 1552). In fact, KB denied *ever* telling MB that she was "crushing on" Appellant. (R. at 1552). MB testified KB confided in him about personal matters, and based on these confidences, he understood that she and Appellant had a previous romantic relationship. (R. at 1572). He knew, through disclosures by KB, that KB and Appellant had mutual feelings for each other and were "crushing on" each other. (R. at 1572-73).

d. Post-Trial Brady *Disclosure Relating to KB*

Pages 10-11 are filed under seal

Pages 10-11 are filed under seal

3. Charge I, Specifications 6 and 7 (Offenses against AN)

SrA AN (AN) and Appellant met in technical school and became friends. (R. at 1128). In April of 2020, AN was hosting a male Airman, OR, at her house in Kaiserslautern, Germany. (R. at 1129-30). AN and OR were drinking alcohol, playing video games, laughing, and having a

good time. (R. at 1132). However, AN testified that the interaction turned negative and OR began being hateful and abusive toward her. (R. at 1132). AN messaged Appellant, asking him to come over and help her deal with OR's belligerence. (R. at 1133). At AN's request, Appellant went to AN's house and the three Airmen (AN, OR, and Appellant) continued to hang out as a group. (R. at 1133). Appellant's presence initially calmed things down, but after a time, OR resumed being verbally abusive toward AN. (R. at 1133). OR progressed to breaking things and attempting to urinate in inappropriate places. (R. at 1134). AN and Appellant attempted to get OR down the stairs and out of the house. (R. at 1134). At this juncture, AN testified that OR slapped her and called her a degrading name. (R. at 1135). AN asked Appellant to use his phone to call the Security Forces.[8] (R. at 1135). The police responded to the house, took statements from AN and Appellant, and took OR away. (R. at 1135-36).

After AN's first alleged assailant of the night (OR) was gone, AN invited Appellant to stay the night with her. (R. at 1137). AN invited Appellant to stay in her bed. (R. at 1159). They got in bed together and began consensually kissing. (R. at 1137). The kissing was mutual, accompanied by mutual "face grabbing," and AN described it as "pretty intimate." (R. at 1159-60). Thereafter, however, Appellant attempted to advance the sexual intimacy by touching AN's breast, removing her shorts, and having intercourse with her. (R. at 1137-41). AN testified she verbally and physically rejected these advances, but testified Appellant persisted over her objection. (R. at 1137-41). After Appellant penetrated her, AN testified she started crying. (R. at 1170).

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[8]Both AN and Appellant were also members of the Security Forces Squadron. (R. at 1144).

After the assault, AN testified she ordered Appellant to leave her room and contacted another Airman, SSgt MS, for assistance. (R. 1141). MS reported the alleged assault. (R. at 1247). After the report, AN underwent a Sexual Assault Forensic Exam (SAFE exam). (R. at 1289). The primary examiner, Ms. DA, did not testify, but the mentor (who was in the room during the exam), Major (Maj) JS, testified. (R. at 1291-93). JS testified she had concerns with the exam. (R. at 1294). JS reported that DA became increasingly flustered during the exam and, by its conclusion, was "profusely sweating" and nervously ticking, continuously making a clicking sound over and over again with her mouth. (R. at 1294-95). During the speculum genital exam, JS noticed DA was struggling and it was taking longer than it should. (R. at 1294, 1304-05). JS was so concerned she got up from her chair and attempted to take over the exam, but DA "elbowed" JS out of the way and told JS she had it. (R. at 1294).

JS also had concerns with the labeling and preservation of the swabs. (R. at 1295-96). DA did not properly label or organize the swabs, so it was unclear where they had come from. (R. at 1295-96). Because she "had no idea where they had come from," JS could not properly package the swabs and was not comfortable putting her name down as packaging the swabs. (R. at 1295-96). JS also testified that DA failed to package every swab that was collected, instead throwing some into the garbage can. (R. at 1297). DA told JS she had thrown away some swabs because she didn't know where they had come from and didn't have any more boxes. (R. at 1297). JS informed DA that an examiner should never throw away swabs and, if unsure about their origin, the examiner should still be packaged with a notation to the effect of "Unsure where they came from." (R. at 1297).

Ms. MC, a forensic biologist at the U.S. Army Criminal Investigations Laboratory (USACIL), tested the samples. (R. at 1312-40). MC reported "discrepancies" in the SAFE exam

kit collected from AN. (R. at 1319). Specifically, MC reported that the swabs were contained within labeled boxes and the boxes were themselves contained within labeled envelopes. (R. at 1319-20). However, in several cases the labeling on envelope contradicted the labeling on the box inside. (R. at 1319-20). For example, an envelope labeled "genital swabs" contained a box labeled "anal swabs." (R. at 1320). Comparing the swabs from AN's exam to swabs of Appellant, MC reported finding DNA from each on the other's swabs, though the location of Appellant's DNA on AN was confusing due to the labeling issues. (R. at 1312-40).

On direct examination, AN denied continuing to consensually kiss Appellant after he attempted to advance the sexual intimacy. (R. at 1139); *see also* (R. at 1162, 1166-67) (further denial of continued kissing). AN denied telling the Office of Special Investigations (OSI) that she continued to kiss Appellant. (R. at 1163). AN denied being arrested for mutual assault after the incident with OR. (R. at 1150). OSI Special Agent (SA) JH interviewed AN in the hours following the charged assault. (R. at 1342). SA JH testified that AN told him that she resumed kissing Appellant after he had touched her breasts. (R. at 1347). AN also told SA JH that she wanted to continue kissing Appellant. (R. at 1347). A video clip of these statements from AN's OSI interview was admitted into evidence. (Def. Ex. A).

There was a COVID-related rule in place in Germany in April 2020 that prohibited having visitors from more than one household in one's home. (R. at 1154). During her testimony, AN acknowledged the rule, and acknowledged that the having Appellant and OR visit her house violated it, but denied that she was aware of the rule at the time (in April 2020). (R. at 1154-55). Master Sergeant (MSgt) PB, the responding officer, confirmed that the rule prohibiting visitors from more than one household was in place at the time he responded to AN's house and that he realized it was being violated by AN and her guests. (R. at 1266-67). AN testified that her unit

did not inform her of *any* of the regulations or requirements related to the COVID-19 pandemic. (R. at 1156). MSgt PB, however, who was in the same unit as AN, testified that the unit had disseminated information about this and other COVID rules, and they were prevalently known. (R. at 1266-67).

AN denied that Appellant had kissed her breasts. (R. at 1163). AN denied having "hickeys" on her breasts after the encounter. (R. at 1164).

AN unambiguously denied that she was holding hands with Appellant while speaking with the responding officers about OR earlier in the evening. (R. at 1152) ("I was not holding his hand."). AN similarly denied stroking Appellant's arm or telling the responding officers that Appellant was her hero. (R. at 1152-54). The responding officer, MSgt PB, reported that AN was in fact holding hands with Appellant and stroking his arm during the response and that she called Appellant her hero multiple times. (R. at 1260, 1268-72).

AN reported that she asked MS (who was also a member of Security Forces (R. at 1178)) if she was allowed to shower, and he told her she could. (R. at 1142, 1179). MS, by contrast, testified that he had told AN just the opposite: *not* to shower, out of concern for preserving evidence. (R. at 1245).

AN and MS (the Airman she called to assist her with Appellant after she called Appellant to assist her with OR) had previously worked together at Edwards Air Force Base, California. (R. at 1174-75). AN testified that their relationship was "strictly professional" while they were working together in California but they had engaged in an intimate relationship together in Germany. (R. at 1175-76). MS, by contrast, testified that he had only hung out with AN twice outside of work (R. at 1208) and adamantly denied any previous dating relationship with her. (R. at 1248, 1255).

4. Charge I, Specification 8 and The Specification of Charge II (Offenses against LD)

Appellant was acquitted of all offenses against Senior Airman (SrA) LD and, as such, only a high-level overview of the facts is provided here.

LD was married to BB (the same BB discussed previously). (R. at 1722-23). The charged events happened after a birthday party in the dorms, in May 2020. (R. at 1725-26). After the party, LD's wife, BB, told LD that Appellant was going to stay with them and all three of them went back to BB's dorm. (R. at 1728). At some point, all three of them ended up in the same bed. (R. at 1730). Later in the night, while she was falling asleep, LD testified she felt Appellant's hand skim over her breasts and down towards her pelvic area. (R. at 1733). Thereafter, BB moved Appellant do a different bed. (R. at 1734-35).

BB supplied a bit more detail on this interaction. (R. at 1691-1721). She testified that she and Appellant had a significant history of sharing a bed and there were "a lot of times" when they would cuddle and "spoon" in bed together. (R. at 1695). BB testified that Appellant swung his arm over her (BB) and across her body to LD's body. (R. at 1697). BB testified she thought "nothing of it" because she was "used to the cuddles with him." (R. at 1697). Appellant's hand slid down to LD's breast. (R. at 1698). BB "didn't think anything of it at the time" and LD "[within] not even a second of him touching her breast she grabs his hand again and flies it back over to his side." (R. at 1698). Thereafter, Appellant swung his arm back across BB's body and across to LD's body, then slid his hand down to BB's hand, which was over LD's groin area. (R. at 1698-99). Thereafter, at LD's request, BB moved Appellant to a different bed. (R. at 1699-1700).

5. Charge I, Specification 9 (Offense against RY)

Appellant was charged with touching Airman First Class (A1C) RY's breast while at a party. (Charge Sheet); *see also*, (R. at 1622-66) (eye-witness testimony describing charged interaction). RY did not testify. Instead, the government called a third-party eyewitness who was also in attendance at the party: SrA CS. (R. at 1622-66). CS endorsed limited memory of the night in question. (R. at 1627). CS testified that, at some juncture in the evening, she was sitting on one side of a table while RY was sitting on the other side (facing away from the table). (R. at 1631-36, 1642). CS described a man approaching RY and sitting down next to RY. (R. at 1631-36). The man interacted with RY – seemingly in a flirtatious manner – for some time, attempted to first-bump RY multiple times, and then got up to leave. (R. at 1631-36). As he was getting up, CS observed him touch RY's breast. (R. at 1634-35).

There were *significant* issues with CS's identification of the man who touched RY. At the time, CS did not know Appellant and did not know what his name was. (R. at 1638). Earlier in the 2022, she also could not remember what he looked like. (R. at 1638). Later, while at a hearing for the present case, CS saw a man she assumed was Appellant running on a track, but she was not sure it was Appellant. (R. at 1638). A few days later, CS spoke to another charged victim and stated she thought she had seen Appellant before but wasn't sure. (R. at 1639). In the same month as the trial (May 2022), CS confirmed she could not remember what the man in question looked like. (R. at 1639). She could not remember his height, if he was tall or short, if he was "buff" or skinny, any details of his face, or any of his features. (R. at 1639-40). She could not directly identify his race and was unable to identify his pictures. (R. at 1640). CS stated that she was aware RY and the man in question knew each other from a deployment – specifically a deployment to Qatar. (R. at 1640-41). The defense presented evidence that Appellant had never deployed to Qatar. (R. at 1770-71).

To fill in the obvious gaps in identification from CS's testimony, the prosecution called SrA TS. TS attended the party on the night in question but left before the charged assault on RY. (R. at 1667-69). After he left, RY sent him a series of text messages. (R. at 1669-70; Prosecution Exhibit (Pros. Ex.) 11). In the messages, RY stated she was angry. After 24 minutes of texting back and forth, RY said, "It was Sam." (R. at 1676; Pros. Ex. 11). The military judge admitted these text messages as excited utterances. (App. Ex. XCVII).

Argument

I. THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION, WHERE THE EVIDENCE RAISED A PRIOR INTIMATE RELATIONSHIP BETWEEN APPELLANT AND THE VICTIM, APPELLANT ASKED FOR CONSENT, THE VICTIM DISCLAIMED ANY VERBAL OR PHYSICAL RESISTANCE PRIOR TO THE OFFENSES APPELLANT WAS CONVICTED OF, THE VICTIM ACKNOWLEDGED THAT APPELLANT STOPPED AS SOON AS SHE ASKED HIM TO AT THE CONCLUSION OF THE LAST OFFENSE, AND A THIRD-PARTY WAS SLEEPING IN THE SAME ROOM AT THE TIME OF THE OFFENSES.

Standard of Review

Where a mistake of fact defense is reasonably raised by the evidence, an instruction on that defense is required. *United States v. Davis*, 76 M.J. 224, 228 (C.A.A.F. 2017) (citations omitted). Whether a mistake of fact instruction has been reasonably raised by evidence is a question of law appellate courts review de novo. *Id.* at 229.

Law

"A military judge must instruct members on any affirmative defense that is 'in issue.'" *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (citing Rule for Courts-Martial (R.C.M.) 920(e)(3)). A matter is "in issue" when *some evidence*, without regard for its source or

credibility, has been admitted upon which the members might rely if they choose. *Id.* (citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (quoting R.C.M. 920(e), Discussion) (additional citation omitted)); *see also Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir. 1961) ("It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence.") (emphasis added) (citation omitted). "In other words, a military judge must instruct on a defense when, viewing the evidence in the light most favorable to the defense, a rational member could have found in the favor of the accused in regard to that defense." *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (citations omitted). "Any doubt whether an [affirmative defense] instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981); *see also United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) (when deciding whether mistake of fact has been raised, "the court is obliged to view the evidence in the light most favorable to the accused.") (citation omitted).

"The test for determining whether an affirmative defense of mistake of fact has been raised is whether the record contains *some evidence* of an honest and reasonable mistake to which the members could have attached credit if they had so desired." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (emphasis added) (citing R.C.M. 916(j), *Manual for Courts-Martial* (2002 ed.)); *see also United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993); *see also Ruiz*, 59 F.3d at 1154 (noting the "threshold burden [to warrant a mistake of fact instruction] is *extremely low*.") (emphasis added) (citation omitted).

Put differently, an instruction on a defense is *not* required if no reasonable panel member could find the defense applicable. *Schumacher*, 70 M.J. at 389-90 (stating that the test is similar

to the test for legal sufficiency). "While the quantity of evidence required is low, the record must contain evidence supporting both the subjective 'honest' and the objective 'reasonable' mistaken belief." *United States v. Rodela*, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021), *rev. denied,* 82 M.J. 312 (C.A.A.F. 2022) (citations omitted). The defense "may be raised by evidence presented by the defense, the prosecution, or the court-martial." R.C.M. 916(b), Discussion; *see also United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998). The Court of Appeals for the Armed Forces (CAAF) has repeatedly emphasized that "[a]n accused is not required to testify in order to establish a mistake-of-fact defense." *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) (citing *Jones*, 49 M.J. at 91); *see also United States v. Tollinchi*, 54 M.J. 80, 81-83 (C.A.A.F. 2000) (reversing the rape conviction as *legally insufficient* because of the accused's mistake of fact as to consent, even though the accused did not testify). In *United States v. Brown*, the CAAF admonished any military judge who did not provide a mistake of fact as to consent instruction stating:

> Lastly, it is hard to believe that . . . [the] Military Judges' Benchbook . . . does not have a statement in 2-inch high letters, "INSTRUCT ON REASONABLE AND HONEST MISTAKE IN ALL RAPE CASES INVOLVING CONSENT UNLESS THE DEFENSE COUNSEL AGREES THAT THE DEFENSE IS NOT RAISED." . . . Why invite an appellate issue?

43 M.J. 187, 190 n.3 (C.A.A.F. 1995) (emphasis in original).

A military judge has no duty to instruct on mistake of fact as to consent "where the evidence raises and the parties dispute only the question of actual consent." *United States v. Willis,* 41 M.J. 435, 438 (C.A.A.F. 1995) (citations omitted). For example, where the defense theory was that the victim was a "willing and enthusiastic" participant in the charged behavior, this Court has found that mistake of fact was not raised. *United States v. Murray*, 43 M.J. 507, 516 (A.F. Ct. Crim.

App. 1995). By contrast, where the evidence raises "mixed messages" on the part of the victim, mistake of fact as to consent is implicated. *DiPaola*, 67 M.J. at 102.

Erroneous omission of a mistake of fact instruction is constitutional error, tested for prejudice under the harmless beyond a reasonable doubt standard. *DiPaola*, 67 M.J. at 102 ("In the context of this case, we cannot say that the absence of a mistake-of-fact instruction on this offense was harmless beyond a reasonable doubt. . . .").

Argument

1. Additional Background

This assignment of error applies to Specifications 4 and 5 of Charge I (offenses against KB). Defense counsel requested, and vigorously argued for, a mistake of fact as to consent instruction for these specifications. (R. at 1846-53). The military judge stated he would take the arguments under advisement and send out draft instructions based on his conclusions. (R. at 1853). Thereafter, the military judge sent out draft instructions that included a mistake of fact as to consent instruction as to other offenses, but not as to Specifications 4 and 5. (R. at 1892-93; App. Ex. CXXXIV).

Defense counsel objected to the omission of a mistake of fact as to consent instruction with respect to these specifications. (R. at 1893). The military judge stated that defense counsel's objection was "noted" but insisted that he did not want to rehash the arguments from the previous day. (R. at 1893) ("I don't want to rehash arguments that we had yesterday. We spent two-and-a-half hours talking about this yesterday. Your objection is noted."). Defense counsel again attempted to voice an objection, but the military judge cut counsel off and provided the following ruling on the record:

> Yeah, so I consider[ed] *United States v. Davis*, 76 MJ 224, *United States v. Willis*, 41 MJ 435, pinpoint cite 438, *United States v. [Rodela]*, A.C.M. 20080. I

> considered the totality of the circumstances at the time of the offense. With regard to KB, considering the totality of the circumstances at the time of the offenses, the record does not contain evidence supporting that the accused had a subjective honest mistake and belief. Your objection is noted but overruled. Move on, Defense Counsel.

(R. at 1893). Despite the rebuke, defense counsel objected for the third time and asked to be heard. (R. at 1894). The military judge again "noted" and "overruled" this third objection. (R. at 1894).

At a subsequent session, defense counsel objected for the fourth time to the omission of the instruction with respect to Specifications 4 and 5. (R. at 1919-21). The military judge declined to reconsider his prior rulings. (R. at 1921). Going even further, the military judge explicitly ruled that the defense was "not allowed to argue mistake of fact as a defense with regard to [KB]." (R. at 1920). The military judge emphasized this ruling was "more than crystal clear". (R. at 1920-21).

In accordance with these rulings, over at least four defense requests/objections to the contrary, the military judge gave a mistake of fact as to consent instruction as to other offenses, but not as to Specifications 4 and 5 of Charge I (offenses against KB). (R. at 1934-35). Defense was also precluded from arguing mistake of fact as to consent with regard to Specifications 4 and 5 of Charge I.

2. The Record Contained Some Evidence of Mistake of Fact as to Consent

The record contained "some evidence" of mistake of fact as to consent. Indeed, while, as this Court has observed, "the quantity of evidence required is low," the record here contains *an abundanc*e of evidence as to both a both a subjective (honest) and objective (reasonable) mistake of fact as to consent. *Rodela*, 82 M.J. at 526.

There was significant evidence of a preexisting consensual sexual relationship between Appellant and KB prior to the offenses of which Appellant was convicted.[9] *See* (R. at 1603-04, 1614-16) (KB statements to BB that she had consensual sex with Appellant in October 2019); (R. at 1773-74, 1777) (KB statements to AV that she had consensual sex with Appellant in October of 2019); (R. at 1606-08) (evidence that KB sat in Appellant's lap and made out with him for approximately two minutes in the Fall of 2019); (R. at 1771-73) (evidence that KB consensually made out with Appellant in December 2019); (R. at 1572-74) (additional evidence of consensual kissing and a romantic relationship between KB and Appellant occurring "up until March of 2020."); (R. at 1546-47, 1550, 1609) (evidence that KB twice moved into Appellant's house after charged assaults, despite having her own dorm room throughout the entirety of the period). Appellate courts have found evidence of prior consensual relations relevant to the question of whether some evidence of mistake of fact as to consent has been raised. *See, e.g.*, *United States v. Johnson*, 25 M.J. 691, 695 (A.C.M.R. 1987) (evidence of prior intimate relationship relevant to raising mistake of fact as to consent); *United States v. Jackson*, 40 M.J. 820, 821-22 (N.M.C.M.R. 1994) (emphasizing lack of evidence of prior relationship as relevant to whether mistake of fact as to consent was raised). In the present case, both the quantity and quality of evidence of a prior relationship cuts strongly in favor of finding that evidence of mistake of fact as to consent was raised.

Layered on top of the preexisting relationship, there was no evidence of verbal or physical resistance prior to the offenses of which Appellant was convicted. (R. at 1527-28) (January 2020

[9] Appellant was convicted of offenses against KB in January and March of 2020. (Statement of Trial Results).

offense); (R. at 1534-37) (March 2020 offense). Prior to the January 2020 offense, Appellant asked for consent. (R. at 1527). Appellate courts have found evidence of verbal or physical resistance relevant to the question of whether some evidence of mistake of fact as to consent has been raised. *See, e.g.*, *Johnson*, 25 M.J. at 695 (lack of physical resistance and minimal verbal resistance relevant to raising mistake of fact as to consent). The fact that Appellant affirmatively asked for consent prior to the January 2020 encounter, and KB could not tell the court how she responded, is additional evidence of both an honest and reasonable mistake of fact as to consent. Additionally, when Appellant asked for consent, KB's testimony was that she internally did not want to engage in sex ("In my mind I'm thinking, I don't want -- I don't want that."), but she could not testify that she communicated this to Appellant and could not testify as to how she responded to his request for consent. (R. at 1527). This is exactly the type of situation where mistake of fact as to consent is most implicated.

At the conclusion of the final charged encounter, KB verbalized her lack of consent and Appellant complied when he "listened and got off [KB]." (R. at 1536-37). Appellant's acquiesce to this clear indication of non-consent is evidence that he did not previously perceive KB's "mixed messages" as indications of non-consent. *See United States v. Prasad*, 80 M.J. 23, 30-31 (C.A.A.F. 2020) (finding appellant's cessation of sexual activity at the point of realizing non-consent relevant to mistake of fact as to consent); *DiPaola*, 67 M.J. at 100 (reversing for failure to give mistake of fact instruction, noting that when the victim told Appellant to stop engaging in a certain act, "he stopped.").[10]

[10] Appellant submits that this fact is particularly relevant to the honest (subjective) prong of mistake of fact as to consent, which appears to be the prong in dispute. If appellant subjectively

Significantly, there was a third-party (SSgt MB) in the room during both encounters of which Appellant was convicted. (R. at 1525) (MB in room during January 2020 offense); (R. at 1531-32) (MB in room during March 2020 offense). Indeed, during the latter offense, MB was not only in the same room as KB, but *in the same bed* as KB. (R. at 1531-32). The fact that there was a third-party so close at hand – and a noncommissioned officer (NCO) at that – is certainly "some evidence" that Appellant had an honest belief that he was engaging in consensual conduct. *See Johnson*, 25 M.J. at 695 (finding mistake of fact as to consent instruction was required and noting that "[the victim] made no effort to contact her friend who was waiting outside appellant's door."); *see also United States v. Whisenhunt*, No. ARMY 20170274, 2019 WL 2368568, at *2 (A. Ct. Crim. App. 3 Jun. 2019) (unpub. op.) (Noting the improbability that appellant would sexually assault the victim with sleeping third-parties close at hand, particularly when he took no steps, such as covering her mouth, to prevent an outcry).[11]

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knew that KB was not consenting prior to her articulation of non-consent, then it is unclear why her verbal request to stop would have made a difference. A reasonable panel member could find that he stopped when she asked him to stop because that was when he realized she did not want to engage in sexual contact. Indeed, this seems by far the most direct and obvious conclusion. Appellant respectfully requests that the government – if it disagrees – articulate with particularity how this fact does not constitute "some evidence" of appellant's honest (subjective) belief that KB was consenting prior to her articulation of non-consent.

[11] Again, Appellant submits that this fact is particularly relevant to the honest (subjective) prong. A reasonable panel member could find that appellant was only willing to initiate sexual contact with KB with a third-party NCO in the room because appellant subjectively thought the contact was consensual. This seems not only reasonable, but obvious. The only other conclusion is that appellant knowingly engaged in a sexual assault with a third-party NCO close at hand. Doing so would be begging to get caught, particularly where "there is no evidence that appellant threatened [KB] or took any steps, such as covering her mouth, to prevent an outcry." *See Whisenhunt*, 2019 WL 2368568, at *2. If the government disagrees, appellant respectfully requests it articulate with particularity how this does not constitute "some evidence" that appellant honestly (subjectively) believed KB.

Appellant was also consuming alcohol prior to the offenses of which he was convicted. *See* (R. at 1523-24) (January 2020 offense); (R. at 1530) (March 2020 offense). This Court may find Appellant's voluntary intoxication relevant to the "honest" prong of the mistake of fact as to consent defense.

Defense counsel at trial requested a mistake of fact as to consent instruction with respect to the specifications at issue at least four times. (R. at 1846-53) (First request); (R. at 1893) (Second request); (R. at 1894) (Third request); (R. at 1919-21) (Fourth request). Even over stern instructions to "move on" from the military judge, the defense doggedly emphasized the relevance of mistake of fat as to consent to the defense theory. The CAAF has observed that "counsel's request for the instruction is indicative of the defense's theory of the case and can be considered by appellate courts as context for whether the entire record contains 'some evidence' that would support the instruction." *DiPaola*, 67 M.J. at 102 (citation omitted). Given defense counsel's *four* requests for the instruction, this factor should cut maximally in favor of Appellant.

Some evidence of mistake of fact as to consent was also raised by the testimony of the defense expert forensic psychologist, Dr. EB. *See* (R. at 1805-1843). The defense expert presented testimony on memory faults, particularly where alcohol is involved, that could lead an individual to forget that they had acted in certain ways, to include giving indications of consent. *See* (R. at 1805-1843). The expert specifically testified about alcohol induced memory flaws or blackouts. (R. at 1821-25). Additionally, the expert testified about how "miscommunication" can occur between individuals in sexual situations, particularly when signals about boundaries are not clearly articulated. The expert pointed out the increased risk of miscommunication in situations where non-verbal forms of communication might be missed due to being in a dark room. (R. at 1820-21, 1833-35, 1837-38). This testimony is particularly relevant given that the January 2020 offense

incident took place in the attic, at night, where there was "[n]ot a lot" of light (R. at 1526) and the March 2020 offense took place in a dorm room, at night, while MB was sleeping (suggesting the room was dark, particularly as KB testified to "feeling" rather than seeing what Appellant was doing). (R. at 1534-35).

Dr. EB also testified about how memory could be altered by confirmation bias. (R. at 1817-19, 1826-28, 1839-40). Particularly relevant to the present case, given the web of accusers from the same social group, Dr. EB specifically spoke about how an individual's memory of a sexual encounter with another person may be colored by later hearing that the other person was accused of sexually assaulting someone else. (R. at 1840). This voluminous testimony raised the possibility that KB had given indications of consent that she could not remember due to memory faults, alcohol consumption, or confirmation bias. It also raised the possibility of miscommunication and misperception on the part of Appellant, especially given the unclear indications of non-consent KB endorsed and the conditions at the time of the encounters (late night, after drinking, low-light conditions, etc). Appellate courts have found expert testimony much less robust than that presented here sufficient to raise some evidence of mistake of fact as to consent. *See United States v. Daniels*, 28 M.J. 743, 746-47 (A.F.C.M.R. 1989) (court member's questions to prosecution expert concerning effect of alcohol and sleep on ability of victim to do and say things without later remembering them raised defense of mistake of fact as to rape).[12]

These factors more than constitute "some evidence" of both an honest and reasonable mistake of fact as to consent. Indeed, while the CAAF has enjoined that close calls regarding

[12] Indeed, in the present case a panel member asked Dr. EB a question not dissimilar from that asked by the panel member in *Daniels*. *See* (R. at 1843).

instructions should be "resolved in favor of the accused," the present case does not present a close call. *See Davis*, 53 M.J. at 205. To the contrary, the evidence here clearly raised the issue of mistake of fact as to consent.

3. Viewing the Evidence in the Light Most Favorable to Appellant, a Rationale Member Could Have Found Mistake of Fact as to Consent

The analysis is similar under the related formulation of the test for when a military judge must instruct on an affirmative defense from *Behenna.* 71 M.J. at 234 ("In other words, a military judge must instruct on a defense when, viewing the evidence in the light most favorable to the defense, a rational member could have found in the favor of the accused in regard to that defense.").

A rationale factfinder could have found that Appellant reasonably believed KB was consenting during the January 2020 encounter where he asked KB for consent, KB could not tell the members how she responded to Appellant's request for consent, and KB did not manifest a lack of consent physically or verbally, particularly given their consensual sexual history. Additionally, a rationale factfinder could have found the presence of a third-party NCO in the room during this encounter supported a conclusion that Appellant believed the encounter was consensual. This is particularly so when the evidence is viewed – as it is required to be – in the light most favorable to the defense.

Similarly, a rationale factfinder could have found that Appellant reasonably believed KB was consenting during the March 2020 encounter given their consensual sexual history and KB's initial lack of physical or verbal indication of non-consent. Significantly, at the conclusion of this encounter, KB *did* verbalize a lack of consent and Appellant dutifully complied when he "listened and got off [KB]." (R. at 1536-37). A rational member could find Appellant's immediate acquiesce to KB's first indication of non-consent as evidence that, prior-thereto, he believed she was consenting. Additionally, a rationale factfinder could have found the presence of a third-party

NCO not only in the same room as KB, but in the same bed as KB, supported a conclusion that Appellant believed the encounter was consensual; Appellant would have to be self-destructive in the extreme to attempt to engage in sexual contact with KB with an NCO so close at hand unless he honestly believed it was consensual.

4. The Omission was not Harmless Beyond a Reasonable Doubt

The government cannot meet its burden to show that the erroneously omitted instruction was harmless beyond a reasonable doubt.

The government's evidence to prove Specifications 4 and 5 of Charge I was weak. There was no corroboration. KB told a great number of confirmed lies, especially about her sexual interactions with Appellant. Going even further, KB specifically confided in a friend that she was intentionally lying about being sexually assaulted by Appellant because she didn't want people to know she was having sex with him (or men in general). These factors should give both this Court and the government great pause.

What's more, the weakness of the evidence specifically implicated the issue of mistake of fact as to consent. While KB suggested she internally did not want to engage in various sexual activities with Appellant, she did not testify to any external communication of these desires prior to the offenses of which Appellant was convicted. (R. at 1527-28) (January 2020 offense); (R. at 1534-37) (March 2020 offense). Prior to the January 2020 offense, Appellant asked for consent, and KB could not testify as to how she responded. (R. at 1527). This indicates a concern about consent on Appellant's part. Similarly, at the conclusion of the final charged encounter, KB verbalized her lack of consent and Appellant complied. (R. at 1536-37). Again, this indicates a concern about consent. The fact that a third-party NCO was present in the room – or even *in the bed* – during these encounters indicates that Appellant had an honest belief they were consensual.

(R. at 1525, 1531-32). All these factors are further informed by the significant evidence of prior close relations and consensual intimate activity between KB and Appellant. *See* (R. at 1546-57, 1550, 1572-73, 1603-04, 1606-09, 1614-16, 1771-74, 1777).

5. Defining the Scope of the Controversy

As a concluding note, Appellant's understanding of the government's position at trial was that the record *did* raise some evidence of reasonable (objective) mistake of fact as to consent but failed to raise some evidence that Appellant actually held an honest (subjective) belief on the issue. *See, e.g.*, (R. at 1847) ("MJ: So what was missing from KB and AN, and can you state that? CTC: The accused's subjective belief as to consent."). To define the controversy, Appellant respectfully requests that the government specify in its answer whether it stipulates that the objective prong was met. If, as Appellant understands it, the government only contests the subjective prong, it will help focus the parties' arguments and simplify this Court's deliberation.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

II. THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL, OVER DEFENSE OBJECTION, THAT THEY MAY CONSIDER THE CHARGED MISCONDUCT IN SPECIFICATIONS 1 THROUGH 5 OF CHARGE I AS EVIDENCE OF A "COMMON PLAN OR SCHEME" OF CRIMINALITY UNDER MIL. R. EVID. 404(b), AND ALLOWING THE GOVERNMENT TO ARGUE THE SAME.

Standard of Review

A military judge's decision to allow charged misconduct to show a "common plan or scheme" of criminality encompassing other charged misconduct is reviewed for an abuse of discretion. *United States v. Hyppolite*, 79 M.J. 161, 164-66 (C.A.A.F. 2019).

Law

Military Rule of Evidence (Mil. R. Evid.) 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving knowledge, absence of mistake, or the existence of a plan. Mil. R. Evid. 404(b)(2).

Military courts apply the three-part "*Reynolds* Test" to review the admissibility of evidence under Mil. R. Evid. 404(b):

> 1. Does the evidence reasonably support a finding by the court members that [the] appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010) (alterations original) (quoting *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)).

Military courts have long emphasized, "we do not approve 'of broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)'; and we have expressed 'concern . . . with the dangers in admitting such evidence even if it meets the requirements of Mil. R. Evid. 404(b).'" *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989) (quoting *United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984)). To this end, evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (emphasis added) (quoting *Brannan*, 18 M.J. at 183).

"Under *Reynolds*' second prong, the common plan analysis considers whether the uncharged acts in question establish a 'plan' of which the charged act is an additional manifestation, or whether the acts merely share some common elements." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citing *Morrison*, 52 M.J. at 122; *United States v. Munoz*, 32 M.J. 359, 363–64 (C.M.A. 1991)). "In answering such a question [in the context of child molestation], [the CAAF has] examined the following factors: the relationship between victims and the appellant; ages of the victims; nature of the acts; situs of the acts; circumstances of the acts; and time span." *Id.* (citing *Morrison*, 52 M.J. at 122–23).

This Court has applied the prejudice test for nonconstitutional error to the erroneous use of Mil. R. Evid. 404(b) "common plan or scheme" evidence to charged misconduct. *United States v. Hyppolite*, 2018 WL 5516681, at *12 (A.F. Ct. Crim. App. 2018), *affirmed*, 79 M.J. 161 (C.A.A.F 2019).

Argument

1. Scope of Review

It may be helpful at the outset to define the scope of this issue. The parties litigated the permissibility of using the charged misconduct in Specifications 1-7 of Charge I as "common plan or scheme" evidence. *See* (App. Ex. VI (defense motion); App. Ex. VII (government response); App. Ex. XXXIII (military judge ruling). These specifications included the offenses against three named victims: EV, KB, and AN. *Id.* The litigation also encompassed the use of certain uncharged conduct towards these same named victims as "common plan or scheme" evidence. *Id.* The military judge ruled that, should the evidence come out "as expected," all seven of the charged specifications, as well as some of the uncharged conduct, *could* be used as "common plan or scheme" evidence. (App. Ex. XXXIII). However, the government did not end up presenting the

uncharged conduct, and the military judge ultimately instructed the panel that it could consider only the charged misconduct in "Specifications one through five of Charge I" as "common plan or scheme" evidence. (R. at 1947); *see also* (App. Ex. CXXXIV) (email from military judge explaining intent to exclude AN from Mil. R. Evid. 404(b) instruction). These specifications included the offenses against two named victims: EV and KB. As such, the only issue for this Court is whether the charged conduct involving EV and KB constituted proper Mil. R. Evid. 404(b) evidence of a "common plan or scheme" of criminality.

2. The Military Judge Made Clearly a Erroneous Finding of Fact

Throughout his ruling, the military judge stated seven times that Appellant's various accusers were "isolate(d)" during the incidents under consideration. (App. Ex. XXXIII, page 9, 10, 11, 12). Given the number of times the military judge emphasized this supposed isolation, and its relevance to the supposed "similarity" between the various allegations under consideration, it seems to have played a large role in his ruling.[13] However, this fact is clearly erroneous. There was quite literally a third-party (SSgt MB) *in the room* during both the January 2020 and March 2020 allegations charged in Specifications 4 and 5. *See* (R. at 1525) (MB in room during January 2020 offense); (R. at 1531-32) (MB in room during March 2020 offense). Indeed, during the latter offense, the third-party was not only in the same room as the victim *but in the same bed as the victim*. (R. at 1531-32). This information was undisputed and was clearly before the military

[13] Indeed, the military judge specifically cited this supposed isolation as the very issue justifying the invocation of Mil. R. of Evid. 404(b), stating: "the 'fact of consequence' in this case is the common scheme or plan for the Accused to engage in sexual acts with women after taking advantage of circumstances where they were *isolated* and intoxicated. . . ." . (App. Ex. XXXIII, page 9) (emphasis added).

judge at the time of his ruling. *See e.g.*, (App. Ex. VI, page 6; App. Ex. VII, page 17, 18). This finding of fact was clearly erroneous.

3. The Various Charged Conduct was not Sufficiency Similar

Specifications 1-5 of Charge I alleged various forms of sexual conduct between Appellant and two female airmen. The only notable similarities between these encounters are that they both involve sexual contact and that some degree of alcohol consumption. Appellant submits that these *extraordinarily common* factors are far too superficial and generalized to qualify as a "common plan or scheme" pursuant to Mil. R. Evid. 404(b). To hold otherwise would represent a significant expansion of Mil. R. Evid. 404(b).

An examination of the cases cited by the military judge further illustrates that a much greater degree of similarity is required. The military judge cited *Munoz*, 32 M.J. 359, *United States v. Johnson*, 49 M.J. 467 (C.A.A.F. 1998), and *Hyppolite,* 79 M.J. 161 as examples of cases where "common plan or scheme" evidence was upheld despite "subtle variations in facts. . . ." (App. Ex. XXXIII, page 8-9). *Munoz* and *Johnson*, however, involved child victims. Sexual conduct with a child, regardless of the specific circumstances, is inherently similar in a way that heterosexual adult conduct (such as that at issue in the present case) is not. *Hyppolite* involved touching the genitalia of four same-sex victims, three of whom were asleep and one who was "falling asleep." The present case simply cannot be analogized to these precedents. This case involves *extraordinarily generic* heterosexual acts between adult Airmen. The fact that alcohol consumption preceded each cannot, in and of itself, make the conduct sufficiently similar to invoke Mil. R. Evid. 404(b). With respect to the nature of the acts, the military judge's finding that each act involved "unwanted sexual touching" was so generic as to be irrelevant. While the military judge stated seven times that the acts involved "isolate(d)" victims, this was clearly erroneous.

Clearly the circumstances of Specifications 1-5 of Charge I were insufficiently similar to constitute a "common plan or scheme." The true nature of this evidence was simply propensity.

4. Dissidence with Refusal to Give Mistake of Fact as to Consent Instruction

The military judge's ruling on the Mil. R. Evid. 404(b) issue is difficult to reconcile with his refusal to give a mistake of fact as to consent instruction with respect to Specifications 4 and 5 of Charge I. *See* A.E. 1. As the CAAF pointed out in *Hyppolite*, "the common plan and scheme evidence was *intent evidence* [rather than propensity evidence] *because mistake of fact* was the only issue in controversy." 79 M.J. at 167 (emphasis added); s*ee also United States v. Gamble*, 27 M.J. 298, 304 (C.M.A. 1988) (pointing out that Mil. R. Evid. 404(b) evidence of prior sexual assault has no relevance to actual consent, so it is only admissible if it goes to a contested issue of identity, motive, or intent) (citations omitted). While the military judge in the present case similarly stated that the "common plan or scheme" evidence went toward "intent," he simultaneously refused to instruct on – or allow the defense to argue – mistake of fact with respect to these same specifications (Specifications 4 and 5 of Charge I). As the military judge *repeatedly* ruled that mistake of fact as to consent was not at issue, it is unclear how the Mil. R. Evid. 404(b) evidence could go to intent, as it did in *Hyppolite*.

Certainly this evidence had no relevance to actual consent. *See Gamble*, 27 M.J. at 301 (pointing out that the fact that one woman was raped has no tendency to prove that another woman did not consent and, therefore, when the only issue at a trial on a charge of rape is whether the sexual act was with the consent of the alleged victim, evidence of an uncharged rape is not admissible.) (citation omitted). The only impermissible alternative, as stated in *Hyppolite*, was that the evidence simply went to propensity. 79 M.J. at 167. This Court recently discussed the interplay between common plan and scheme in a sexual context and intent as it relates to mistake

of fact to consent. *United States v. Zimmerman*, No. ACM 40267, slip op. at 20-24 (A.F. Ct. Crim. App. 11 Oct. 2023) (unpub. op.) ("If the relevant intent is understood to relate to Appellant's intent with respect to whether SP consented—i.e., his disregard for the absence of consent—then the relevance of JS's testimony increases sufficiently to justify its admission.").

Similarly, the government's arguments on the Mil. R. Evid. 404(b) issue are inconsistent with the government's later position that mistake of fact was not in issue with respect to Specifications 4 and 5 of Charge I. In its Mil. R. Evid 404(b) notice, the government argued that the innovation of that rule was necessary to "pattern, common scheme or plan, and absence of mistake. . . ." *See* (App. Ex. VI, Attachment 5). In its corresponding Mil. R. Evid. 404(b) motion, the government repeatedly argued this evidence was necessary to show "common plan or scheme", "absence of mistake", and "intent".) *See* (App. Ex. VII). In ruling, the military judge specifically cited "intent" as the fact or consequence at issue. *See, e.g.*, (App. Ex. XXXIII, page 10) ("the permissible logical inference from this common plan or scheme is that the Accused had the requisite intent to pursue sex with women who were in a vulnerable position after consuming alcohol."). The instruction the military judge ultimately gave informed the panel that they could use the Mil. R. Evid. 404(b) evidence "to show the accused['s] *intent* in committing the offense." (R. at 1947) (emphasis added).

Controlling precedent holds that the government cannot simultaneously argue that Mil. R. Evid. 404(b) evidence is required for purposes such as those cited here, and then contend that mistake of fact as to consent is not at issue. In *Gamble*, the government successfully sought to introduce Mil. R. Evid. 404(b) evidence of a prior sexual encounter, but then contended on appeal that mistake of fact as to consent had not been raised by the evidence. 27 M.J. 298. The Court found this argument inconsistent and reversed:

> We perceive an inconsistency in the Government's contention that the possibility of mistake was raised to the extent that it would authorize reception of extrinsic evidence about another sexual offense but was not raised to the extent that it required an instruction to the court members on mistake of fact. Therefore, even if Gamble were not entitled to reversal of the findings of rape and forcible sodomy because of the evidentiary error, he would be entitled to this relief because of the instructional omission.

Id. at 308. Indeed, even the leading case of *Reynolds* emphasized the interplay between Mil. R. Evid. 404(b) evidence such as that used here and mistake of fact:

> Confronted with this classic consent/mistake-of-fact defense, evidence that appellant used the very same method to accomplish his sordid purposes on other occasions was extremely probative of a predatory *mens rea* on the night in question. Likewise, it strongly countered the fall-back position of mistake-of-fact.

29 M.J. at 109.

The dissidence between the supposed relevance of the Mil. R. Evid. 404(b) evidence in the present case and the military judge's refusal to give a mistake of fact as to consent instruction is relevant both to this assignment of error and the proceeding one. First, the repeated invocation of intent-related justifications for the Mil. R. Evid. 404(b) evidence belies the contention that mistake of fact as to consent was not at issue. This logical dissidence has been held reversable. *Gamble*, 27 M.J. at 308. Relatedly, if mistake of fact as to consent was not at issue – as it was in *Hyppolite* – it undermines the justification for the Mil. R. Evid. 404(b) instruction and shows that the evidence truly only went to the prohibited purpose of propensity. *See Hyppolite*, 79 M.J. at 167.

In order to define the scope of the controversy, Appellant respectfully requests that the government specify with precision in its answer what fact of consequence at issue the Mil. R. Evid. 404(b) evidence went to. If the fact of consequence is anything other than intent – which the government argues is not at issue – Appellant respectfully requests the government specify how any such alternative basis for this evidence can be reconciled with the military judge's instruction to the panel that it went to intent.

5. Appellant was Prejudiced

Given Appellant's contention that the true use of the charged misconduct was as propensity evidence for other charged misconduct, he urges this Court to test for prejudice under the constitutional standard (harmless beyond a reasonable doubt). *See United States v. Hukill*, 76 M.J. 219, 221 (C.A.A.F. 2017); *United States v. Hills*, 75 M.J. 350, 356-57 (C.A.A.F. 2016). Appellant recognizes that this Court rejected such a contention in *Hyppolite* but suggests that a distinction might be found in the fact that this was a panel case, while *Hyppolite* was a judge-alone case. *See Hyppo*lite, 2018 WL 5516681, at *12, n.13. Under either standard, however, Appellant was prejudiced. The nonconstitutional standard will be analyzed below.

a. The Strength of the Government's Case

The government's case was weak. There was no corroboration. KB told a great number of confirmed lies, especially about her sexual interactions with Appellant. Going even further, KB specifically confided in a friend that she was intentionally lying about being sexually assaulted by Appellant because she didn't want people to know she was having sex with him (or men in general). *See* Assignment of Error (A.E.) III (alleging legal and factual insufficiency).

b. The Strength of the Defense Case

The defense case was correspondingly strong, to include KB's explicit confession that she had falsely accused Appellant of sexual assault for reputational reasons. *See* A.E. III (alleging legal and factual insufficiency).

c. The Materiality of the Evidence in Question

Allowing evidence of various allegations of sexual misconduct to be used to bolster each other is inherently dangerous. Military courts have long "expressed 'concern . . . with the dangers in admitting such evidence even if it meets the requirements of Mil. R. Evid. 404(b).'" *Ferguson*, 28 M.J. at 109 (quoting *Brannan*, 18 M.J. at 185). In this case, where five specifications were allowed to bolster each other, the danger is particularly high.

d. The Quality of the Evidence in Question

The quality of the evidence supporting the five specifications individually was mixed. Appellant would submit the quality of the evidence with respect to the offenses against KB (Specifications 4 and 5) was quite low, given the credibility issues.[14] The quality of the evidence with respect to the offenses against EV was arguably higher. EV appears to have been reasonably genuine and credible in her testimony. While the deliberations of the panel cannot be pierced, it is not hard to guess that the acquittals on these specifications was attributable to mistake of fact as to consent, as EV disclaimed any verbal or physical resistance, acknowledged Appellant asked for consent, and could not remember how she replied to the request for consent.

The Mil. R. Evid. 404(b) allowed the government to bolster KB's credibility through the testimony of EV. Even if the panel was not convinced beyond a reasonable doubt that that Appellant did not have a valid defense to EV's accusations, this evidence (and instruction) allowed EV's testimony to be used to strengthen KB's testimony. This is exactly the evil that the rules against propensity evidence are intended to prevent.

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[14] Of course, as these are the very convictions under review, the quality of the other allegations is more relevant to this Court's prejudice analysis.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

III. THE EVIDENCE SUPPORTING SPECIFICATIONS 4 AND 5 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE, *INTER ALIA*, THERE WAS NO CORROBORATION, THE VICTIM TOLD A NUMBER OF DEMONSTRATED LIES ABOUT HER SEXUAL INTERACTIONS WITH APPELLANT, AND THE VICTIM CONFESSED TO A FRIEND THAT SHE HAD FALSELY ACCUSED APPELLANT OF SEXUAL ASSAULT FOR REPUTATIONAL REASONS.

Standard of Review

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citations omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *Rodela*, 82 M.J. at 525 (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

Law

"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) (quotation and citation omitted). "This legal sufficiency assessment draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (alteration in original) (quotation and citation omitted).

The test for factual sufficiency is, "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 395 (citation omitted). "In conducting this unique appellate role, we take 'a fresh, impartial look at the

evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] 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) (alteration in original) (quoting *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)). Further, "an appellate tribunal must independently evaluate the evidence to determine whether or not an accused has been deprived of his right to have the court-martial consider all reasonable alternatives of guilt." *United States v. Clark*, 48 C.M.R. 83, 87 (C.M.A. 1973) (citation omitted).

"As an evidentiary standard, proof beyond a reasonable doubt does not require more than one witness to *credibly* testify." *United States v. Lopez*, 2023 WL 2401185, at *6 (A.F. Ct. Crim. App. 7 Mar. 2023) (unpub. op.) (emphasis added) (citing *United States v. Rodriguez-Rivera,* 63 M.J. 372, 383 (C.A.A.F. 2006)).

"A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (quotations omitted). "Where a variance exists, R.C.M. 918(a)(1) permits a factfinder to enter findings of guilty with exceptions and substitutions, so long as the [e]xceptions and substitutions [are] not . . . used to substantially change the nature of the offense." *Id.* (alterations in original) (quotation omitted). However, "exceptions and substitutions pursuant to R.C.M. 918 may only be made by the factfinder at the findings portion of the trial." *Id.* (quotation omitted). "An accused has a right to be tried and 'heard on the specific charges of which he is accused.'" *United States v. Bennitt*, 74 M.J. 125, 128 (C.A.A.F. 2015) (quoting *Dunn v. United States*, 442 U.S. 100, 106, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979)). Though the Courts of Criminal Appeals have significant

factfinding powers under Article 66, UCMJ, they are "not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009) (quotation omitted).

Argument

KB's allegations were not corroborated by eye-witness testimony, physical evidence, forensic evidence, or admissions of the accused. Appellant realizes, and this Court recently reiterated, *credible* testimony from a single witness may satisfy the government's burden of proof. *See Lopez*, 2023 WL 2401185, at *6. However, KB's testimony was anything but credible.

Most concerningly, KB told a large number of demonstrated lies directly about her sexual interactions with Appellant and their aftermath. KB denied sitting on Appellant's lap and kissing him in late October 2019. (R. at 1548). Eye-witness testimony confirmed this was a lie. (R. at 1606-08). KB similarly denied kissing Appellant in December of 2019. (R. at 1548-59). Eye-witness testimony again confirmed this was a lie. (R. at 1772-73). KB denied kissing Appellant on other occasions and telling MB about kissing Appellant. (R. at 1551). MB's testimony demonstrated that these were lies. (R. at 1573). KB denied wanting to pursue a romantic relationship with Appellant. (R. 1510). These statements were contradicted by the evidence of her prior intimate interactions with Appellant, her acknowledgements to BB and AV that the October 2019 sexual encounter had been consensual, and by her disclosures to MB that she and Appellant had mutual feelings for each other and had a previous romantic relationship. (R. at 1572-73, 1604-05, 1614-16, 1774, 1777). KB reported that she disclosed the first alleged assault to BB the next day and adamantly denied that her report included numerous statements indicating consent. (R. at 1515, 1540-42). BB's testimony demonstrated that KB had lied, in great detail, about the substance of this report. (R. at 1604-05, 1614-16). Most disturbingly of all, KB

confessed to AV that she was falsely telling people her sexual encounter with Appellant was nonconsensual for reputational reasons. (R. at 1774, 1777).

KB's story also contained inherent improbabilities. During both encounters of which Appellant was convicted, there was a third-party NCO (SSgt MB) sleeping close at hand. (R. at 1525) (MB in room during January 2020 offense); (R. at 1531-32) (MB in room during March 2020 offense). Yet KB made no effort to ask for assistance and Appellant seemed unconcerned about being discovered in any illegal activity. KB also continued to associate closely with Appellant in the aftermath of the alleged assaults. While some degree of continued association might be common or understandable, the post-assault conduct here is particularly notable. KB made the affirmative decision to move into Appellant's house not once, but twice, after allegedly being assaulted by him, even though she maintained a perfectly adequate dorm room on base this entire time. (R. at 1550, 1546-47, 1609).

Tying in with the above assignment of error (A.E. II), the evidence further failed to preclude mistake of fact as to consent. KB did not endorse any verbal or physical resistance prior to the offenses of which Appellant was convicted. (R. at 1527-28) (January 2020 offense); (R. at 1534-37) (March 2020 offense). Prior to the January 2020 offense, Appellant asked for consent, and KB could not testify as to how she responded. (R. at 1527). During the March 2020, KB verbalized her lack of consent and Appellant immediately complied, ending the encounter at her request. (R. at 1536-37).

Finally, there are additional concerns with the sufficiency of the evidence with respect to Specification 5. While Appellant was charged with touching KB's "groin," the testimony was that he touched her "inner thigh." (Charge Sheet; R. at 1534-35). The "inner thigh" is a different body part than the "groin." Both of these anatomical terms of art have distinct meanings, both as a

matter of common usage and as acknowledged by Article 120's statutory definitions. *See* Article 120(g)(2), UCMJ, 10 U.S.C. § 920(g)(2) (2018) (defining sexual contact as touching of an enumerated body parts and clearly listing "groin" and "inner thigh" as separate body parts).[15] *See United States v. Perez*, No. ARMY 20140117, 2016 WL 796971 (A. Ct. Crim. App. 29 Feb. 2016) (unpub. op.) (finding a guilty plea to abusive sexual contact improvident because the member described touching of the genitals and the specification was charged as touching of the groin). As the Army Court observed: "Because of the differentiation by Congress in Article 120 of 'genitalia' and 'groin,' for either the military judge or this court to substitute 'groin' for the charged 'genitals' would constitute a material, and possibly fatal, variance." *Id.* at *3 (citation omitted). The analysis here is the same. Congress specifically differentiated between "groin" and "inner thigh" in Article 120's statutory text. As such, it is improper to intermix these statutorily distinct terms. While it is possible, though not certain, that exceptions and substitutions may have been available at trial, the government did not argue for any and the panel did not make any.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

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[15] "The term 'sexual contact' means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, *groin*, breast, *inner thigh*, or buttocks of any person. . . ." Article 120(g)(2), UCMJ, 10 U.S.C. § 920(g)(2) (2018) (emphasis added).

IV. SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA A POST-TRIAL *BRADY* DISCLOSURE FROM TRIAL COUNSEL.

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V. SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED WHERE APPELLANT'S ACCUSER PROVIDED FALSE OR MISLEADING TESTIMONY ABOUT HER HISTORY OF INTIMACY WITH APPELLANT, THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN THE TESTIMONY WAS FALSE BECAUSE THE TESTIMONY CONTRADICTED THE ACCUSER'S ADMISSIONS TO THE GOVERNMENT IN A PRETRIAL INTERVIEW, AND THE GOVERNMENT ALLOWED THE TESTIMONY TO GO UNCORRECTED AND FAILED TO INFORM THE DEFENSE OF THE PRETRIAL ADMISSIONS.

Standard of Review

Claims of prosecutorial misconduct are reviewed de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

[27] Of course, the prejudice from the dual discovery violations must be evaluated cumulatively. It is only separated in this briefing for formatting purposes.

Law

Prosecutors "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . [even if] the false testimony goes only to the credibility of the witness." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959). The government commits a *Napue* violation when it introduces false or misleading testimony – or allows such testimony to go uncorrected – when the government knew or should have known that the testimony was false. *United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019); *see also United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011) (observing that false testimony may include "half-truths and vague statements that could be true in a limited, literal sense but give a false impression"). Under such circumstances, reversal is required if there is "any reasonable likelihood" the evidence could have "affected the judgment of the jury." *Ausby*, 916 F.3d at 1092 (quotation and citations omitted). In other words, prejudice is tested under the "harmless beyond a reasonable doubt" standard. *United States v. Bagley*, 473 U.S. 667, 680, 105 S.Ct. 3375, 3382, (1985).

Argument

This assignment of error is related to the preceding one. Not only did the government fail to disclose KB's pretrial admission of prior intimacy with Appellant, but the government allowed KB to testify falsely – in contradiction to this pretrial admission – and failed to correct the misleading testimony.

KB's repeated denials of prior kissing with Appellant were false and misleading. She repeatedly denied prior kissing in contradiction to her pretrial admission to the government.

The government knew or should have known of the falsity of KB's testimony. The pretrial admission was directly made to the government counsel. The government failed to correct the misleading testimony and failed to inform the defense of KB's pretrial admission that contradicted

it. There is a reasonable likelihood this evidence could have affected the judgment of the jury. The government allowed KB to mislead the jury about her history of consensual intimacy with Appellant in a trial where the panel was tasked with evaluating whether other intimacy between these same two people was consensual or not.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

VI. THE MILITARY JUDGE ERRED IN ADMITTING AS AN "EXCITED UTTERANCE," A TEXT MESSAGE IDENTIFYING APPELLANT, SENT BY A NON-PARTICIPATING COMPLAINING WITNESS TO A THIRD-PARTY, AT THE CONCLUSION OF TWENTY-FOUR MINUTES OF TEXTING BACK-AND-FORTH.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2020); *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). A military judge abuses his discretion when: (1) "his findings of fact are clearly erroneous," (2) "the [military judge's] decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

In determining prejudice arising from non-constitutional evidentiary errors, this Court weighs: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015) and *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Law

Mil. R. Evid. 802 states the general prohibition against the admission of hearsay. Mil. R. Evid. 803(2), the excited utterance exception to the rule prohibiting hearsay, permits the admission of: "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

The Court of Military Appeals, in *United States v. Arnold*, articulated a three-prong test for a statement to qualify as an excited utterance: (1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling, and (3) the declarant must be under the stress of excitement caused by the event. 25 M.J. 129, 132 (C.M.A. 1987).

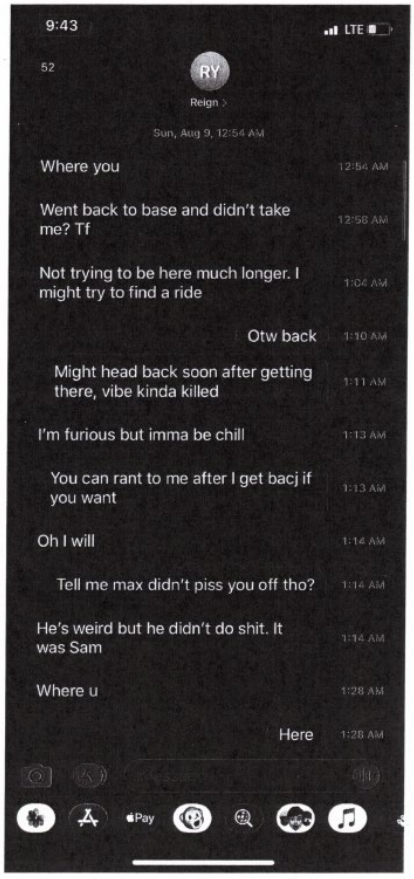
Military courts apply a strong presumption against admissibility where a proffered excited utterance does not immediately follow the startling event. *United States v. Abdirahman*, 66 M.J. 668, 676 (C.A.A.F. 2008) (quoting *United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003) (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990))).

"There may be reason for skepticism about spontaneity when a declarant's statements are in response to questioning." S. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 803.02[4][a] at 8-92 (7th ed. 2011); *see also Donaldson*, 58 M.J. at 483 (listing "whether the statement was made in response to an inquiry" as a factor in "determining whether a declarant was under the stress of a startling event at the time of his or her statement".); *Jones*, 30 M.J. at 129-30 (abuse accusations *not* an excited utterance because, *inter alia*, it was made in response to a question ("what is wrong?") to a crying declarant, rather than "being the product of impulse or instinct."). "The crucial point is that the court must be able to find that the declarant's state at the time he made the declaration ruled out the possibility of conscious thought." J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 803-91 (1984) (footnote omitted.).

Argument

1. Introduction

In Specification 9 of Charge I, Appellant was convicted of touching the breast of RY with his hand. (Statement of Trial Results). RY did not testify at trial. The only evidence of the act alleged was a third-party eyewitness from the party: SrA CS. (R. at 1622-66). While CS was able to describe the charged act, she did not know Appellant and her identification of him was extremely weak. *See* (R. at 1638-39). The government used Prox. Ex. 11, a series of text messages which the military judge admitted as excited utterances, to fill in the obvious gaps in identification from CS's testimony:



Page 1 of 1 Prosecution Ex 11 for Identification
Offered Page 170 Accepted/Rejected Page 1670

(Pros. Ex. 11). Appellant primarily challenges the admission of the 0114 text message, identifying Appellant: "He's weird but he didn't do shit. *It was Sam*". (Pros. Ex. 11) (emphasis added).

2. Procedural Background

Litigation of this issue spans several disparate portions of the record of trial. On 29 October 2021, the government filed a Motion to Pre-Admit thirteen prosecution exhibits, to include Prox. Ex. 11, a string of text messages between RY and TS. (App. Ex. XII); *see also* (App. Ex. XIII) (Defense Response); Pros. Ex. 11 (text messages at issue)). On 16-17 November 2021, the Court held a number of lengthy Article 39(a) sessions to consider several motions, including the government motion to preadmit. (R. at 12-522). Relevant to the admission of Pros. Ex. 11, the military judge heard testimony from RY, the named victim who sent the text messages at issue (R. at 366-80), and SrA TS, the recipient of the text messages (R. at 293-97). RY's testimony, in addition to several of the other witnesses, was conducted remotely via "Zoom." After hearing evidence, the military judge stated that he would decline to rule on the Motion to Pre-Admit at that time. (R. at 513-22).

Subsequent to her testimony at this hearing, RY declined further participation. *See* (App. Ex. XXXVI) (Defense Motion to Dismiss).

On 11 January 2022, at a subsequent Article 39(a) session, the issue of RY's hearsay statements, including the hearsay text messages contained in Pros. Ex. 11, was revisited, but again no ruling was made. (R. at 664-89). On 18 May 2022, trial on the merits began. (R. at 1113). On 19 May 2022, the outstanding issue of RY's hearsay statements was again revisited at an Article

39(a) session. (R. at 1453-99).[28] On 20 May 2022, the military judge issued a written ruling, finding that the text messages were admissible as an excited utterance. (App. Ex. XCVII) ("Ruling: Statements of R.Y.: Excited Utterance").

3. The Military Judge Misstated the Burden of Persuasion

In a section of his ruling entitled "Burden of Proof," the military judge stated: "The burden of persuasion in this matter rests with the defense. The burden of proof is a preponderance of the evidence. R.C.M. 905(c)(1)." (App. Ex. XCVII, page 2). This is flatly wrong. "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021) (citing *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)) (additional citation omitted). It is an error of law and an abuse of discretion to apply the wrong burden to an issue of the admissibility of evidence.

4. The Military Judge Made Clearly Erroneous Factual Findings

In the opening lines of his ruling, in a section entitled "Essential Findings of Fact," the military judge stated:

> Specifically, the text messages include the following texted to A1C Tyler Sellitto:
>
> a. "Where you?"
>
> b. "Not trying to be here much longer, I might try to find a ride."

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[28] Substantial portions of the discussions here relate to additional hearsay statements that were ultimately excluded. Appellant directs the Court's particular attention to the Record at 1489-99 where the parties discuss the excited utterance issue. Additionally, in several places the transcript refers to "ROI." *See, e.g.*, (R. at 1453). These appear to be typographical errors that should read "RY" (the initials of the victim).

c. “I'm furious but imam be chill.”

d. “He's weird but he didn't do shit. It was Sam.”

e. “Where U?”

f. “He grabbed my titty.”

(App. Ex. XCVII, page 1). The final message does not exist. *See* (Pros. Ex. 11).[29] There *was* discussion of an oral statement to this effect, made to an Airman MV. *See* (R. at 685, 1467-68). However, this occurred later in the evening and was not part of the text messages at issue. The military judge’s explicit inclusion of this non-existent message within his findings of fact is clearly erroneous and an abuse of discretion.

Additionally, the clearly erroneous inclusion of this non-existent message significantly impacts the excited utterance analysis. Unlike all the existent messages, the non-existent message “he grabbed my titty” is much more of a traditional excited utterance. This non-existent message is clearly distinguishable from the much more deliberate messages that RY actually sent. This is exactly the type of statement, had it existed, that would be highly relevant to an excited utterance analysis.

5. The Actual Text Messages Fail the First Prong of the Arnold *Test*[30]

[29] The military judge’s quotation of the text messages contains several other inaccuracies with respect to spelling, capitalization, and grammar. These inaccuracies, however, are largely superficial and do not substantially alter the contents of the messages.

[30] While the messages cannot survive the first prong of the *Arnold* test, it is also notable with respect to the third prong that the emotions RY endorsed were primarily irritation and anger, which are not the traditional emotions underlying the exception.

The messages at issue, particularly the 0114 text message, identifying Appellant ("He's weird but he didn't do shit. It was Sam"), were not "spontaneous, excited, or impulsive." Instead, they were "the product of reflection and deliberation."

As an initial matter, while, under the right circumstances, a text message could be sufficiently spontaneous to qualify as an excited utterance, written messages inherently involve a degree of composure, reflection, and conscious thought. The Supreme Judicial Court of Massachusetts addressed this dynamic, stating with respect to text messages: "'[b]ecause a writing is more suspect as a spontaneous exclamation than is an oral statement, the circumstances of the writing would have to include indicia of reliability even more persuasive than those required for an oral statement before we could conclude that the writing qualified as a spontaneous exclamation.'" *Commonwealth v. Mulgrave*, 472 Mass. 170, 177 (Mass. 2015) (quoting *Commonwealth v. DiMonte*, 427 Mass. 233, 239 (Mass. 1998)). This is particularly true when, as in the present case, RY engaged in a lengthy back-and-forth, in writing, over the course of 24 minutes, prior to the message identifying Appellant – and using comparatively good grammar and syntax.

Additionally, the substance of the messages themselves – as well as RY's testimony about them – explicitly show deliberation and conscious thought. RY was clearly exercising conscious thought to organize the logistics of leaving the party: by contacting TS and, when he was not readily available, considering alternative transportation options. The impetus for the messages was not to make a disclosure or an outcry, but to arrange transportation. In her testimony, RY even stated that she had a "plan" to leave the party. (R. at 368). A "plan" inherently involves deliberation. Indeed, "plan" and "deliberate" are synonyms. RY very logically described texting TS, inquiring where he was, with the express motivation of "because I wanted to get a ride home."

(R. at 368). Again, this is a conscious, deliberative communicative process. Additionally, RY directly endorsed control over her emotions ("Imma be chill.").

It should factor heavily into this Court's analysis that in the initial 19 minutes of the text conversation, RY did not express any emotion, distress, or make any statement whatsoever relating to the startling event in question.[31] It was not until the sixth text message in the thread, 19 minutes in, that she expressed that she was angry. Even then, she specifically qualified the statement by endorsing control over her emotional state ("Imma be chill."). The decision to "be chill" is a direct endorsement of "conscious thought."

Perhaps most relevant of all, at this point in the message thread, TS told RY there would be an opportunity to "rant" when they met up later, *to which RY agreed*. RY and TS were deliberately making plans to discuss the "startling event" at a later time. Agreeing to discuss an event at a later time is the exact opposite of spontaneity.

When RY finally identified Appellant as the source of her anger, 24 minutes into the conversation, it was only in response to questioning by TS, who apparently speculated that RY was angry at another individual named "Max." Before identifying Appellant, RY made a dismissive comment about "Max," stating that "Max" was "weird" but was not the source of her anger. This is clearly not a spontaneous outburst made without conscious thought.

The final statement: "It was Sam" was not a spontaneous outburst prompted by RY's emotional state. It was not even initiated or volunteered by RY. It was in response to a question

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[31] Indeed, it is hard to see how these initial messages meet the requirement of "relating to a startling event." That said, the messages where RY coordinates the logistics of transportation are of limited relevance. The material issue here for prejudice purposes is the message identifying appellant as the source of her anger.

by TS. But for TS's question, RY would have been perfectly content waiting until the deliberately pre-scheduled discussion with TS that they had agreed to have after meeting up later in the evening. This was not an excited utterance.

6. Appellant was Prejudiced

RY's identification of Appellant in these messages was crucial to the conviction.

In the absence of the erroneously admitted identification ("It was Sam") from the otherwise-absent RY, the government's evidence would have been fatally flawed with respect to identification of the man in question. The only other evidence about the charged act came from CS, whose identification was weak in the extreme and objectively did not fit Appellant.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 9 of Charge I.

VII. THE EVIDENCE SUPPORTING SPECIFICATION 9 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED ONLY "INTENT TO ABUSE, HUMILIATE, HARASS, OR DEGRADE" BUT THE EVIDENCE SHOWED SEXUAL INTENT (WHICH WAS NOT ALLEGED).

Standard of Review

Adopted from A.E. III.

Law

Adopted from A.E. III.

Argument

In Specification 9 of Charge I, Appellant was convicted of touching the breast of RY with his hand. (Statement of Trial Results). The government originally alleged disjunctively that the touching was done "with an intent to abuse, humiliate, harass, or degrade her, or with an intent to gratify his sexual desire". (Charge Sheet; Statement of Trial Results). However, after arraignment,

the government amended the specification, deleting the words "or with an intent to gratify his sexual desire". (Charge Sheet; Statement of Trial Results). As such, the remaining specification alleged *only* the "intent to abuse, humiliate, harass, or degrade". (Charge Sheet; Statement of Trial Results).

The evidence failed to prove beyond a reasonable doubt that Appellant acted with any of the ultimately alleged intents (abuse, humiliate, harass, or degrade). To the contrary, the evidence supports a sexual intent (which was not alleged).

The nature of the touching was inherently sexual (touching of breast). Nothing in the scant record proved that Appellant acted with an alternative intent (abuse, humiliate, harass, or degrade). CS, the only eyewitness on this specification, specifically opined that the motivation for the touching was that RY was "a very beautiful woman" (i.e. that the intent was sexual). (R. at 1635). CS described the male participant "hitting on" or flirting with RY (again, a sexual intent). *See* (R. at 1631-36). CS described the interaction to OSI as "flirting". (R. at 1763).[32] Even the government, in closing, acknowledged the sexual nature of this interaction: "the accused seems to be doing some kind of *an advance* on [RY]. Some sort of *flirting* . . . ." (R. at 1965) (emphasis added).

In short, the alleged act was inherently sexual and the evidence corroborated a sexual intent. Correspondingly, the evidence failed to prove an alternative intent to abuse/degrade/etc. Certainly, the evidence did not prove such an alternative intent beyond a reasonable doubt. As the other side of the same coin, the evidence cannot be said to have *excluded* beyond a reasonable doubt the

[32] This testimony was introduced through the OSI agent.

possibility that the motivation was simply sexual, as would be required by the charging scheme. This case illustrates the importance of careful charging. Given the government's perplexing charging decision (excluding sexual intent), the evidence is both legally and factually insufficient.[33]

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 9 of Charge I.

VIII. THE EVIDENCE SUPPORTING SPECIFICATION 6 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED APPELLANT TOUCHED THE VICTIM'S BREAST BUT SHE TESTIFIED THE CHARGED TOUCHING DID NOT OCCUR.

Standard of Review

Adopted from A.E. III.

Law

Adopted from A.E. III.

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[33] While it is not necessary for this Court to determine *why* the evidence did not match the charging theory, it is not difficult to speculate how this problem might have occurred. RY was initially participating in the case, but declined further participation while the case was pending. The government's original intent was, no-doubt, to rely primarily on RY's testimony to prove up this specification. Perhaps, based on the government's pretrial preparation with RY, they intended to latch on to some aspect of her expected testimony to support the charged theory of alternative intent. However, when she declined participation, this evidence never made it before the factfinder. Regardless of what RY might have said had she continued to participate, the government is stuck with the evidence presented at trial, and this evidence does not support the charged theories of intent.

Argument

In Specification 6 of Charge I, Appellant was charged with "touch[ing] the breasts of [AN] with his hand . . . without her consent." (Charge Sheet; Statement of Trial Results).

It is undisputed that this encounter began consensually. AN invited Appellant to stay the night with her. (R. at 1137). AN invited Appellant to stay in her bed. (R. at 1137, 1159). They got in bed together and began consensually kissing. (R. at 1137). The kissing was mutual, accompanied by mutual "face grabbing," and AN described it as "pretty intimate." (R. at 1159-60). Thereafter, Appellant attempted to advance the sexual intimacy between the two of them, starting by getting on top of AN and putting "his hand underneath [her] shirt." (R. at 1137). *Only* the "first time" did Appellant actually touch AN's breast. (R. at 1137-38). And AN was explicitly clear that it was only after this initial touch that she said "no." (R. at 1137-38, 1161). Thereafter, while Appellant tried, apparently multiple times, to re-place his hand on AN's breast, she was clear that he never actually touched her breasts again and he eventually "gave up":

> Q. So he puts his hand under your shirt.
> A. Yes, ma'am.
> Q. *Does he actually touch your breast* with his hand?
> A. Yes, *the first time* he did.
> Q. And *at that point* what did you say to him?
> A. *I told him to stop*. I kept moving his hands away. He proceeded to do it multiple times. And then once he stopped with like *trying to grab my breast*, he moved down to my shorts, trying to take them off.
> Q. Okay. So after you first tell him "No," it sounds like you push his hand away; is that correct?
> A. Yes.
> Q. He *then replaces his hand*?
> A. *He tries to, but I kept pulling away his hands*, and then that's when he just, I guess, *gave up* and then tried to pull my pants down.

(R. at 1138) (emphasis added). It was clear the government thought that there was a subsequent breast touch that constituted the charged abusive sexual contact. *See* (R. at 1956) ("She said no after [he] touched her breast and she moved his hand away. He didn't stop. He *reached back and*

he touched her again. That's an abusive sexual contact.") (emphasis added).[34] But this is not what the evidence showed. AN was explicitly clear that he *did not* touch her breast again after she removed his hand the first time. In rebuttal argument, the government even more clearly articulated that the charge related not to the initial breast touch (which proceeded the "no") but to supposed subsequent breast touches:

> [AN] testified that the accused put his hand inside her shirt to touch her breast and she said "no." A reasonable person who hears the word "no" and has someone pull her hand away from their breast is aware that they do not have consent to touch that person's breast. She testified that *he proceeded to do it a couple more times*. *The charge you have is that time he touches her breast after she had said "no." That's what's charged*. That's what has been proven beyond a reasonable doubt.

(R. at 2020) (emphasis added). Again, this is not what the evidence showed. The evidence showed that Appellant *did not* touch AN's breast again after the initial touch. As such, there was no evidence the act the government explicitly stated was the charged act had ever occurred. To the contrary, the charged act was expressly disclaimed by the victim. This makes the specification *per se* both legally and factually insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 6 of Charge I.

IX. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO USE A PRIOR STATEMENT BY THE VICTIM, CORROBORATED BY PHYSICAL EVIDENCE, ENDORSING ADDITIONAL CONSENSUAL SEXUAL CONDUCT DURING THE CHARGED ENCOUNTER, WHICH WAS IRRECONCILABLE WITH HER TRIAL TESTIMONY.

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[34] To the extent this argument mischaracterized the evidence – which it clearly did – it was improper argument. *See United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993) ("It is axiomatic that the prosecution may not . . . mischaracterize the evidence . . . .") (citation omitted).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012).

Law

The Sixth Amendment guarantees not only the right to counsel, but the "right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Datavs*, 71 M.J. at 424 (citing *Strickland*, 466 U.S. at 687). To prevail on a claim of ineffective assistance of counsel, counsel's performance must be "unreasonable under prevailing professional norms," and the Court will not "second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) and *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001)).

Argument

Specifications 6 and 7 relate to the same encounter between AN and Appellant in April of 2020. Following the encounter, AN underwent a sexual assault forensic exam (SAFE exam). (R. at 1289).

In her trial testimony, AN repeatedly denied that Appellant had kissed her breasts during the encounter. (R. at 1163-4). AN denied having "hickeys" on her breasts after the encounter. (R. at 1164). Evidence of consensual breast sucking would be irreconcilable with this testimony. The DD Form 2911 (App. Ex. CXXXVIII, SAFE Report), however, noted petechiae on AN's breasts and "sucking consensual 2 breasts plus right neck." (App. Ex. LXXIX, page 4-5) (DD 2911).

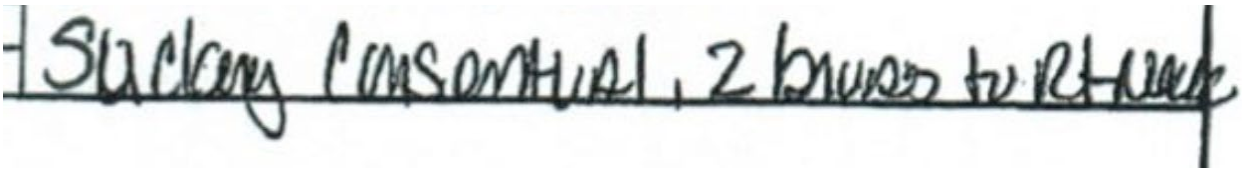
The defense conducted a deposition of Ms. DA, the nurse who performed the exam. In this deposition, DA confirmed noting petechiae on AN's breast. (App. Ex. CXXXVIII, Deposition, timestamp 38:30). It was on each breast, on the areola. (App. Ex. CXXXVIII, Deposition, timestamp 41:00). AN confirmed this was consistent with sucking, though it could not definitively be attributed to sucking. (App. Ex. CXXXVIII, Deposition, timestamp 38:30). Based on AN's statements during the exam, DA noted "sucking consensual 2 breasts plus right neck." (App. Ex. CXXXVIII, Deposition, timestamp 132:00); (App. Ex. LXXIX, page 5). DA confirmed that this description came from statements AN made to her, particularly with respect to the "consensual" notation. (App. Ex. CXXXVIII, Deposition, timestamp 132:00). In sum: AN endorsed consensual breast sucking during the charged encounter and the physical evidence was consistent with her report – this evidence was irreconcilable with AN's trial testimony.

While the defense appears to have attempted to present this evidence, they failed to actually present it in any coherent way. Defense counsel asked AN personally if she had marks on her breasts after the incident. (R. at 1164). AN replied: "I had marks and they noted that in the exam, but it wasn't from him kissing my breasts." (R. at 1164). Defense counsel then asked AN personally if the marks were consistent with sucking injuries. (R. at 1164).[35] AN repeated her denials that sucking had occurred. (R. at 1164). Later in the questioning, defense counsel again asked AN personally about the results of the SAFE exam: "During the examination you discovered there were petechiae on your breast?" (R. at 1181). AN confirmed that the nurse had told her there were, but she didn't remember the details because she was "half asleep for most of that." (R.

[35] Clearly, AN was not the correct witness to ask this question. This was a question for an expert witness.

at 1181). Defense counsel later asked Maj JS (the SAFE mentor) about petechiae in an educational sense and got Maj JS to confirm that it "could be caused by someone sucking on the skin". (R. at 1308).[36] Later, the USACIL examiner confirmed that there was male DNA consistent with Appellant's profile on a swab taken from AN's breasts. (R. at 1330).

In sum, then, the evidence presented to the panel was that (1) AN had marks on her breasts, (2) petechiae could be caused by sucking on the skin, and (3) DNA consistent with Appellant's profile on a swab taken from AN's breasts. The defense wholesale failed to present evidence, however, that AN herself had reported consensual sucking of her breasts during the SANE exam. This was noted on the DD 2911:



(App. Ex. LXXIX, page 5). This statement was also confirmed by DA in the deposition, with specific confirmation that it came from AN, particularly with regard to the "consensual" notation. (App. Ex. CXXXVIII, Deposition, timestamp 132:00). The defense did not question AN about her past endorsement of consensual breast sucking, nor present any evidence thereof (e.g. the deposition testimony).[37]

Failing to present this evidence was a specific and unreasonable error. There was no tactical or strategic reason to do so.

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[36] This testimony was not connected to AN, but was merely educational in nature.
[37] Presumably the default procedure would be to confront AN with the past statement and, if she denied it, present extrinsic evidence thereof.

Appellant was prejudiced by the error. AN's prior endorsement of consensual breast sucking directly and irreconcilably contradicted her trial testimony. AN's confirmed lie about the very subject under dispute (consensual sexual activity with Appellant) is extremely exculpatory. How far the encounter progressed with AN's consent was hotly contested at trial. If admitted substantively, AN's prior admission that the encounter had progressed to consensual breast sucking would have clearly favored the defense position on that issue (relevant, *inter alia*, to mistake of fact as to consent). More than anything though, AN's prior inconsistent statement would have been devastating to her repeated denials of breast sucking at trial. Her prior statements directly and irreconcilably contradicted her trial testimony on the very encounter under consideration. There is a reasonable probability the panel would have acquitted had they been presented this evidence that AN had lied to them about the charged encounter.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 6 and 7 of Charge I.

X. TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, it reviews for plain error." *Voorhees*, 79 M.J. at 9 (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). To prove plain error, Appellant has the burden of establishing (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* When the error is of constitutional dimensions, after the first two prongs of the plain error test are established, "the burden shifts to the Government to convince [the Court] that this constitutional error was harmless beyond a reasonable doubt." *United States*

v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999)); *see also United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) ("Regardless of whether there was an objection or not, in the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.") (cleaned up).

Law

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (cleaned up) (quotations and citations omitted). Vouching for the credibility of witnesses is prohibited. *Voorhees*, 79 M.J. at 12; *see also* R.C.M. 919(b), Discussion ("Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices."). Vouching "pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Voorhees*, 79 M.J. at 12 (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985) (additional citation omitted).

"Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed." *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (citation omitted); *see also Voorhees*, 79 M.J. at 11 ("Trial counsel also improperly . . .

utilized personal pronouns . . . ."). The CAAF has found that prosecutors may improperly "insert[] [themselves] into the proceedings by using the pronouns "I" and "we." *Fletcher*, 62 M.J. at 181. In *Fletcher*, the CAAF found "plain and obvious" error in various vouching arguments, to include: "*we know* that that was from an amount that's consistent with recreational use, having fun and partying with drugs." *Id.* at 180-81 (emphasis added by CAAF).

In *Voorhees*, the CAAF found "clear and obvious error" in the following vouching arguments:

- "That was his perception. That was the truth."
- "[T]hat airman is credible. She testified credibly; she told you what happened to her."
- "[That witness is] not lying. It's the truth. It's what happened."

79 M.J. at 11-12. Similarly, the CAAF found in *Norwood* that trial counsel "clearly committed misconduct during findings by repeatedly vouching for [the victim]. . . ." 81 M.J. at 20. The arguments the CAAF found "clearly" improper in *Norwood* included:

- "[The victim is an] innocent 15-year-old girl who has absolutely no reason to lie about what happened."
- "[The victim has] no reason to lie about what her uncle did to her"
- "[as soon as you] realize that [E.N.] is telling you the truth, the government will have proven its case to you beyond a reasonable doubt and it will be your duty to find the accused guilty."
- "[The victim is] an innocent child with no reason to lie."
- "[The victim] told you the truth"
- "you got to see the truth"
- "you know [the victim] told you the truth"

- "It's not a fabrication. It's not a lie. It's the truth. You know it's the truth."[38]

Improper argument is particularly severe when coupled with *Brady* violations. *See United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993) (improper withholding of *Brady* information, coupled with the misleading closing argument, denied the defendant her due process rights and necessitated reversal); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989) (*Brady* violation, involving withheld information about government support for commutation of witness' sentence, was aggravated by the prosecutor's closing argument during which he argued that the witness had no reason whatsoever to lie and had nothing to gain from cooperating with the State.).

Argument

1. <u>As applied to Victim KB (Specifications 4 and 5)</u>

Trial counsel improperly vouched for KB's credibility with the following argument:

> Her report does not gain her anything. Her testimony in court does not gain her anything. She doesn't have a motive to lie in her testimony before this court. She told you what she remembered to the best of her knowledge, her recollection, and her belief.

(R. at 1964).

a. There was error

These arguments were erroneous and the error was plain or obvious. The CAAF has repeatedly found plain and obvious error in comparable statements. *See Voorhees*, 79 M.J. 5; *Norwood*, 81 M.J. 12. The error here is increased because the government had undisclosed evidence in its possession that directly undercut this argument. As discussed in A.E. IV, KB

[38] While the *Norwood* opinion does not list all of the objectionable arguments in their entirety, more detail on the arguments the CAAF found erroneous can be found in the parties' briefs, available on the CAAF website: https://www.armfor.uscourts.gov/calendar/202010.htm.

steadfastly – and repeatedly – refused to acknowledge prior kissing at trial. *See* (R. at 1548-59). The government, meanwhile, knew but failed to disclose that KB had made inconsistent statements during a pretrial interview. (Def. App. Ex. A). As KB did not repeat her acknowledgement of prior kissing at trial, her testimony was *not* true "to the best of her knowledge, her recollection, and her belief." To the contrary, the government knew or should have known that her testimony at trial was evasive, incomplete, and inconsistent with her pretrial statements to the government.

b. Appellant was prejudiced

The three prejudice factors favor a finding of prejudice.

In isolation, Appellant would characterize the violation as moderately severe. The error was plain and it went to the very heart of the matter in controversy: KB's credibility. In *Voorhees*, the CAAF found similar, albeit more pervasive, arguments severe. 79 M.J. at 12 ("trial counsel's improper argument was severe."). However, the severity is considerably increased when considered in context of the discovery violation discussed in A.E. IV. The government had undisclosed evidence in its possession that directly undercut this argument. While the government argued to the panel that KB "told you what she remembered to the best of her knowledge, her recollection, and her belief", the government simultaneously possessed evidence that KB remembered consensually kissing Appellant but failed to acknowledge it at trial. As such, the government not only vouched for KB's credibility, but vouched for her credibility while hiding evidence that would undercut it. *See Udechukwu*, 11 F.3d 1101 (Brady violation coupled with improper argument); *Reutter*, 888 F.2d 578 (same). This is severe misconduct and this factor clearly favors a finding of prejudice.

No specific curative measures were taken, with the military judge giving only generic instructions prior to sending the panel into deliberations. *See Andrews*, 77 M.J. at 403 (finding

"the military judge's failure to offer any specific, timely curative instructions also weighs in favor of finding prejudice."); *Fletcher*, 62 M.J. at 185 (finding the military judge's curative efforts to be "minimal and insufficient" where he gave only a generic limiting instruction, chastised trial counsel on a single occasion, and failed to *sua sponte* interrupt trial counsel). Here, as in *Norwood*, "the defense counsel could have done more to meet their duty to their clients to object to improper arguments early and often, as could have the military judge to fulfill his *sua sponte* duty to ensure that an accused receives a fair trial but because they did not, there was a total lack of curative measures to redress this misconduct." *Norwood*, 81 M.J. at 21 (cleaned up).

Finally, the weight of the evidence was far from overwhelming. To the contrary, as discussed at length in A.E. III, the evidence supporting these specifications was weak. Even if this Court disagrees that the weaknesses in the evidence raise to the level of factual insufficiency, the weight of evidence clearly favors a finding of prejudice. Relatedly, the improper argument went straight to the dispositive issue: KB's credibility – which was attacked, and could have been further diminished had exculpatory evidence been properly disclosed. *See United States v. Warda*, __ M.J. __, 2023 WL 6454017, at *10 (C.A.A.F. 2023) ("In cases such as this one, where there is no substantial evidence supporting the complaining witness's allegation of domestic abuse, the credibility of the complaining witness is of central importance.") (citing *United States v. Jaspe*r, 72 M.J. 276, 281 (C.A.A.F. 2013) (concluding where the victim's testimony was critical to the government's case, "the credibility of the putative victim [wa]s of paramount importance. . . .")).

As all three prejudice factors favor a finding of prejudice, this Court should set aside the

findings of guilty as to Specifications 4 and 5.[39]

2. As applied to Victim AN (Specifications 6 and 7)

With respect to AN, trial counsel improperly utilized personal pronouns, arguing "What *we know* from that report, without any doubt, is that the accused's semen was on [AN's] body." (R. at 1953) (emphasis added); and "*We know* that the SAFE, the sexual assault nurse who performed the exam was struggling." (R. at 1954) (emphasis added). These arguments mirror the argument CAAF found constituted "plain and obvious" error in *Fletcher* ("*we know* that that was from an amount that's consistent with recreational use, having fun and partying with drugs."). 62 M.J. at 180-81.

Trial counsel further argued AN had: "No motive to lie then, no motive or reason to lie to you in court this week." (R. at 1955). This argument mirrored those the CAAF found "clearly" improper in *Norwood* ("[The victim is an] innocent 15-year-old girl who has absolutely no reason

[39] As a final note on prejudice, this Court should consider prejudice from this improper argument cumulatively with the prejudice from the *Brady* violation discussed in A.E. III, as well as any other error this Court finds. Case law often discusses prejudice from various forms of prosecutorial misconduct jointly and collectively. *See, e.g.*, *Udechukwu*, 11 F.3d 1101 (cumulative impact of *Brady* violation and improper argument); *Reutter*, 888 F.2d 578 (same); *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004) (reversing for a combination of improper evidence and argument); *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (finding prejudice in a mix of improper evidence and argument: "[T]he improprieties on the part of the prosecutor were not isolated, but rather infected all aspects of the trial."); *United States v. Combs*, 379 F.3d 564 (9th Cir. 2004) (reversing for combination of improper examination and argument). Additionally, even when error is unrelated, its impact can be viewed collectively under the cumulative error doctrine. *See United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) ("Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'") (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). While not necessitating a separate assignment of error, Appellant requests consideration of the cumulative error doctrine with respect to all errors this Court finds.

to lie about what happened." ; "[The victim has] no reason to lie about what her uncle did to her" ; "[The victim is] an innocent child with no reason to lie.").

a. There was error

These arguments were erroneous and the error was plain or obvious. As highlighted above, the CAAF found plain and obvious error in comparable statements in *Fletcher* and *Norwood*.

b. Appellant was prejudiced

The misconduct was moderately severe. Trial counsel thrice invoked arguments controlling precedent clearly condemns and the error went directly to the central issue in controversy: AN's credibility.

No specific curative measures were taken.

The weight of the evidence for these specifications, while stronger than for the above examined specifications relating to KB, was not overwhelming. Without repeating the entirety of the mixed evidence, AN's denial of awareness of the COVID restrictions she was violating was contradicted by MSgt PB's testimony that the unit had disseminated this information and it was prevalently known within the unit. (R. at 1154-56; 1266-67). AN's testimony about the night in question was contradicted by the responding officer, MSgt PB, and by the friend she called for assistance, MS. (R. at 1152-56) (AN denials of various statements/actions on night in question); (R. at 1260, 1266-72) (MSgt PB contradiction of those denials); (R. at 1142, 1179) (AN report that MS – a security forces member – told her she could shower); (R. at 1245) (MS contradiction of AN's testimony). AN testified that she asked MS (who was also a member of Security Forces (R. at 1178)) if she was allowed to shower, and he told her she could. (R. at 1142, 1179). MS, by contrast, testified that he had told AN not to shower, out of concern for preserving evidence. (R. at 1245). AN's testimony as to the nature of her relationship with MS (R. at 1175-76) was

irreconcilable with MS's testimony (R. at 1208, 1245, 1255). AN's prior testimony also contradicted her in-court testimony on the crucial issue of her continued consensual sexual conduct with Appellant as the encounter went on. On direct examination, AN denied continuing to consensually kiss Appellant after he attempted to advance the sexual intimacy. (R. at 1139); *see also* (R. at 1162, 1166-67) (further denial of continued kissing). AN denied telling OSI that she continued to kiss Appellant. (R. at 1163). SA JH directly contradicted AN's testimony on these points, recounting that AN told him that she resumed kissing Appellant after he had touched her breasts. (R. at 1347). AN also told SA JH that she wanted to continue kissing Appellant. (R. at 1347). A video clip of these statements from AN's OSI interview was admitted into evidence. (Def. Ex. A). Notably, these and other flaws in the government evidence went to the exact area impacted by the improper argument: AN's credibility.

This Court should find prejudice. Additionally, to the extent this Court reaches a prejudice analysis on both this issue and the ineffective assistance of counsel issue (A.E. VIII), both of which relate to the specifications involving AN, the cumulative error doctrine should be considered.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4, 5, 6, and 7 of Charge I.

XI. APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

Law and Analysis

Appellant respectfully contends he was entitled to a unanimous verdict (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict; (2) under the Fifth Amendment's Due Process Clause; and (3) under the Fifth Amendment's Equal Protection Clause. Appellant recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation.[40]

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

Conclusion

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

Respectfully submitted,

[redacted]

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[40] Petitions for writ of certiorari have been filed with the Supreme Court on this issue in multiple cases and are currently pending.

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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 15 December 2023.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**APPELLANT'S MOTION TO EXCEED PAGE LIMIT**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 15 December 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to file his brief in excess of this Court's 50-page limit. Appellant respectfully requests 83 pages for his opening brief.

Appellant's brief is 83 pages, excluding the title page, table of contents, table of authorities, and certificate of service. Good cause exists for this motion because of the length and complexity of the case, where Appellant was charged with offenses against five different victims and convicted of offenses against three different victims. While these charges were consolidated within one trial, it would be more accurate to say that Appellant is placed in the position of appealing three separate sets of charges. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, 3 defense exhibits, 151 appellate exhibits, and 2 court exhibits. In addition, this case contains many legal issues relevant to this Court's review. Appellate defense counsel identified, and are submitting, eleven assignments of error. Additional length is required to thoroughly brief these issues.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 15 December 2023.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 December 2023, counsel for Appellant submitted a Motion to Attach Documents, a Motion to File Under Seal (Attachments to Motion to Attach), and a Motion to File Under Seal (Excerpts of Appellant's Brief). In the Motion to Attach Documents, Appellant seek to attach six documents to the record: trial counsel's post-trial Brady disclosure (Attachment A), trial counsel's interview notes (Attachment B), trial defense counsel's discovery request (Attachment C), two affidavits from Appellant's trial defense counsel (Attachments D–E), and one affidavit from Appellant himself (Attachment F). In the motions to file under seal, Appellant requests this court file under seal Attachments A, B, D, E, and F of the Motion to Attach Documents and specific portions of pages 10, 11, and 45–55 of Appellant's Assignments of Error brief. Government appellate counsel did not respond to the motions.

The court has considered Appellant's motions, the lack of opposition to them, the applicable case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 29th day of December 2023,

ORDERED:

Appellant's Motion to Attach Documents, is **GRANTED**; however, the court specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review of Appellant's entire case.

Appellant's Motion to File Under Seal (Attachments to Motion to Attach) and Motion to File Under Seal (Excerpts of Appellant's Brief), are **GRANTED**.

Appellate government counsel and appellate defense counsel may retain copies of these items ordered sealed and in their possession until completion of our Article 66, UCMJ, review of Appellant's case, to include the period for

reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After which, counsel shall destroy any retained copies of these items in their possession.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**MOTION TO FILE UNDER SEAL (EXCERPTS OF APPELLANT'S BRIEF)**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 15 December 2023

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file two excerpts of his Assignments of Error (AOE) brief under seal, specifically section 2.d. of the Statement of Facts (pages 10-11) and Issue IV (pages 45-55).

Pages 10-11 (section 2.d. of the Statement of Facts) and pages 45-55 (Assignment of Error Issue IV) reference information derived from sealed materials in the record of trial. Pages 10-11 references information that falls under Mil. R. Evid. 412. Pages 45-55 reference Appellate Exhibits IV, V, and XXX, all of which were ordered sealed by the military judge. Pages 45-55 also reference parts of the trial transcript from a closed Mil. R. Evid. 412 hearing. The inclusion of this information is necessary for this Court's consideration of the case.

Section 2.d. of the Statement of Facts (pages 10-11) and Issue IV (pages 45-55) have been redacted in Appellant's AOE brief. These portions will be delivered in hard copy to the Court and Appellate Government. The unsealed filing, redacted to identify which portions have been filed

under seal in accordance with Rule 17.2(b), is being filed separately via email on 15 December 2023.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 15 December 2023.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 29 December 2023, this court granted Appellant's motions to attach documents, a motion to file under seal attachments to the motion to attach and a motion to file under seal excerpts of his brief wherein he alleges ineffective assistance of counsel.

On 4 January 2024, the Government filed a Motion to Compel Affidavits for Appellant's ineffective assistance claims, and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel— Major Carlos Y. Cueto Diaz, Major Cynthia A. McGrath, and Captain Mary E. Clemons—to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration by an order by this court. The Government requests trial defense counsel each provide a declaration or affidavit—each containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel—within 30 days of an order to compel.

In the motion for enlargement of time, the Government requests that it be given 14 days after this court's receipt of a declaration or affidavit from trial defense counsel to submit its answer. Appellant did not file responses to either motion.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims of ineffective assistance of counsel without piercing the privileged communications between Appellant and his trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the issues raised by Appellant, it is by the court on this 17th day of January, 2024,

ORDERED:

The Government's Motion to Compel Affidavits for Ineffective Assistance of Counsel is **GRANTED**. Major Carlos Y. Cueto Diaz, Major Cynthia A. McGrath, Captain Mary E. Clemons are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **16 February 2024.** The Government shall deliver a copy of the responsive affidavits or declarations upon receipt to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **2 March 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 TO ATTACH DOCUMENTS**[1]
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 15 December 2023

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

Pursuant to Rule 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to attach the following documents to the Record of Trial:

- **Def App. Ex. A**: Trial Counsel Post-Trial *Brady* Disclosure – 22 March 2023
- **Def App. Ex. B**: Trial Counsel Interview Notes – 6 November 2021
- **Def App. Ex. C**: Defense Discovery Request – Email – 3 November 2021
- **Def App. Ex. D**: Affidavit of Circuit Defense Counsel – 4 December 2023
- **Def App. Ex. E**: Affidavit of Defense Counsel – 13 December 2023
- **Def App. Ex. F**: Affidavit of Appellant – 15 November 2023

Def. App. Ex. A-F are necessary to this Court's evaluation of assignments of error relating to discovery violation(s) and related issues. On 22 March 2023, 362 days after the conclusion of the trial, the government provided a *Brady* disclosure, informing the defense for the first time that a named victim had made inconsistent statements about her history of intimacy with appellant. (Def. App. Ex. A). These statements contradicted the victim's trial testimony and would have

[1] Undersigned counsel hereby withdraws the previous motion titled "Motion to Attach Sensitive Documents" as this document had the improper titling of the motion.

supported the defense theory of the case. After the initial Brady disclosure, appellate defense counsel requested and received trial counsel's notes from the interview in question. (Def. App. Ex. B). Review of these notes revealed that the named victim was also dishonest about her history of intimacy with another witness on a topic the military judge later ruled relevant to the trial. The government never disclosed this information. At trial, the defense made multiple discovery requests that should have elicited the undisclosed information. (Def. App. Ex. C, D). Trial defense counsel have provided affidavits on the significance of the undisclosed evidence relating to the named victim's dishonesty about her history of intimacy with a third-party witness. (Def. App. Ex. E).

Def. App. Ex. F is relevant to Appellant's claim of ineffective assistance of counsel. Appellant explains that another named victim made statements irreconcilable with her trial testimony, admitting to much more extensive consensual contact with Appellant, but his trial defense counsel failed to use them. (Def. App. Ex. F).

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. Def. App. Ex. A-F are necessary to this Court's evaluation of assignments of error relating to discovery violation(s) and related issues, which are reasonably raised by materials in Appellant's record, but not fully resolvable from the materials in the record.

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

[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 Appellate Government Division on 15 December 2023.

Respectfully submitted,

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4 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO COMPEL AFFIDAVITS FOR INEFFECTIVE ASSISTANCE OF COUNSEL
v.	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Panel No. 3

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Maj CCD, Maj CM, and Capt MC, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claims.[1]

Maj CCD, Maj CM, and Capt MC represented Appellant at his trial. Appellant filed his Assignments of Error brief with this Court on 15 December 2023. The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. All have responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

The United States requires an affidavit from Maj CCD, Maj CM, and Capt MC to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66

[1] Filed in conjunction with this motion, the United States has also moved this Court for an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. The United States seeks an enlargement of time following the submission of the affidavits or declarations in order to properly and completely respond to Appellant's brief.

M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Affidavits or declarations are necessary in this case because the allegations of ineffective assistance of counsel involve strategic decisions that only Appellant's trial defense counsel can explain.

Accordingly, the United States respectfully requests this Court order Maj CCD, Maj CM, and Capt MC to provide an affidavit with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Affidavits.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian and military appellate defense counsel, and the Air Force Appellate Defense Division on 4 January 2024 via electronic filing.

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20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)))))))))	MOTION TO ATTACH DOCUMENTS ACM 40363 Panel No. 3

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following documents previously ordered by this Honorable Court on 17 January 2024:

- Affidavit of Maj CCD, dated 16 February 2024, 4 pages;
- Affidavit of Maj CM, dated 16 February 2024, 5 pages; and
- Declaration of Capt MC, dated 16 February 2024, 2 pages.

On 4 January 2024, the United States requested this Honorable Court compel Maj CCD, Maj CM, and Capt MC to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 17 January 2024, this Honorable Court granted that motion and ordered Maj CCD, Maj CM, and Capt MC to "provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective." The Order stated that the affidavits or declarations "will be provided to the court not later than 16 February 2024"[1] and that the United States' "answer to Appellant's assignments of error brief will be filed not later than 2 March 2024."

[1] Because 16 February 2024 fell on a Family Day, this Court provided notice on 14 February 2024 would be due the next business day, Tuesday, 20 February 2024.

Maj CCD and Maj CM provided their affidavits to undersigned counsel on 16 February 2024. Capt MC provided her declaration to undersigned counsel on 16 February 2024.

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

[redacted]

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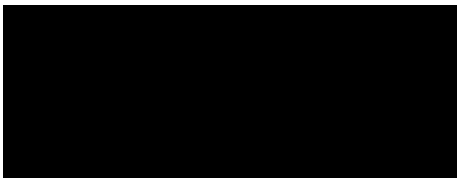
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 20 February 2024 via electronic filing.



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4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40363
Senior Airman (E-4)	)	
SAMUEL A. DOROTEO, USAF	)	Panel No. 3
Appellant.	)	

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40363
Senior Airman (E-4)	)	
SAMUEL A. DOROTEO, USAF	)	Panel No. 3
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION, WHERE THE EVIDENCE RAISED A PRIOR INTIMATE RELATIONSHIP BETWEEN APPELLANT AND THE VICTIM, APPELLANT ASKED FOR CONSENT, THE VICTIM DISCLAIMED ANY VERBAL OR PHYSICAL RESISTANCE PRIOR TO THE OFFENSES APPELLANT WAS CONVICTED OF, THE VICTIM ACKNOWLEDGED THAT APPELLANT STOPPED AS SOON AS SHE ASKED HIM TO AT THE CONCLUSION OF THE LAST OFFENSE, AND A THIRD-PARTY WAS SLEEPING IN THE SAME ROOM AT THE TIME OF THE OFFENSES.

II.

WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL, OVER DEFENSE OBJECTION, THAT THEY MAY CONSIDER THE CHARGED MISCONDUCT IN SPECIFICATIONS 1 THROUGH 5 OF CHARGE I AS EVIDENCE OF A "COMMON PLAN OR SCHEME" OF CRIMINALITY UNDER MIL. R. EVID. 404(b), AND ALLOWING THE GOVERNMENT TO ARGUE THE SAME.

III.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 4 AND 5 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE, INTER ALIA, THERE WAS NO CORROBORATION, THE VICTIM TOLD A NUMBER OF DEMONSTRATED LIES ABOUT HER SEXUAL INTERACTIONS WITH APPELLANT, AND THE VICTIM CONFESSED TO A FRIEND THAT SHE HAD FALSELY ACCUSED APPELLANT OF SEXUAL ASSAULT FOR REPUTATIONAL REASONS.

IV.

WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA A POST-TRIAL BRADY DISCLOSURE FROM TRIAL COUNSEL.

V.

WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED WHERE APPELLANT'S ACCUSER PROVIDED FALSE OR MISLEADING TESTIMONY ABOUT HER HISTORY OF INTIMACY WITH APPELLANT, THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN THE TESTIMONY WAS FALSE BECAUSE THE TESTIMONY CONTRADICTED THE ACCUSER'S ADMISSIONS TO THE GOVERNMENT IN A PRETRIAL INTERVIEW, AND THE GOVERNMENT ALLOWED THE TESTIMONY TO GO UNCORRECTED AND FAILED TO INFORM THE DEFENSE OF THE PRETRIAL ADMISSIONS.

VI.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING AS AN "EXCITED UTTERANCE," A TEXT MESSAGE IDENTIFYING APPELLANT, SENT BY A NONPARTICIPATING COMPLAINING WITNESS TO A THIRDPARTY, AT THE CONCLUSION OF TWENTY-FOUR MINUTES OF TEXTING BACK-AND-FORTH.

VII.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 9 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED ONLY "INTENT TO ABUSE, HUMILIATE, HARASS, OR DEGRADE" BUT THE EVIDENCE SHOWED SEXUAL INTENT (WHICH WAS NOT ALLEGED).

VIII.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 6 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED APPELLANT TOUCHED THE VICTIM'S BREAST BUT SHE TESTIFIED THE CHARGED TOUCHING DID NOT OCCUR.

IX.

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO USE A PRIOR STATEMENT BY THE VICTIM, CORROBORATED BY PHYSICAL EVIDENCE, ENDORSING ADDITIONAL CONSENSUAL SEXUAL CONDUCT DURING THE CHARGED ENCOUNTER, WHICH WAS IRRECONCILABLE WITH HER TRIAL TESTIMONY.

X.

WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

XI.

WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant faced the following charges and specifications at trial:

- SSgt EV

Specifications 1 through 3 of Charge I involved SSgt EV and stemmed from events occurring on or about 20 September 2019 at or near Osan Air Base. (ROT, Vol. I, Charge Sheet). In Specification 1, Appellant was charged with committing abusive sexual contact against SSgt EV by touching her breasts with his hand. (Id.) In Specification 2, Appellant was charged with committing a sexual assault against SSgt EV by penetrating her vulva with his penis. (Id.) In Specification 3, Appellant was charged with committing a sexual assault against SSgt EV by penetrating her anus with his penis. (Id.) The member panel acquitted Appellant of all specifications involving SSgt EV. (R. at 2039-40.)

- A1C KB

Specifications 4 and 5 of Charge I involved A1C KB. (ROT, Vol. I, Charge Sheet). In Specification 4, Appellant was charged with committing a sexual assault against A1C KB, on divers occasions, between on or about 12 October 2019 and on or about 31 January 2020, at or near Ramstein Air Base, by penetrating A1C KB's vulva with his penis. (ROT, Vol. I, Charge Sheet.) The specification stemmed from two separate instances, one occurring in October 2019 and the other occurring in January 2020. The panel convicted Appellant of this specification but excepting out the words "On divers occasions between on or about 12 October 2019, and on or about 31 January 2020," and substituting them with the words, "On or about 31 January 2020." (R. at 2039-40.)

In Specification 5, Appellant was charged with abusive sexual contact against A1C KB by touching her groin with this penis between on or about 1 February 2020 and on or about 31 March 2020, at or near Ramstein Air Base. (ROT, Vol. I, Charge Sheet.) The member panel convicted Appellant of this specification. (R. at 2039-40.)

- SrA AN

Specifications 6 and 7 of Charge I involved SrA AN and stemmed from events occurring on or about 26 April 2020, at or near Kaiserslautern, Germany. (ROT, Vol. I, Charge Sheet). In Specification 6, Appellant was charged with abusive sexual contact by touching SrA AN's breast. In Specification 7, Appellant was charged with sexually assaulting SrA AN by penetrating her vulva with his penis. (Id.) The panel convicted Appellant of both specifications. (R. at 2039-40.)

- A1C LD

Specification 8 of Charge I and the specification of Charge II involved A1C LD and stemmed from events occurring on or about 1 May 2020, at or near Ramstein Air Base. (ROT, Vol. I, Charge Sheet). In Specification 8, Appellant was charged with abusive sexual contact by touching A1C LD's breast. In the specification of Charge II, Appellant was charged with attempted abusive sexual contact by attempting to touch her inner thigh with his hand. (Id.) The panel acquitted Appellant of both specifications. (R. at 2039-40.)

- A1C RY

In Specification 9 of Charge I, Appellant was charged with abusive sexual contact, on or about August 2020, at or near Hermersberg, Germany, by touching A1C RY's breast with his hand. (ROT, Vol. I, Charge Sheet). The panel convicted Appellant of this specification. (R. at 2039-40.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN NOT GIVING A MISTAKE OF FACT AS TO CONSENT INSTRUCTION TO THE PANEL.

Additional Facts

A1C KB enlisted in the Air Force in 2018 and arrived at Ramstein AB in 2019. (R. at 1503.) There, A1C KB met Appellant at a club and began hanging out with him and another female friend, SrA BB. (R. at 1505-06.) At one point, A1C KB began living in Appellant's house along with SrA BB and SSgt MB. (R. at 1518.) Even though A1C KB had a dorm room on base, A1C KB said she was homesick and being around friends made it feel like home. (R. at 1552.) A1C KB said, "I liked that homey feeling, not being stuck in a dorm." (Id.) A1C KB testified that Appellant slept in his room, SrA BB slept in another bedroom, and both A1C KB and SSgt MB slept in the attic. (R. at 1518.)

- *January 2020 Incident (Charge I, Specification 4)*

One evening in January 2020, the four were drinking at the house and telling stories. (R. at 1522.) A1C KB became emotional and started crying about sad things that had happened in her life. (R. at 1523.) SrA BB took A1C KB upstairs to try and get her to bed but Appellant interceded and told SrA BB that he would take care of A1C KB. (R. at 1524.) At some point, A1C KB recalled being in the attic and that she felt "still sad, super emotional and drunk and tired." (Id.)

A1C KB also recalled SSgt MB was in the attic but was asleep. (R. at 1525.) She testified that SSgt MB was "a pretty heavy sleeper" who was hard to wake up. (R. at 1521.) A1C KB recalled lying down on her mattress "intending on going to bed, just to sleep it off." (R. at 1525.) However, Appellant began touching her "around my body" and told A1C KB, "Let me make you feel better. Let me help you." (R. at 1526.) A1C KB said this made her feel uncomfortable and recalled that she was still crying.

Appellant then got on top of A1C KB. A1C KB testified she could feel Appellant's weight of top of her and recalled Appellant asking her, "Let me put the tip in again." (R. at 1527.) A1C KB testified, "In my mind I'm thinking, I don't want – I don't want that." (Id.) A1C KB stated she was not kissing or rubbing Appellant at all.

A1C KB next remembered Appellant putting his penis into her vagina. (R. at 1528.) A1C KB said she felt "disgusted" because "he knows I don't want sex." (Id.) When asked if she felt like there was anything she could do to stop Appellant, A1C KB responded, "No, ma'am." (Id.) Once Appellant stopped, A1C KB said he left the attic. A1C KB testified that she told both SrA BB and SSgt MB about the incident. (R. at 1544.)

- *March 2020 Incident (Charge I, Specification 5)*

A couple of months later, in March 2020, A1C KB went out drinking with SrA BB, SSgt MB, Appellant, and another friend. (R. at 1530.) The group went back to A1C KB's dorm room where SSgt MB went to sleep while SrA BB went to sleep in another room. (R. at 1531-32.) Appellant could not drive home because he had been drinking so he remained in A1C KB's room. A1C KB testified that she intended to sleep in her bed alongside SSgt MB and that Appellant would sleep on the floor. (R. at 1533.)

A1C KB testified that she was sleeping on the edge of her bed when Appellant pulled her down onto the floor. (R. at 1534.) A1C KB said, "I remember just being on the floor and him on top of me." (Id.) A1C KB said she felt Appellant's hand on her thigh and his penis on her inner thigh. (R. at 1535.) A1C KB continued, "I remember telling him, 'I don't want to have sex with you.' And I felt a little more persistent on that. And after that, he listened and got off of me and I went back to bed." (R. at 1536.)

When asked if she had been kissing, flirting with, touching or caressing Appellant at all that night, A1C KB responded, "No, ma'am." (Id.) When asked if she gave Appellant any indication that she wanted to have sex with Appellant that night or was interested in something sexual with him, A1C KB responded, "No, ma'am." (Id.)

When asked on cross-examination by Appellant's counsel if she kissed Appellant in October 2019, A1C KB replied, "I don't recall that, no." (R. at 1548.) When asked again if she recalled "making out with him for approximately 15 seconds," A1C KB replied, "I don't remember." (Id.) When asked if she "made out" with Appellant in December 2019 and kissed him "intensely," A1C KB initially replied, "No," and "That is not true." (R. at 1548-49.) When asked, "So that never happened," A1C KB said, "I don't remember that ever happening." (R. at 1549.) When asked, "So it's not that it isn't true; it's that you don't remember that ever happening, according to you, right," A1C KB replied, "No, I don't remember." (Id.)[1]

[1] In the Statements of Facts section of his brief, Appellant states that A1C KB "denied 'making out' with Appellant in December 2019" without providing context that A1C KB said Appellant's trial defense counsel that she did not "remember that ever happening." (*See* App. Br. at 8.)

A1C KB replied, "No," when asked if she "made out" with Appellant after the January 2020 incident. She also replied, "No," when asked if she ever told SSgt MB, "OMG, I just kissed [Appellant]." (R. at 1551.)

SSgt MB testified that he met SrA BB and Appellant in Korea before coming to Germany. (R. at 1557-58.) He met A1C KB the day he arrived in Germany when she, SrA BB and Appellant picked up SSgt MB at the airport. SSgt MB said he and A1C KB "hit it off pretty quickly," adding that it was like "meeting a long-lost friend." (R. at 1559.) The two became very close very quickly and spent a lot of time together.

SSgt MB said he lived at Appellant's house for a few months before getting his own place in March 2020. (R. at 1560.) SSgt MB said A1C KB moved in with him at that time. SSgt MB also stated he was a "very heavy sleeper," adding, "If someone would try to wake me up, it's not a good time for anybody." (Id.) SSgt MB recounted instances when he had fallen asleep on a kitchen countertop and his family had simply gone about their day around him. (Id.)

Regarding the type of relationship he saw between Appellant and A1C KB, SSgt MB stated, "Their interactions were like any other in the friend group . . . ." (R. at 1561.) SSgt MB said that he found out that Appellant and A1C KB "had some sort of relationship type deal" prior to SSgt MB arriving in Germany in January 2020. (R. at 1562.) SSgt MB said, "It was just like a mutual sharing of feelings for each other. But as far as that goes, I was not here to actually witness that, so." (R. at 1562.) When asked if he "only saw a platonic relationship" between Appellant and A1C KB, SSgt MB replied, "Yes." (Id.) When asked "To the best of your understanding, anything that had been between them had ended by the time you PCSed in," SSgt MB replied, "Yes, ma'am." (R. at 1571.) However, SSgt SB stated that A1C KB had admitted to him that she and Appellant had kissed. (R. at 1573.)

Regarding the March 2020 incident, SSgt MB testified that the group had been out drinking and ended up back at Ramstein AB. (R. at 1562-64.) He stated SrA BB went back to her dorm room, and he and Appellant stayed in A1C KB's dorm room. SSgt MB said he immediately went to the corner of A1C KB's bed and went to sleep. (R. at 1564.) The next morning, SSgt MB said A1C KB was "a little more serious" than she usually was.

SrA BB testified that her family and A1C KB's family had been friends since before they were born because their dads had deployed together. (R. at 1587.) The two became friends when they were both stationed in Germany. SrA BB detailed how she, A1C KB, and others hung out. After an incident in October 2019, SrA BB said A1C KB told her that she "never wanted to be left alone" with Appellant. (R. at 1592.)

In January 2020, SrA BB said SSgt MB joined their group of friends. (R. at 1593.) SrA BB described SSgt MB as a "heavy sleeper" who "wouldn't wake up to anything." (Id.) She added that when they lived in Appellant's house, "I would walk up in the attic when he would take naps, and he wouldn't even budge to wake up." (R. at 1594.)

Regarding the January 2020 incident, SrA BB said they group had been drinking and ended up at Appellant's house. (R. at 1595.) She said she ended up having to help A1C KB up the attic ladder due to her intoxication. While SrA BB was getting A1C KB into her bed in the attic, she "noticed [Appellant] coming up the ladder." (R. at 1596.) She said, "The only thing [Appellant] said to me was when I asked [A1C KB] if she wanted me to stay up, and he kept telling me to go downstairs." (Id.) On cross-examination, SrA BB said A1C KB wanted SrA BB to stay in the attic with her. (R. at 1610.) On redirect examination, SrA BB testified that she knew A1C KB wanted her to stay in the attic because "[s]he was hooking onto my arm" and "[s]he was grabbing onto my arm." (R. at 1615.)

Even though A1C KB had previously told SrA BB that she did not want to be left alone with Appellant, SrA BB said she eventually left the attic because "I'm getting frustrated with [Appellant]," adding, "He kept budging me to go downstairs when I did not want that answer from him." (Id.) SrA BB said A1C KB told her what happened in the attic. (R. at 1597.)

On cross-examination, SrA BB acknowledged that she saw A1C KB kiss Appellant in October or November 2019. (R. at 1606.) SrA BB also agreed that the kiss occurred after she suggested to A1C KB that A1C KB should go kiss Appellant. (R. at 1607-08.)

SrA AV testified she saw A1C KB and Appellant kissing in December 2019. (R. at 1771.) SrA AV also testified that she met A1C KB in either July or August of 2019 and that early that fall, A1C KB initially told SrA AV that she had a non-consensual sexual encounter with Appellant. (R. at 1777.) However, SrA AV testified that A1C KB told her in a second conversation that the sex was consensual, "but she didn't want people to know that she was having sex with him or had sex with him because she was supposed to be into females." (R. at 1774.)

SrA AV stated that she PCS'd from Germany to Utah in February 2020. (R. at 1778.) When asked if A1C KB called her in Utah to tell her about an assault in the attic, SrA AV responded, "No. I was not aware of any assault in the attic." (Id.)

- *Instructions*

When discussing instructions, the military judge asked Appellant's trial defense counsel what defenses they believed were raised by the evidence. (R. at 1846.) Appellant counsel, among other things, stated "mistake of fact as to consent." (Id.) The Government, citing to United States v. Rodela, 82 M.J. 521 (A.F. Ct. Crim. App. 2021) and United States v. Willis, 41

M.J. 435 (C.A.A.F. 1995), argued that there was no evidence supporting Appellant's "subjective belief as to consent."[2] (R. at 1847.)

Appellant's counsel argued that, for the October 2019 incident, "we have statements from [A1C KB] as to the truth of the matter asserted . . . she consented. She agrees to have sex with him for whatever reason." (R. at 1848.) For the January and March 2020 incidents, Appellant's counsel argued as follows:

> If you remember the testimony of [A1C KB] for the January 2020 incident, she said she "thought" she did not want to do it, but when she was asked if she communicated something to that affect, she said "I don't remember." When she was asked if she actually did something to communicate whether through words or comments that she did not want to do it, her answer was "I don't remember." So we believe that that's more than sufficient evidence to raise a defense with respect to that charge.
>
> With regards to the March 2020 incident, the same, right? Their history, the fact that they have been sort of hooking up when they had been drinking, and kissing intermittently through all this time, as was witnessed by other individuals, we believe the argument would be that it would lead a reasonable person to believe that this person is willing to engage in a sexual act which is what led to what she recounted happening in March of 2020 with him pulling her when she was on the bed and climbing on top of her.

(R. at 1849.)

In response, the Government argued that in Willis, "the court states that the testimony relied on the appellant -- it's an appellate case -- tended to show objective circumstances; however, they provided no insight as to whether the accused actually or subjectively did infer consent based on those circumstances." (R. at 1850.) The Government also argued, "Rodella [sic] makes clear that there must be evidence to support subjective honest believe, and there must

[2] The Government acknowledged "there has been some evidence for the allegations regarding [SSgt EV]." (R. at 1847.)

be evidence to support the objective reasonable belief," adding that in this case, "there has been no evidence presented as to [Appellant's] subjective honest belief that he had consent." (Id.)

After additional discussion between the parties, the military judge sent out draft instructions that did not include the mistake of fact instruction as to Specifications 4 and 5 of Charge I. (R. at 1892-93.) As to his decision, the military judge stated as follows:

> Yeah, so I consider [sic] United States v. Davis, 76 MJ 224, United States v. Willis, 41 MJ 435, pinpoint cite 438, United States v. Rodella [sic], A.C.M. 20080. I considered the totality of the circumstances at the time of the offense. With regard to [A1C KB], considering the totality of the circumstances at the time of the offenses, the record does not contain evidence supporting that the accused had a subjective honest mistake and belief. Your objection is noted but overruled.

(R. at 1893.)

The elements of Specification 4 of Charge I, sexual assault, were as follows:

> (1) That between on or about 12 October 2019, and on or about 31 January 2020, on divers occasions at or near Ramstein Air Base, Germany, [Appellant] committed a sexual act against [A1C KB], by penetrating her vulva with his penis; and
>
> (2) That [Appellant] did so without the consent of [A1C KB].

(R. at 1931-32.)

The elements of Specification 5 of Charge I, abusive sexual contact, were as follows:

> (1) That between on or about 1 February 2020, and on or about 31 March 9 2020, at or near Ramstein Air Base, Germany, [Appellant] committed sexual contact upon [A1C KB] by touching her groin with his penis with an intent to gratify his sexual desire; and
>
> (2) That [Appellant] did so without the consent of [A1C KB].

(R. at 1932.)

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). Whether the evidence reasonably raises a required findings instruction under R.C.M. 920(e) is also a question of law reviewed de novo. United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017) (citations omitted).

Law

A military judge must instruct members on any affirmative defense in issue. R.C.M. 920(e)(3). "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." R.C.M. 920(e), Discussion.

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." Id. Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to sexual assault and abusive sexual contact. *See* e.g., United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (as a defense to a charge of sexual assault); Rodela, 78 M.J. at 526.

In considering whether the defense of mistake of fact as to consent was raised at trial, this Court "consider[s] the totality of the circumstances at the time of the offense" and considers "whether the record contains some evidence of an honest and reasonable mistake to which the [factfinder] could have attached credit if they had so desired." Rodela, 78 M.J. at 526 (*quoting* United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003). While the quantity of evidence

required is low, the record must contain evidence supporting both the subjective "honest" and the objective "reasonable" mistaken belief. *See* Davis, 76 M.J. at 230 ("[W]hile [the a]ppellant's statement may constitute a scintilla of evidence about his 'honest' belief, . . . there is not an iota of evidence that such a belief was reasonable."); *see also* Willis, 41 M.J. at 438 ("The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.") If a mistake is honest yet "patently unreasonable," the defense is unavailable to an appellant. Davis, 76 M.J. at 230.

In Rodela, this Court reviewed our superior Court's decision in McDonald, noting their conclusion that:

> As a general intent offense, sexual assault by bodily harm has an implied mens rea that an accused intentionally committed the sexual act. No mens rea is required with regard to consent, however.
>
> This does not criminalize otherwise innocent conduct because only consensual sexual intercourse is innocent. The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent. [The a]ppellant's actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent. The Government only needed to prove that he had not done so to eliminate the mistake of fact defense.

Rodela, 78 M.J. at 526. This Court also highlighted in Rodela that the Government need not prove an appellant intended the alleged sexual contact to be without consent. Id., *citing* United States v. Lee, No. ACM 39531, 2020 CCA LEXIS 61, at *21-22 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (applying the mistake of fact as to consent analysis from McDonald to the offense of abusive sexual contact).

Analysis

Contrary to Appellant's claims, the military judge did not err in not giving a mistake of fact as to consent instruction regarding Specifications 4 and 5 of Charge I. To start, the military judge's ruling in allowing the mistake of fact as to consent instruction for other charged offenses, as well as his citations to Davis, Willis, and Rodela, shows the military judge understood the distinctions as to when a mistake of fact instruction was required. This is certainly not a case where the military judge issued a blanket denial of Appellant's request for the instruction for all charges offenses.

Instead, the military judge recognized that for the two specifications in question, the totality of the circumstances at the time of the offenses showed the record contained no evidence supporting that Appellant had a subjective honest mistake and belief for either the January or March 2020 incidents.

Regarding the January 2020 incident, A1C KB testified that she said nothing when Appellant said, "Let me put the tip in again," adding that she felt disgusted because "he knows I don't want sex." (R. at 1528.) Further, SrA BB stated that she knew A1C KB wanted her to say in the attic with her with Appellant came up, but that Appellant was adamant about SrA BB leaving. (R. at 1610, 1615.)

Here, there was no evidence presented showing that at this place and time, and considering the circumstances of A1C KB's physical and emotional state, that Appellant had any honest belief that A1C KB consented to sexual activity. Our superior Court's decisions in Willis and United States v. Jones, 49 M.J. 85 (C.A.A.F. 1998), are instructive. In Willis, CAAF held the military judge did not err in not giving a mistake of fact defense, stating:

> The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances. *See* People v. Williams, 4 Cal. 4th 354, 14 Cal. Rptr. 2d 441, 841 P.2d 961, 967 (1992) (Third-party testimony of absence of screams or other sounds of struggle "sheds no light" on accused's state of mind).

Willis, 41 M.J. at 438.

Then, in Jones, CAAF, citing to Willis, held that the appellant likewise has failed to show an "*honest* mistake of fact," because "there was no evidence 'whatsoever' that appellant actually believed that [the victim] was consenting to sexual intercourse with him." Jones, 49 M.J. at 91.

Here, Appellant presented no evidence whatsoever that Appellant actually believe A1C KB was consenting to sexual activity with him on either occasion. While not required to raise the defense, Appellant did not testify in this case. Moreover, Appellant provided no evidence, whether in the form of pretrial statements or otherwise, affirmatively showing that he held an honest belief that A1C KB consented to any of his sexual acts against her.

Likewise, the evidence shows any belief on the part of Appellant would have been objectively unreasonable as well. Here, Appellant, who followed A1C KB and SrA BB up to the attic, knew the state in which A1C KB was in, and there is no evidence that, once alone in the attic, A1C KB did anything to make Appellant believe he had consent to have sex with her. Instead, A1C KB presented as highly emotional, drunk, and attempting to go to sleep. As our superior Court in McDonald held, "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." McDonald, 78 M.J. at 381. Here, while he may have asked for consent, there is no evidence at all showing A1C KB granted consent or did anything in her emotional state to indicate or make Appellant believe she consented.

The same holds true for the March 2020 incident. Here, A1C KB was sleeping in her bed and Appellant, who was on the floor, pulled her down onto the floor from the bed, got on top of her, and pressed his penis upon her inner thigh. (R. at 1534-35.) Again, A1C KB denied kissing, flirting, or touching Appellant at all that evening or giving Appellant any indication that he was interested in something sexual with him that night. (R. at 1536.) Most pointedly, A1C KB was *sleeping* when Appellant initiated his actions against her. Again, there is no evidence at all showing A1C KB granted consent or did anything in her unconscious and sleeping state to indicate or make Appellant believe she wanted Appellant to pull her from her bed onto the floor, get on top of her, and press his penis on her inner thigh.

Still, Appellant finds fault. First, he states there was "significant evidence of a preexisting consensual sexual relationship between Appellant and [A1C KB] prior to the offenses of which Appellant was convicted." (App. Br. at 23.) Yet, even if that were true, it still provides no evidence that Appellant actually held an honest belief that on the two specific nights in question, in the circumstances described above, A1C KB consented to sexual activity with Appellant. Again, there is no evidence in the record showing Appellant's actual thoughts and beliefs on the nights in question. Further, the evidence shows Appellant had no reasonable belief either. In January, A1C KB had just been led upstairs by her friend in order to go to bed, was in a drunken and emotional state, and was trying to simply go to sleep. No evidence was adduced to show A1C KB did anything to make Appellant think she was interested in sex with him. In March, A1C KB was asleep with Appellant pulled her down onto him. Whether the two had a prior relationship or not,[3] nothing in those two circumstances provided Appellant a reasonable

[3] SSgt MB testified that any prior relationship ended prior to him PCSing to Germany in early January 2020, which was before this incident.

belief that A1C KB was interested in sexual activity with Appellant on those nights in those circumstances.

Next, Appellant claims "there was no evidence of verbal or physical resistance prior to the offenses of which Appellant was convicted." (App. Br. at 23.) Again, this lack of evidence does not equate to evidence that Appellant honestly believed A1C KB consented to his sexual acts. If anything, this lack of evidence would go to the reasonableness of his belief. But, yet again, our superior Court has held, "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." McDonald, 78 M.J. at 381. Further, the definition of "consent" states that a "[l]ack of verbal or physical resistance does not constitute consent." *See Manual for Courts-Martial, United States* (2019 ed.) pt. IV, ¶ 60.a.(g)(7)(A), While Appellant cites to a 37-year-old case from the Army Court of Criminal Appeals for the contention that a "lack of physical resistance and minimal verbal resistance [is] relevant to raising mistake of fact as to consent," he notably fails to note the now-applicable definition of "consent" or cite to our superior Court's McDonald opinion, both of which state otherwise.

Here, while Appellant asserts that there were no manifestations of lack of consent, there are also no indications that MS *did* consent to any of the touching. Yet, as McDonald tell us, the burden was on Appellant to gain consent, which he never received. Appellant himself recognizes this when he states that A1C KB testified that she "internally did not want to engage in sex . . . but could not testify that she communicated this to Appellant and could not testify as to how she responded to his request for consent." (App. Br. at 24.) In other words, Appellant recognizes that there was no evidence as to how A1C KB responded to his "just the tip" statement. Yet, as McDonald tells us, she did not have to respond at all because the burden was on Appellant to obtain consent.

Appellant's acknowledgement now that the record shows no evidence of how A1C KB responded encapsulates exactly why his claim must fail. It is hard to imagine a case that more plainly demonstrates the McDonald principle. Appellant cannot honestly or reasonably believe that he had obtained A1C KB's consent to sexual intercourse when she had not given him any indication of consent to any touching at all, let alone sexual intercourse. Further, her lack of response to him asking to "put the tip in" – while she was already in a highly-emotional, intoxicated, and sleepy state – cannot be found to be a manifestation of consent which would then lead to Appellant further escalate his conduct.

And again, considering the lack of evidence at all as to what Appellant was actually thinking at the time, Appellant has failed to show he had an honest belief that A1C KB consented to the activity based on her non-responsiveness, especially in light of our superior Court's holding in McDonald placing the onus of consent on Appellant.

Next, Appellant claims that, for the March 2020 incident, since A1C KB "verbalized her lack of consent and Appellant complied," this somehow absolves him of culpability. (App. Br. at 24.) However, Appellant fails to realize he had already completed his act by the time A1C KB had time to verbalize her objection to his actions. As noted above, the evidence showed A1C KB was sleeping when Appellant pulled her onto the floor, got on top of her, and pressed his penis onto her inner thigh. While Appellant may have stopped once A1C KB realized what was going on and voiced her objection, the abusive sexual contact offense was complete. The issue here is what was going on in Appellant's head prior to him pulling a sleeping A1C KB off of her bed and onto the floor. As detailed above, there is no evidence in the record that would give Appellant any honest belief that a sleeping A1C KB wanted him to pull her onto the floor and

press his penis onto her inner thigh. There is likewise no evidence that Appellant had a reasonable belief either.

Appellant's other arguments regarding his supposed honest mistake of fact, including that SSgt MB was in the same room on both occasions, Appellant's consumption of alcohol, and testimony by Appellant's expert on memory faults and confirmation bias, similarly fall flat as they all fail to reasonably explain how Appellant somehow garnered an honest belief that A1C KB consented to activity on the two nights in question. For instance, as detailed by testimony and discussed throughout this brief, SSgt MB was renowned for being a heavy sleeper who was not easily awoken. Thus, Appellant could have simply believed, as everyone else knew, that SSgt MB was a heavy sleeper and would not wake up whether the sexual activity was consensual or not. Yet still, this is all based on conjecture because, again, there is no evidence in the record showing what Appellant honestly believed on that January 2020 night

In doing so, Appellant cites to a 1989 case from this Court's predecessor, United States v. Daniels, 28 M.J. 743 (A.F.C.M.R. 1989). There, the appellant testified that the victim specifically invited him into her room, pulled him down onto her, and initiated intimate and consensual contact. Id. at 746. The victim testified she awoke to find the appellant on top of her. A base psychologist then testified and was asked by a court member a question that could "fairly be interpreted as suggesting that the court member was considering the possibility of unconscious responses by [the victim] as a means of resolving the conflict between her testimony and that of the appellant." Id. Thus, expert testimony in that case was pertinent to discuss the two conflicting testimonies in that case and how the appellant could have interpreted what he testified occurred as an honest mistake of fact as to consent.

However, this case has no such conflicting testimonies. As opposed to Daniels, there is no evidence or testimony in this case that A1C KB provided Appellant any indication that she consented to sexual activity. Instead, there is the opposite, as SrA BB testified that A1C KB did not want SrA BB alone with Appellant. There is certainly no testimony that A1C KB at any point pulled Appellant to her and initiated intimate and consensual contact similar to what occurred in Daniels. Most importantly, however, is there is no evidence, whether in the form of Appellant testifying or the introduction of circumstantial evidence (such as a pretrial statement by Appellant) showing Appellant held an actual and honest belief that A1C KB consented on the nights in question.

Appellant's citations to United States v. Johnson, 25 M.J. 691 (A.C.M.R. 1987) and United States v. Jackson, 40 M.J. 820 ((N.M.C.M.R. 1994) are similarly unpresuasive as neither cases are clear that the evidence discussed established the existaence of an honest mistake.

Likewise, Appellant's reliance on United States v. DiPaola, 67 M.J. 98 (C.A.A.F. 2008), is misplaced as it is easily distinguishable from this case. There, CAAF highlighted the following evidence present in that case:

> In Willis, we found that the dispute at trial was limited to actual consent and stated "that a mistake-of-fact instruction is not warranted where the evidence raises and the parties dispute only the question of actual consent." Id. at 438. In this case the facts present no such clear dichotomy. While it is well established that ED said "no" to sexual intercourse on this day and also asked DiPaola to stop biting her breasts, it is also clear that ED consented to and willingly participated in some of the sexual acts listed in the specification, such as kissing DiPaola and allowing him to take off her shirt and kiss her breasts. These consensual acts could be seen, in conjunction with their past sexual relationship, as creating a "mixed message" as to which acts were permissible and which were off-limits.

DiPaola, 67 M.J. at 101. CAAF held these "mixed messages" of the conduct and conversations of the parties "*during the encounter*" provided "'some evidence' that could support an honest (subjective) and reasonable (objective) belief as to consent to some or all of the alleged acts." Id. (emphasis added.)

Yet, here, there were no such "mixed messages" evidence in play during either the January 2020 or March 2020 encounters. Certainly, there was no mutual kissing or A1C KB allowing Appellant to take off her shirt and kiss her breasts as was present in DiPaola. In fact, the exact opposite is true as A1C KB testified she never consented to anything and never responded to Appellant when he asked for consent in January 2020, and was sleeping when Appellant initiated his actions in March 2020. While DiPaola involved "mixed messages" during the encounter involving consensual acts, there are no similar circumstances here proving *any* evidence that could support either an honest or reasonable belief as to consent.

Next, Appellant claims that a rationale factfinder could have found that Appellant reasonably believed A1C KB consented on both occasions. (App. Br. at 28.) In doing so, however, Appellant simply repeats the same unpersuasive arguments previously discussed.

Further, even if this Court finds that the military judge erred in not providing the instruction, Appellant was not prejudiced. There is no evidence that the members failed to consider all of the evidence presented in this case. As detailed in Issue III below, the Government presented compelling evidence that Appellant penetrated A1C KB without her consent. A1C KB provided testimony of how, in her emotional state, she was unable to do anything once Appellant began sexually assaulting her but also that she did nothing to encourage, entice, or otherwise make Appellant believe she was interested or consented to his advances. She also testified that she was sleeping in the other instance when Appellant pulled

her down and got on top of her. Further, even if this Court finds "some evidence" was produced at trial to show an honest and reasonable mistake of fact as to consent, the details discussed above explain why they Government would have been able to disprove that defense beyond a reasonable doubt. Conversely, the defense case and argument, that the victim was a liar, was weak. For these reasons, even if this Court finds error, Appellant was not prejudiced by the military judge not providing a mistake of fact as to consent instruction for Specifications 4 and 5 of Charge I. This Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR BY PROVIDING AN INSTRUCTION REGARDING A COMMON SCHEME OR PLAN UNDER MIL. R. EVID. 404(B) FOR SPECIFICATIONS 1 THROUGH 5 OF CHARGE I.

Standard of Review

Appellate courts review a military judge's ruling pursuant to Mil. R. Evid. 404(b) for an abuse of discretion. United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous" in order to be invalidated on appeal.'" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (*quoting* United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980), aff'd on other grounds, 9 M.J. 417 (C.M.A. 1980)).

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010). When judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. Id.

Law

Mil. R. Evid. 404(b)(1) prohibits evidence of a crime, wrong, or other act from being used to prove that an accused had a certain character and that the accused acted in accordance with that character during the charged offense(s) – this is commonly referred to as propensity evidence. Hyppolite, 79 M.J. at 161 (C.A.A.F. 2019). However, evidence of a crime, wrong, or other act may be admissible for another purpose. Id. One proper purpose of evidence of a crime, wrong, or other act is to show a common plan or scheme. Id. at 165. Evidence may be admissible for one purpose but not for others. Id. at 164. "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002) (*quoting* Huddleston v. United States, 485 U.S. 681, 686 (1988)).

When a court looks to evidence of uncharged acts, it tests its admissibility under three standards: (1) Does the evidence reasonably support a finding by a preponderance of the evidence that the accused committed prior crimes, wrongs, or acts? (2) What fact of consequence is made more or less probable by the existence of this evidence, and (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice. United States v.

Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). The evidence at issue must fulfill all three prongs to be admissible. United States v. Barnett, 63 M.J. 388, 394 (C.A.A.F. 2006) (*quoting* United States v. Berry, 61 M.J. 91, 95-96 (C.A.A.F. 2005)). Mil. R. Evid. 404(b) "is a rule of inclusion rather than exclusion." United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000). Consistent with prevailing federal practice under Fed. R. Evid. 404(b), on which Mil. R. Evid. 404(b) is based, C.A.A.F. "has applied the Reynolds test to subsequent acts as well." United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001).

In a recent unpublished opinion, United States v. Greene-Watson, ACM 40293, 2023 CCA LEXIS 542 (A.F. Ct. Crim. App. 27 December 2023) (unpub. op.), this Court highlighted the following related to the issue of a "common plan or scheme" under Mil. R. Evid. 404(b):

> Pertinent to this case, evidence of a common plan or scheme has long been recognized as a legitimate, non-propensity purpose under Mil. R. Evid. 404(b). *See*, *e.g.*, United States v. Johnson, 49 M.J. 467, 474-75 (C.A.A.F. 1998); United States v. Munoz, 32 M.J. 359, 364 (C.M.A. 1991); United States v. Reynolds, 29 M.J. 105, 105-06 (C.M.A. 1989). In Hyppolite, the CAAF revisited the parameters of common plan or scheme evidence. The CAAF endorsed a substantial similarity test employed by the military judge in assessing whether the evidence qualified as a common plan or scheme, and affirmed the trial judge's reliance upon a three-factor test in ruling upon the evidence: (1) relationship between the alleged victim and the accused; (2) surrounding circumstances of the preceding misconduct; and (3) nature of the alleged misconduct involved. Hyppolite, 79 M.J. at 166-67.

Greene-Watson, at *27-28.

In the event of non-constitutional error in admitting Mil. R. Evid. 404(b) evidence, this Court reviews for harmless error. Whether an error is harmless is a question of law this Court reviews de novo. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017) (*quoting* United States v. McCollum, 58 M.J. 323, 342 (C.A.A.F. 2003)). "For non-constitutional errors, the

Government must demonstrate that the error did not have a substantial influence on the findings." Id. (*quoting* McCollum, 58 M.J. at 342). "We evaluate the harmlessness of an evidentiary ruling by weighing: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" Id. at 89 (*quoting* United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Additional Facts

Prior to trial, the Government provided notice pursuant to Mil. R. Evid. 404(b) to show Appellant had a common plan or scheme to target and non-consensually touch or penetrate victims when they were intoxicated. (App. Ex. VI. at Atchs 4, 5.) After litigating the issue, the military judge issued a 14-page ruling on the matter. (App. Ex. XXXIII.)

Appellant was charged with three specifications involving SSgt EV, all of which occurred at or near Osan Air Base on or about 20 September 2019. (ROT, Vol. I, Charge Sheet.) The specifications involved Appellant (1) touching SSgt EV's breast; (2) penetrating her vulva with his penis; and (3) penetrating her anus with his penis. (Id.)

The military judge found as fact the following regarding SSgt EV:

- On or about 20 September 2019, SSgt EV was "very drunk and emotional"
- Appellant told SSgt EV she could sleep in his bed and he would sleep on the sofa
- Appellant told her she could remove her blue jeans and he removed her bra
- Appellant cuddled and asked SSgt EV for sex; she does not recall her response

- SSgt EV's next memory was waking up with Appellant penetrating her

(App. Ex. XXXIII at 2.)

The military judge found as fact the following regarding A1C KB:

- Around November 2019, Appellant was in A1C KB's dorm room
- A1C KB consumed two bottles of wine and was intoxicated
- A1C KB told Appellant she did not want to have sex with him and unwillingly had sex with him
- In January 2020, A1C KB was at Appellant's house where she consumed alcohol to the point of intoxication
- A1C KB went to an air mattress in the attic to sleep and Appellant laid down on the air mattress
- Appellant asked A1C KB if he could "put the tip in" and A1C KB said no three times and that she did not want to have sex with Appellant
- A1C KB got tired of pushing Appellant away and Appellant penetrated her

(Id. at 3.)[4]

The military judge, citing to a multitude of cases including Humpherys, Huddleston, Browning, Barnett, Hyppolite, and the Reynolds test, performed an analysis on the caselaw leading up to our superior Court's Hyppolite opinion before turning his analysis to the facts of this case. Below are various findings made by the military judge within his ruling:

[4] The military judge made findings of fact regarding other instances of charged misconduct involving SrA AN and uncharged misconduct involving SSgt EV, A1C KB, and SrA AN. However, since, as Appellant admits in his brief, the military judge ultimately only instructed the panel regarding the charged misconduct against SSgt EV and A1C KB, this brief will not discuss those facts. (*See* App. Br. at 33.)

- "[T]his Court finds, consistent with Hyppolite, the 'fact of consequences' in this case is the common scheme or plan for [Appellant] to engage in sexual acts with women after taking advantage of circumstances where they are isolated and intoxicated as a cognizable non-propensity purpose."

- "Although in this case there is some evidence [Appellant] attempted to direct women into vulnerable situations."[5]

- "Applying Hyppolite's rationale, the government has met it's burden under MRE 404(b) that there is sufficient evidence for a reasonable finder of fact to conclude that [Appellant] did in fact act in a systemic way to take sexual advantage of intoxicated women (while not all the charged offenses are penetrative acts, the government alleges penile penetration against [SSgt EV, SrA AN, and A1C KB] respectively). Nonetheless, the other charged offenses are also sexual in nature and the facts indicate a common plan or scheme to take sexual advantage of intoxicated women."

- "[SSgt EV, SrA AN, and A1C KB] all knew [Appellant] and had a pre-existing relationship, or at minimum a friendship, with [Appellant]. He knew them all and spent time around them fairly regularly."

- "Additionally, similar to Hyppolite, each of the alleged sexual encounters was preceded by alcohol consumption resulting in toxication and increased vulnerability to unwanted physical advances."
- "Finally, all the charged offenses involved unwanted sexual touching and each case includes penetration of the alleged victim's vulva with [Appellant's] penis."

- "Given the similarity of these facts, in accordance with CAAF's reasoning in Hyppolite, the permissible logical inference from this common plan or scheme is that [Appellant] had the requisite intent to pursue sex with women who were in a vulnerable position after consuming alcohol."

[5] This statement coincided with the military judge notes that, in Hyppolite, "it appears the Accused need not be personally responsible for orchestrating the events that led to placing his alleged victims in a vulnerable circumstances, rather, he must respond in the same way." (App. Ex. XXXIII at 9.)

(Id. at 9-10.) The military judge then performed a multi-paragraph analysis of Mil. R. Evid 403 and performed a balancing test. The military judge also highlighted that the issue of propensity would be monitored and that he would provide curative instructions in the event of any implication of propensity. (Id. at 10-11.)

The military judge ultimately instructed the panel as follows:

> I've instructed you that you may not infer the accused is guilty of one offense because his guilt may have been proven on another offense. You must keep the evidence with respect to each offense separate except where the offenses are closely related to another.
>
> To be closely related, the offenses must involve the same victim or occurred near in time to one another. So for instance, Specification one through three involve an offense that are closely related in that they involve the same victim, and they are committed close in time -- so I should say the same alleged victim. Outside of the offenses which are closely related, the general rule is that you must keep the evidence with respect to each offense separate. However, in some circumstances you may consider evidence presented in support of Specifications one through five of Charge I, although some specifications are not closely related for the limited purpose, if any, to show a common plan or scheme of the accused to engage in a -- in sexual activity with women who were in a vulnerable state due to overindulgence of alcohol for the limited purpose of its tendency, if any, to show [Appellant's] intent in committing the offense. If you find the evidence shows a common plan or scheme, you may only consider this common plan or scheme for Specifications one through five of Charge I. If you do not believe the evidence shows such a common plan or scheme, then the evidence can be considered only for the specific offense for which it relates and the closely related offense.
>
> You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has a general criminal tendency and that the accused therefore committed the offense.

(R. at 1947.)[6]

[6] Besides taking issue with the instruction being given at all, Appellant in this issue does not appear to take issue with the wording of the instruction itself.

Analysis

To begin, the law section of Appellant's brief states that evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." (App. Br. at 31, *citing* United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999).) However, in Greene-Watson, this Court expressly discounted this "almost identical" standard from Morrison, stating that in adopting the "substantially similar" test, our superior Court "appeared to *sub silentio* either overrule, or at a minimum distinguish, the reasoning from an earlier common plan or scheme evidence case," which was the plan detailed in Morrison. Greene-Watson, 2023 CCA LEXIS 542, at *28 (unpub. op.). This Court stated, "We decline Appellant's suggestion we employ that 'almost identical' standard implicitly rejected in Hyppolite." This Court should likewise decline Appellant's suggestion as well.

Next, Appellant claims the military judge was clearly erroneous in finding the incidents in question were "isolated." (App. Br. at 33.) Appellant claims this fact was clearly erroneous because SSgt MB was in the same room as A1C KB and Appellant during the January 2020 incident and in the same bed as A1C KB during the March 2020 incident.[7] (Id.) However, Appellant fails to provide this Court the context around SSgt MB. Specifically, Appellant fails to detail the multiple witnesses who testified that SSgt MB was a heavy sleeper who was virtually impossible to wake up. A1C KB testified that SSgt MB was "a pretty heavy sleeper" who was hard to wake up. (R. at 1521.) SSgt MB himself said, "I would say I'm a very heavy sleeper. If someone would try to wake me up, it's not a good time for anybody." (R. at 1560.)

[7] By not mentioning the incident involving SSgt EV on this point, Appellant seemingly concedes that incident was isolated.

SrA BB described SSgt MB as a "heavy sleeper" who "wouldn't wake up to anything." (Id.) She added that when they lived in Appellant's house, "I would walk up in the attic when he would take naps, and he wouldn't even budge to wake up." (R. at 1594.) Thus, both incidents were isolated because everyone knew SSgt MB was a heavy sleeper who, for all intents and purposes, was not there even though his unconscious body physically present.

In each incident, Appellant worked his way into situations where he would be isolated with both SSgt EV and A1C KB. For SSgt EV, Appellant knew she had been drinking and was upset and invited SSgt EV to spend the night in his hotel room. (*See* App. Br. at 4, *citing* R. at 1361-62.) For A1C KB, Appellant found himself alone in A1C KB's dorm room in October 2019 after an evening of drinking with SrA BB, who testified she left the room because "I caught on that [Appellant] wanted to stay and that he wanted to make a move on [A1C KB], so that's why I left." (R. at 1590.) Then, in January 2020, Appellant followed a drunken and highly emotional A1C KB into the attic and then pressured SrA BB to leave, which would leave Appellant essentially alone with A1C KB considering SSgt MB was already heavily sleeping. Then, in March 2020, Appellant found himself again in A1C KB's dorm room after a night of drinking with only a heavily sleeping SSgt MB in the room. Considering these circumstances, the military judge did not make a clearly erroneous finding of fact by stating these incidents occurred in isolated circumstances.

Appellant next seems to turn to the Reynolds factors by claiming the charged conduct was not "sufficiently similar." (App. Br. at 34.) In doing so, Appellant does not seem to contest the first or third Reynolds prongs. Thus, there is no error, let alone an abuse of discretion, regarding those prongs.

As to the second prong, Appellant attempts to minimize his conduct by saying both encounters only involved "sexual contact" and "some degree of alcohol consumption." (App. Br. at 34.) However, the evidence shows multiple similar factors in play among the specifications involving SSgt EV and A1C KB:

1. Occurred in isolated circumstances (all incidents)

2. Involved a victim in a drunken state (all incidents)

3. Involved a victim in a highly emotional state (SSgt EV incident and one of three incidents involving A1C KB)

4. Involved a victim who was a female friend of Appellant's (all incidents)

5. Involved a victim who was asleep or wanted to go to sleep (SSgt EV incident and two of the three incidents involving A1C KB)

6. Involved touching of victim's body with intent to gratify sexual desire (SSgt EV incident and one incident involving A1C KB)

7. Involved sexual acts (SSgt EV incident and two of three incidents involving A1C KB)

The common factors upheld in Hyppolite involved the following:

1. The relationship of the alleged victims to the accused (friends);

2. The circumstances surrounding the alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep); and

3. The nature of the misconduct (touching the alleged victims' genitalia).

Hyppolite, 79 M.J. at 166. Further, the common plan found in that case was a plan "to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep." Id.

Appellant's case showcases the same factors used in Hyppolite, as well as others, including the incidents occurring in isolated circumstances. Appellant's case also includes a similar plan, namely that he sought to "engage in sexual acts with women after taking advantage of circumstances where they are isolated and intoxicated." (*See* App. Ex. XXXIII at 9-10.) Using Hyppolite as a roadmap, the military judge did not abuse his discretion in finding the incidents similar and that Appellant had a common plan or scheme.

Next, Appellant claims there is "dissidence" between the military judge's Mil. R. Evid 404(b) ruling and his refusal to give a mistake of fact as to consent instruction. In doing so, Appellant points to Hyppolite where our superior Court addressed why the Government in that case was introducing the Mil R. Evid. 404(b) evidence in that case, which happened to involve a mistake of fact defense.

Here, Appellant appears to argue that the only reason the Government would, or could, seek to introduce Mil. R. Evid. 404(b) evidence would be to refute a mistake of fact defense, stating, "Controlling precedent holds that the government cannot simultaneously argue that Mil. R. Evid. 404(b) evidence is required for purposes such as those cited here, and then contend that mistake of fact as to consent is not at issue." (App. Br. at 36.) In other words, Appellant believes Mil. R. Evid. 404(b) evidence related to intent cannot be introduced unless the mistake of fact defense is also in play.

However, Appellant's stance is contradicted by the language of Mil. R. Evid. 404(b)(2) itself, which states, "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, *or* lack of accident." Mil. R. Evid. 404(b)(2) (emphasis added.); *see also* United States v. Zimmerman, ACM 40267, 2023 CCA LEXIS 429, at *37 (A.F. Ct. Crim. App. 11 October 2023) (unpub. op.)

("such evidence may be admissible for another purpose, including, *inter alia*, proving motive, intent, *or* the absence of mistake.") (emphasis added.)

During discussions about instructions at the close of findings, even Appellant's trial defense counsel recognized using this evidence for intent was separate and apart from using it to show an absence of mistake when Appellant's counsel stated, "So we have pattern, common scheme or plan or absence of mistake. Not within that list is intent, opportunity, or knowledge." (R. at 1885.)[8]

Appellant does not address the "or" used within the listing of permissible purposes within Mil. R. Evid. 404(b)(2) nor does he combat the well-settled principle that the list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989). Further, in addition to saying the rule is one of inclusion, our superior Court has also held "it is unnecessary . . . that relevant evidence fit snugly into a pigeon hole provided by Mil. R. Evid. 404(b)." United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989).

[8] Appellant's trial defense counsel was referencing the Government's initial Mil. R. Evid. 404(b) notice which stated, "As evidence of a pattern, common scheme or plan, and absence of mistake, the Government intends to offer evidence relating to each of the charged offenses to prove the commission of the other charged offenses." (App. Ex. VI at Atch. 4.) To this point, the Government acknowledges that it initially intended to use Appellant's common plan or scheme if a mistake of fact as to consent defense was raised. In addition to the Government's initial Mil. R. Evid. 404(b) notice, the Government also stated, "Appellant's pattern of ignoring signs of non-consent tends to show that there was no mistake of fact as to consent" in its Response to Appellant's Mil. R. Evid. 404(b) Motion in Limine. (*See* App. Ex. VII.) However, by the close of the case, the trial counsel recognized, and in fact argued, that no mistake of fact as to consent defense had been raised and thus changed its requested Mil. R. Evid. 404(b) use of the evidence to only intent. (R. at 1884.)

Instead, relying on United States v. Gamble, 27 M.J. 298 (C.M.A. 1988), Appellant claims "[c]ontrolling precedent holds that the government cannot simultaneously argue that Mil. R. Evid. 404(b) evidence is required for purposes such as those cited here, and then contend that mistake of fact as to consent is not at issue." (App. Br. at 36.) However, the facts of Gamble differ significantly from Appellant's case. There, the Government sought to, and ultimately did, introduce testimony concerning a prior, unrelated, uncharged incident in part to show an "absence of mistake." Gamble, 27 M.J. at 300. Our superior Court noted, "We perceive an inconsistency in the Government's contention that the possibility of mistake was raised to the extent that it would authorize reception of extrinsic evidence about another sexual offense but was not raised to the extent that it required an instruction to the court members on mistake of fact."

To start, this case does not create "controlling precedent" for Appellant's ultimate claim that Mil. R. Evid. 404(b) can only be offered for intent if and only if mistake of fact as to consent is also raised. Instead, Gamble simply stands for the premise that if the Government offers uncharged and unrelated acts into evidence before members for the purpose of showing an "absence of mistake," it cannot then argue that the mistake of fact defense was not raised and, therefore, did not garner the requisite instruction.

Additionally, Appellant's case differs from Gamble. Notably, as Appellant admits, the Government did not admit any extrinsic or uncharged acts related to Mil. R. Evid. 404(b). In fact, the only Mil. R. Evid. 404(b) evidence at issue is evidence of charged offenses that was going to come into evidence whether Mil. R. Evid. 404(b) was at issue or not. Further, nothing related to "absence of mistake" was ever mentioned to the panel, and this reasoning did not play a role in any evidence being placed before the panel because, again, all acts involved in the Mil.

R. Evid. 404(b) issue were charged offenses that would have come into evidence on their own. Thus, as opposed to Gamble, the Government's initial basis for introducing the evidence in no way tainted the evidence placed before the panel nor did it taint the military judge's ruling or ultimate instruction to the panel.

Appellant also quotes the following from Reynolds to support his contention:

> Confronted with this classic consent/mistake-of-fact defense, evidence that appellant used the very same method to accomplish his sordid purposes on other occasions was extremely probative of a predatory mens rea on the night in question. Likewise, it strongly countered the fall-back position of mistake-of-fact.

(App. Br. at 37, *citing* Reynolds, 29 M.J. at 109.) However, this case again does not stand for his contention that Mil R. Evid 404(b) evidence can only be used when a mistake of fact defense has been raised. Reynolds does highlight, however, how Mil. R. Evid. 404(b) "scheme" evidence can be used to showcase an appellant's intent. There, our superior Court detailed how that appellant's scheme was "highly probative of his intent," holding as follows:

> His significantly similar conduct evidencing his "design" or "scheme" or "system" leading to non-consensual intercourse was highly probative of his intent. The logical inference to be drawn from his similar acts was that he had worked out a system to put his victim into an unsuspecting and vulnerable position whereby he could engage in sexual intercourse with or without consent.

Reynolds, 29 M.J. at 110.

In this case, Appellant's likewise significantly similar conduct showcased his common plan or scheme to, as the military judge held, "to pursue sex with women who were in a vulnerable position after consuming alcohol." (App. Ex. XXXIII at 10.) Here, Appellant's common plan or scheme directly shows Appellant's intent, which was to have sex with these women with or without their consent. Like in Reynolds, Appellant "worked out a system" to

find himself repeatedly into situations with SSgt EV and A1C when they were each in an "unsuspecting and vulnerable position whereby he could engage in sexual intercourse with or without their consent." *See* Reynolds, 29 M.J. at 110.Finally, Appellant seems to argue the Government sought to introduce this evidence for propensity purposes. However, the transcript is littered with citations from the trial counsel expressly highlighting the evidence would be used for a non-propensity purpose and repeatedly expressed concern to ensure no spillover would occur, even suggesting the military judge place the propensity instruction immediately before the Mil. R. Evid. 404(b) instruction. (R. at 383-85, 392, 1882, 1906.) Moreover, the military judge provided a propensity instruction to the members. (R. at 1946.)

Yet, even if this Court were to find the military judge abused his discretion in providing the instruction, Appellant was not prejudiced. To start, the panel fully acquitted Appellant of 60% of the specifications included in the military judge's Mil. R. Evid. 404(b) instruction. To that end, Appellant cannot claim that allegations related to SSgt EV infected his convictions involving A1C KB because they acquitted him of all allegations involving SSgt EV.

Further, the panel essentially acquitted Appellant of the October 2019 allegation made by A1C KB when they excepted that date out of Specification 4. Considering these acquittals and excepted language, the panel's findings show it reviewed each specification, including separate specifications involving the same victim, individually and obeyed the military judge's instruction that "[e]ach offense must stand on its own." (R. at 1946.)

Still, Appellant claims the Government's case involving Specifications 4 and 5 was "weak" and that his case was "strong." (App. Br. at 38.) However, for the reasons detailed in Issue III below, the opposite holds true. Further, as stated above, the military judge bracketed the instruction with a reminder to the members that they could not consider the evidence for

Appellant's general bad character, nor could they convict him on the basis of it, and that they may not convict him of one offense based upon his conviction for a different offense. (R. at 1946-47.)

In sum, as the military judge did not abuse his discretion in determining that evidence of charged conduct could be used in the limited exceptions outlined in Mil. R. Evid. 404(b) to prove intent, and as his instruction was proper, the United States respectfully requests this Court deny Appellant's requested relief.

III.

APPELLANT'S CONVICTIONS FOR SPECIFICATIONS 4 AND 5 OF CHARGE I ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J.

37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

The elements of Specification 4 and Specification 5 of Charge I, as instructed to the members, are listed in Issue I above.

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual assault and abusive sexual contact, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

As detailed in Issue I above, A1C KB testified that Appellant penetrated her vulva with his penis in January 2020 and touched her inner thigh with his penis in March 2020, all of which was done without her consent. Still, Appellant claims fault because A1C KB's testimony was not "corroborated by eye-witness testimony, physical evidence, forensic evidence, or admissions of the accused." (App. Br. at 42.) However, as Appellant is forced to admit, both this Court and our superior Court has held that a single witness may satisfy the Government's burden to prove

every element of a charged offense beyond a reasonable doubt. (App. Br. at 42, *citing* United States v. Lopez, 2023 WL 2401185, at *6 (A.F. Ct. Crim. App. 7 March 2023) (unpub. op.)); *see also* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006).

Next, Appellant attacks A1C KB's credibility by repeating the same attacks against A1C KB that provided unpersuasive at trial. First, Appellant argues A1C KB lied about her past interactions with Appellant. (App. Br. at 42.) However, in doing so, Appellant misconstrues A1C KB's testimony. For instance, Appellant claims A1C KB "denied sitting on Appellant's lap and kissing him in October 2019." (Id. *citing* R. at 1548.) However, A1C KB never denied either sitting in Appellant's lap or kissing him. Instead, when asked about that incident, she stated, "I don't recall that, no," "I don't remember," and, when asked if she remembers that incident, said, "No, I do not." (R. at 1548.)

Similarly, Appellant claims A1C KB denied kissing Appellant in December 2019. (App. Br. at 42, *citing* R. at 1548-49.) However, as detailed above, when asked if she "made out" with Appellant in December 2019 and kissed him "intensely," A1C KB initially replied, "No," and "That is not true." (R. at 1548-49.) However, when further asked, "So that never happened," A1C KB said, "I don't remember that ever happening." (R. at 1549.) When asked, "So it's not that it isn't true; it's that you don't remember that ever happening, according to you, right," A1C KB replied, "No, I don't remember." (Id.) Thus, once again, A1C KB never denied these incidents, but instead testified that she did not recall them happening.

Next, Appellant claims A1C KB's testimony "contained inherent improbabilities" because SSgt MB was in the same room as Appellant and A1C KB during the incidents. (App. Br. at 43.) However, as multiple witnesses testified, SSgt MB was a notoriously heavy sleeper

who was not easily woken. Considering these circumstances, Appellant committing his acts while SSgt MB slept nearby is not an "inherent improbability."

Likewise, A1C KB continuing to associate with Appellant even after the incidents, including living in a house where Appellant also lived, is not improbable considering the circumstances explained in testimony within this case. As previously explained, even though A1C KB had a dorm room on base, A1C KB said she was homesick and being around friends made it feel like home. (R. at 1552.) A1C KB said, "I liked that homey feeling, not being stuck in a dorm." (Id.) A1C KB testified that two other friends were also staying at Appellant's house during this time along with her. (R. at 1518.) Moreover, and unmentioned by Appellant in his brief, even though A1C KB still continued to associated with Appellant, SrA BB testified that A1C KB made it clear to her that she "never wanted to be left alone" with Appellant. (R. at 1592.)

Notably, as Appellant readily admits by citing to portions of the trial transcript, each of Appellant's credibility claims and alleged improbabilities against A1C KB were raised by his defense counsel at trial and put squarely before the panel to consider in reaching its verdict. Yet, the panel, who had the opportunity to see A1C KB's and other witnesses' testimonies in person, still found A1C KB's testimony regarding the January 2020 and March 2020 incidents proved beyond a reasonable doubt that Appellant sexually assaulted and committed abusive sexual contact against A1C KB.

Next, Appellant restates the same arguments made in Issue I that he had a mistake of fact as to consent regarding these offenses. (App. Br. at 43.) However, for the same reasons detailed in Issue I above, Appellant had no mistake of fact as to consent in either incident.

For the January 2020 incident, Appellant, followed A1C KB and SrA BB up to the attic, knew the state in which A1C KB was in, and there is no evidence that, once alone in the attic, A1C KB did anything to make Appellant either honestly or reasonably believe he had consent to have sex with her. Instead, the evidence shows A1C was highly emotional, drunk, and attempting to go to sleep. While he may have asked for consent, there is no evidence at all showing A1C KB granted consent or did anything in her emotional state to indicate or make Appellant either honestly or reasonably believe she consented.

As for the March 2020 incident, A1C KB was *sleeping* when Appellant began to commit his offense against her. A1C KB was simply sleeping in her bed when Appellant pulled her down onto the floor from the bed, got on top of her, and pressed his penis upon her inner thigh, all before A1C KB had time to interject. (R. at 1534-35.) A1C KB denied kissing, flirting, or touching Appellant at all that evening or giving Appellant any indication that he was interested in something sexual with him that night. (R. at 1536.) And again, most pointedly, A1C KB was *sleeping* when Appellant initiated his actions against her. There is no evidence at all showing A1C KB granted consent or did anything in her unconscious and sleeping state to indicate or make Appellant honestly or reasonably believe she wanted Appellant to pull her from her bed onto the floor, get on top of her, and press his penis on her inner thigh.

Finally, Appellant resurrects a failed R.C.M. 917 motion to dismiss that Appellant raised at trial after the members convicted him of this offense. (App. Br. at 44; *see also* R. at 2089; App. Ex. CXLVII.) At trial, Appellant moved the court to dismiss Specification 5 of Charge I because A1C KB "never once testified to her groin being touched." (R. at 2089.) Appellant also filed a written motion, citing the same United States Army Court of Criminal Appeals case, United States v. Perez, No. ARMY 20140117, 2016 WL 796971 (A. Ct. Crim. App. 29 February

2016) (unpub. op), that he cites in his brief to this Court, for his contention that the evidence did not support a finding that Appellant's penis touched A1C KB's groin. (App. Ex. CXLVII; *see also* App. Br. at 44.)

Relying heavily on this Court's opinion in United States v. Westcott, ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 March 2022), the military judge denied Appellant's R.C.M. 917 motion. (App. Ex. CL.) Like in this case, the appellant in Westcott was charged with touching the victim's groin, but the victim did not use the word "groin" in her testimony. *See* Westcott, ACM 39936, at *21. In Westcott, the victim testified that appellant "got down pretty far" and "close to the outside of [her] vagina," and that "[h]e like was around the area." Id.

This Court distinguished Perez and held that the appellant touched the victim "where her thighs joined her abdomen, or the part of the body around that junction." Id. at *24. In doing so, this Court employed a definition of "groin" used by the Navy-Marine Corps Court of Criminal Appeals in United States v. McDonald, 78 M.J. 669, 680 (N.M. Ct. Crim App. 2018), which found the medical definition of groin to mean "[t]he groove, and the part of the body around it, formed by the junction of the thigh with the abdomen, on either side."

Applying Westcott to this case, the military judge noted that A1C KB testified that she felt Appellant's penis on her inner thigh as his weight was against her. (App. Ex. CL at 5.) Citing to this Court's use of the McDonald "groin" definition being "the groove, and the part of the body around it, formed by the junction of the thigh with the abdomen," the military judge held "the thigh is either part of the groin - as the groin comprises the junction of the thigh with the abdomen - or it is in very close proximity to the groin." (Id.)

Notably, Appellant fails to mention his failed R.C.M. 917 motion on this issue or raise a separate issue related to the military judge's denial of the motion. Appellant also fails to discuss this Court's opinion in Westcott, let alone attempt to distinguish his case from this Court's Westcott opinion or explain how the military judge erred in relying upon it in his ruling.[9]

Here, the "groin" definition used by this Court in Westcott meets the circumstances detailed by A1C KB in her testimony. Testimony shows Appellant reached up onto A1C KB's bed, grabbed her arm, pulled her down to the ground, rolled on top of her, put his weight on top of her, and pushed his penis down onto what A1C KB described as her "inner thigh." Considering Appellant getting on top of her, bearing his full weight on her, and placing his hands on her thighs, along with his penis on her "inner thigh," this Court should be confident Appellant touched A1C KB with his penis "where her thighs joined her abdomen, or the part of the body around that junction." *See* Westcott, ACM 39936, at *24.

Yet, even if this Court finds that the "inner thigh" does not equate to the "groin" in this circumstance, a reasonable factfinder, using their own common sense, knowledge of human nature, and ways of the world, could have found that the overall circumstances of (1) Appellant pulling A1C KB down from her bed; (2) rolling on top of her; (3) putting his full weight on top of her; (4)grabbing her thighs with his hands; and (5) placing his penis on her inner thigh, could

[9] Just days prior to Appellant filing his brief, this Court found an abusive sexual contact conviction was factually and legally sufficient when the victim did not testify to the appellant touching her groin. United States v. Kribs, ACM 40383, 2023 CCA LEXIS 509 (A.F.Ct. Crim. App. 8 December 2023) (unpub. op.) In Kribs, the victim testified the appellant put his hand in her shorts, touched her buttocks, he touched her on the front part of her hip and identified this touching as "[m]ore like the groin area." Id. at *7. The victim also demonstrated the area of the touching, which the military judge commented that it appeared to be on her right hip flexor. Id.

have *also* resulted in him touching her groin, or the part of her body around that area, with his penis during the overall course of his actions.

In sum, the evidence adduced at trial shows Appellant sexually assaulted and committed abusive sexual contact upon A1C KB. The record shows that both specifications are legally and factually sufficient. Here, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, including that Appellant touched A1C KB's groin with his penis. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

IV.

THE GOVERNMENT DID NOT COMMIT A DISCOVERY VIOLATION WARRANTING DISMISSAL OF SPECIFICATIONS 4 AND 5 OF CHARGE I.

This issue was filed separately under seal.

V.

THE TRIAL COUNSEL DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo . . . ." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019).

Law

Our superior Court has explained:

> Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be

> generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.

Id. (*citing* Andrews, 77 M.J. at 402.)

Analysis

Here, Appellant claims the trial counsel committed prosecutorial misconduct because "the government allowed [A1C] KB to testify falsely – in contradiction to [her pretrial admission of prior intimacy with Appellant] – and failed to correct the misleading testimony." (App. Br. at 56.) Appellant claims A1B KB's "repeated denials of prior kissing with Appellant were false and misleading" and that the "government knew or should have known of the falsity of [A1C KB's] testimony." (Id.)

However, as discussed in Issue IV within the Government's sealed brief, and within Issue X below, A1C KB did not deny *ever* kissing Appellant. She also did not deny kissing Appellant on the two incidents raised by Appellant's trial defense counsel. Instead, she stated that on two occasions she did not recall kissing Appellant. While Appellant continually calls this testimony a denial by A1C KB, her testimony shows otherwise. Further, while A1C KB did outright deny kissing Appellant following the January 2020 incident, her denial of kissing him after that time does not equate to her denying outright that she *ever* kissed Appellant.

As discussed in the sealed Issue IV, this is certainly not a case where A1C KB positively confirmed in her pretrial interview that she kissed Appellant on that night and then affirmatively denied *ever* kissing Appellant during her testimony at trial. Instead, A1C KB's pretrial statement to a trial counsel only stated that she *may have* kissed Appellant on the first night she met him, a

statement that was not inconsistent with any of A1C KB's in-court testimony that she did not recall or remember kissing Appellant on the incidents in question.

Here, A1C KB never outright denied ever kissing Appellant during her testimony, and her pretrial statement only stated that she may have kissed Appellant on the first night they met. Thus, A1C KB's testimony did not contradict her pretrial statement and, thus, was not misleading. As a result, the trial counsel was under no obligation to correct any alleged "misleading testimony" and did not "allow[] [A1C KB] to mislead the jury" as Appellant claims. (*See* App. Br. at 57.)

And even if trial defense counsel had access to A1C KB's pretrial statement at trial, at most trial defense counsel could have asked A1C KB on cross-examination, "Isn't it true you told trial counsel in an interview that you may have kissed Appellant in October 2019?" Whether A1C KB answered "yes" or "no," and even if extrinsic evidence of the statement had been introduced, the defense would not have been in a much different place. At the time of trial, A1C KB could not remember kissing Appellant, even though there was other evidence from other witnesses (and even A1C KB herself) that she had actually done so.

Finally, in relation Appellant's alleged discovery violation in Issue IV, the evidence shows trial counsel did not initially disclose the information because they though Appellant's trial defense counsel already knew about A1C KB's pretrial statement based on their Mil. R. Evid. 412 motion. However, once trial counsel realized the potential problem, he sought to remedy it. Considering these circumstances, no prosecutorial misconduct occurred with relation to the discovery issue in Issue IV as well.

Accordingly, Appellant has failed to show error in the trial counsel's handling of A1C KB's testimony and, likewise, failed to show any prosecutorial misconduct.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING A1C RY'S TEXT MESSSAGES TO SRA TS CONSTITUTED AN EXCITED UTTERANCE.

Standard of Review

Appellate courts test a military judge's admission or exclusion of evidence for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Additional Facts

- *Motion Testimony*

During a pretrial motion hearing, A1C RY testified that she attended a party at Appellant's house on 8 August 2020. (R. at 367.) She stated Appellant touched on her thigh and chest multiple times without her permission. (R. at 371.) On cross-examination, A1C RY provided specific details of when and where in the house the touching occurred, including one instance when Appellant stood up from a table they were sitting at and cupped her breast and a second instance in the kitchen. (R. at 373-77.) A1C RY stated she was frustrated, annoyed, angry, upset, and in a state of desperation. (R. 367, 371.) She stated she was "continuously telling him to stop touching me." (R. at 375.)

When asked, "And when that happened did you – did you have a plan to go home after that," A1C RY stated, "Yes, I did," and that she sent text messages to her friend SrA TS for a ride home. (R. at 368.) When asked how soon after the touching that she sent the text messages, A1C RY explained:

> The first text message where I asked where he was [was] sent after the first time that he touched me. And then the second time that text

> message was sent after the second time. So the second time when I asked where he was it was after the second incident.

(R. at 368.)

The text messages AC RY sent to SrA TS are at Prosecution Exhibit 11 and read as follows:

> A1C RY (0054 hours): Where you
>
> A1C RY (0058 hours): Went back to base and didn't take me? Tf
>
> A1C RY (0104 hours): Not trying to be here much longer. I might try to find a ride
>
> SrA TS (0110 hours): Otw back
>
> SrA TS (0111 hours): Might head back soon after getting there, vibe kinda killed
>
> A1C RY (0113 hours): I'm furious but imma be chill
>
> SrA TS (0113 hours): You can rant to me after I get bacj [sic] if you want
>
> A1C RY (0114 hours): Oh I will
>
> SrA TS (0114 hours): Tell me max didn't piss you off tho?
>
> A1C RY (0114 hours): He's weird but he didn't do shit. It was [Appellant]
>
> A1C RY (0128 hours): Where u
>
> SrA TS (0128 hours): Here

(Pros. Ex. 11.)

A1C RY later said she sent the "I am furious" text "almost immediately after" Appellant touched her a second time. (R. at 371.) A1C RY added that at this point she was "Frustrated, angry, upset, hurt, annoyed." (R. at 372.)

SrA TS testified that on 8 August 2020 he attended a party at Appellant's house with A1C RY. (R. at 294, 1475.) SrA TS stated that he was the designated driver that night and left at one point to taken a drunk airman to the dormitory on Ramstein AB. While gone, SrA TS received the text messages from A1C RY that are at Prosecution Exhibit 11. (R. at 295-96.) SrA TS testified he received the first text message at 0054 hours. (R. at 651.) He arrived back at Appellant's house at 0128 hours. (R. at 653.)

A1C RY testified that SrA TS arrived back at the party "about 25 minutes" after the text messages had been sent. (R. at 372.) A1C RY stated she was still feeling the same feelings as when she sent the texts and added, "At that point it was also fear. More fearful." (Id.) When asked why she was furious, A1C RY replied, "Because I was being touched without my consent." (Id.)

When SrA TS arrived back at the party approximately 30 minutes after the text messages, he described A1C RY as "pissed," closed off, and could tell due to her facial expression, body language and her "voicing that she was upset." (R. at 296, 660, 1476, 1671.) SrA TS stated, "She described that [Appellant] had touched/brushed her boobs two or three times." (R. at 297, 653.) SrA TS also testified about his friendship with A1C RY, including being deployed together when he "really got to know her as a person," and explained how he knew A1C RY was upset based on her actions. (R. at 660-61, 1477, 1672.) SrA TS also testified that A1C RY was "visibly upset." (R. at 1673.)

AB MV also attended the party at Appellant's house and recalled seeing A1C RY being "irritated and angry." (R. at 672.) AB MV described A1C RY as "flustered." (R. at 1456.) AB MV testified that A1C RY said Appellant was constantly asking her out that night and that Appellant "grabbed her tits." (R. at 673, 1456, 1467-68.) AB MV said he knew A1C RY was

angry and irritated because of "Her vocal tone. So when someone is normally speaking like I am now, it's an average tone. But when someone gets irritated, they start either speeding up their words and you can vocally hear a change of pitch in their voice, which is how I determined that she was still angry, because she was talking slightly faster than she was normally before." (R. at 673.) AB MV said he could tell A1C RY was flustered and irritated by the "redness in her face and the tone of her voice was changed and altered from previous conversations" earlier that evening. (R. at 1457.) When asked what he meant by "irritated," AB MV said, "'Irritated' more or less means upset about something or angry or the combination of both about something that happened in an event." (Id.)

- *Military Judge's Ruling*

In his ruling on the excited utterance issue, the military judge stated, "In addressing whether a startling even occurred, this court looks at the totality of the circumstances presented in the evidence on the motion." (App. Ex. XCVII.) The military judge held that the unwanted touchings by Appellant caused A1C RY to "become increasingly frustrated, annoyed, angry and upset," adding, "Based on the evidence presented on the motion, this Court is able to determine by a preponderance of the evidence that unwanted touching occurred, and that this was a 'startling event.'" (Id. at 3.)

The military judge further found by a preponderance of the evidence that A1C RY was in an excited state at the time she sent the texts rather than after reflection and deliberation. Specifically, the military judge noted that A1C RY sent the first text after she was touched and that her use of the word "furious" 20 minutes later demonstrated "her continued state of agitation and excitement." (Id.) The military judge further noted the second "Where u" text was sent after

A1C RY had again been touched, and A1C RY testified she was "frustrated, angry, and upset" at that time. (Id.)

Ultimately, the military judge concluded "the timeline supports the fact that [A1C RY] sent the texts in an excited state, rather than after deliberation and reflection," and that the "texts/statements related to the startling event and made while under the stress or excitement of the event." Additionally, the military judge stated he conducted a Mil. R. Evid. 403 balancing test and found the probative value of the text messages was not substantially outweighed by the danger of unfair prejudice. (Id.)

Conversely, the military judge held that the statement made by A1C RY to SrA TS and AB MV about Appellant "grabbing her breast" or "grabbing her titty" did not constitute an excited utterance. (Id. at 3-4.) The military judge held, "[T]his Court cannot determine by a preponderance of the evidence that the statement was made still under the stress or excitement of the touching" because A1C RY did not immediately make the statement to SrA TS, instead making it only after multiple prompts.

Law

"[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995). A military judge is afforded "considerable discretion" in admitting evidence. United States v. Donaldson, 58 M.J. 477, 488 (C.A.A.F. 2003) (citations omitted).

"An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice." Travers, 25 M.J. at 62 (citations and ellipsis omitted). The "'abuse of discretion' standard is a strict one." Id. "To reverse for an abuse of discretion involves far more than a difference in

opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." Id. (citations and ellipsis omitted).

In Donaldson, the Court of Appeals for the Armed Forces explained the excited utterance exception to the hearsay rule as follows:

> An otherwise inadmissible hearsay statement is admissible under M.R.E. 803(2) . . . if (1) the statement relates to a startling event, (2) the declarant makes the statement while under the stress of excitement caused by the startling event, and (3) the statement is 'spontaneous, excited or impulsive rather than the product of reflection and deliberation.'

Donaldson, 58 M.J. at 482, *citing* United States v. Feltham, 58 M.J. 470 (C.A.A.F. 2003); United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987); and United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980).

The excited utterance exception requires the speaker be "under the sway of a 'startling event' and that the statement be made before there is an opportunity 'to contrive or misrepresent.'" United States v. Winters, 33 F.3d 720, 723 (6th Cir. 1994) (internal citations omitted). "The assumption underlying [the] exception is that a person under the sway of excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication and that, consequently, any utterance he makes will be spontaneous and trustworthy." Haggins v. Warden, 715 F.2d 1050, 1057 (6th Cir. 1983).

In Donaldson, our superior Court listed a variety of factors that should be considered in making this judgment, including "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the

statement." Donaldson, 58 M.J. at 483, *citing* Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999).

Analysis

A. The military judge ruled properly on the evidentiary objection.

The military judge acted within his broad discretion in finding that A1C RY's text messages to SrA TS qualified as an excited utterance. Here, the military judge had before him evidence that A1C RY, in the minutes following being grabbed by Appellant multiple times, sent SrA TS multiple texts, including one stating that she was furious and one identifying Appellant as the reason for her stress from the startling events. (App. Ex. at XCVII.) Such a ruling was based on a clear understanding and analysis of the law, which included citations to Arnold. The military judge's ruling, which also denied admission of other utterances by A1C RY due to a lapse of time and determining A1C RY "had time to calm down and reflect" prior to making her oral statements, shows the military judge astutely understood the three-part test from Donaldson and ruled accordingly.

Still, Appellant finds fault with the military judge's ruling regarding the text messages, claiming he misapplied the law. Notably, Appellant finds no fault with the portion of the military judge's ruling that *excluded* evidence, even though that portion of the military judge's ruling relies on the same law and analysis as that which he now takes issue.

First, Appellant takes issue with a "burden of persuasion" statement in the military judge's ruling. (App. Br. at 61.) However, on multiple occasions throughout the ruling, the military judge stated that the Court "looks at the totality of the circumstances" in order to be able to determine "by a preponderance of the evidence" whether the statements were excited utterances. Irrespective of which party had a burden of persuasion, the military judge's ruling

clearly shows he understood that the Court must itself determine by a preponderance of the evidence whether or not a statement was an excited utterance. Considering the military judge found one set of statements met this standard and one set did not, this Court should be convinced the military judge understood the burden on this issue and applied it correctly.

Next, Appellant takes issue with the military judge stating, "He grabbed my titty," was a text message sent by A1C RY to SrA TS. (Id.) As shown in Prosecution Exhibit 11, this statement was not part of A1C RY's text messages to SrA TS, but instead was an oral statement made by A1C RY and which was ultimately excluded by the military judge. However, Appellant has failed to show how the military judge's incorrect inclusion of this phrase in the text messages impacted the military judge's ruling in any fashion. Notably, the military judge's ruling on the text messages did not mention this statement at all as a basis for why he found the statements were excited utterances. The military judge did, however, highlight the text message in which A1C RY said she was "furious" about the actions that took place, which swayed much more heavily on whether or not A1C RY was, and remained in, an excited state at the time she sent the messages.

Next, Appellant seems to take issue with whether a text message can qualify as an excited utterance. (Id. at 62.) However, our superior Court has indicated that the medium in which a statement is made does not detract from the spontaneous nature of the statement. United States v. Smith, 83 M.J. 350, 357-58 (C.A.A.F. 2023) (*citing* Mil. R. Evid. 801(A)(2) (defining "statement" for purposes of hearsay rules to include a "written assertion"); *see also* United States v. Gortzig, 2022 CCA LEXIS 515, at *15, (NM. Ct. Crim. App. Aug. 31, 2022) (unpub. op.) (per curiam) (holding that the military judge did not abuse discretion in admitting text messages as excited utterance).) Notably, the appellant in Gortzig cited to the same Supreme Judicial court of

Massachusetts cases that Appellant now cites in his brief to this Court. (App. Br. at 63.) Our sister Court found these citations unpersuasive, stating, "At a time when people—particularly young people—regularly communicate via texts as frequently, or even more frequently, as they do orally on their cell phones, we see no reason to treat such communication methods under different standards. We find this especially true where, as in the instant case, the texts are brief and clearly part of a back-and-forth conversation." Gortzig, 2022 CCA LEXIS 515, at *6 (unpub. op.). This Court should be equally unpersuaded.

Next, Appellant takes issue with the timeline of the texts, claiming that A1C RY was more worried about "logistics of leaving the party" and had "control over her emotions." (App. Br. at 63.) Yet, a review of the text messages shows A1C RY was texting about leaving the party specifically because of what Appellant had just done to her. In the minutes after Appellant first grabbed her breast, A1C RY was looking for her ride, SrA TS, because she was furious. While Appellant attempts to downplay A1C RY saying she was furious because the text was sent "19 minutes" after the initial text, this fact only highlights the anger A1C RY continued to feel after she had been touched by Appellant the first time. Then, as A1C RY testified, Appellant touched her again. Moreover, all of these texts were made within mere minutes of Appellant's touching A1C RY's breasts.

Finally, Appellant believes the statement "It was Sam," which appears to be the only statement he believes is material, "was not a spontaneous outburst," but instead "in response to a question by [SrA] TS." (App. Br. at 64-65.) Yet, SrA TS's text, "Tell me max didn't piss you off tho?," was neither leading nor was it directed to get a specific response from A1C RY. SrA TS did not mention Appellant's name and certainly was not intended to make A1C RY accuse

Appellant of sexual assault or stated in a leading nature meant to destroy the trustworthiness or spontaneity of A1C RY's response.

Further, Donaldson is clear that the fact that a statement is prompted by a question is but one factor in the overall excited utterance analysis. Indeed, the fact that a statement was prompted by a question does not imply that a declarant made the statement as a result of reflection or fabrication. *See* Webb v. Lane, 922 F. 2d 390, 394 (7th Cir. 1991) (the fact that the statements were in response to…questions, although relevant, did not destroy their statements' spontaneity); United States v. Glenn, 473 F.2d 191, 194 (D.C. Cir. 1972) (officer's questions, "What happened? And "Who did it?", did not destroy spontaneity); United States v. Kearney, 420 F.2d 170, 175 n.11 (D.C. Cir. 1969) ("fact that statement made in response to questioning several hours after the precipitating event is not decisive"). Simply put, Appellant here has failed to provide any reason to believe that A1C RY's response was made with any "premeditation, reflection, or design." *See* Gross v. Greer, 773 F.2d 116, 120 (7th Cir. 1985).

In addition to citing the same Massachusetts cases as in Gortzig, Appellant's argument is similar to Gortzig as well. There, the appellant claimed an utterance was a result of reflection, and not spontaneous, because it was written in texts, was made over a 40-minute period, and was mostly in response to questions. Gortzig, 2022 CCA LEXIS 515, at *6 (unpub. op.). However, citing to United States v. Flesher, 73 M.J. 303, 312 (C.A.A.F. 2014), our sister Court held that "where the military judge placed on the record his analysis and application of the law to the facts, deference is clearly warranted." Id. Here, the military judge did just that within his ruling where he properly allowed the introduction of a portion of A1C RY's statements as excited utterances while also denying admission of other utterances. As shown, the military judge applied the correct legal principles in resolving this issue and Appellant has failed to show the

military judge's application of those principles to the facts was clearly unreasonable. Thus, this Court should deny Appellant's claim.

B. Appellant has failed to demonstrate prejudice.

Yet, even if this Court were to agree with Appellant that the military judge abused his discretion in admitting the evidence as an excited utterance, this Court must still address prejudice. Whether prejudice results in the context of an erroneous evidentiary ruling is determined by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999), *citing* United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

Here, the Government's case was very strong. As detailed in Issue VII below, the Government produced an eyewitness who saw Appellant touch A1C RY's breast. The strength of the defense's case, on the other hand, was very weak as it relies solely on a supposed issue with the eyewitness's identification of Appellant.[10] However, as detailed below, there is no issue with the witness's identification of Appellant. Moreover, the eyewitness testimony corroborates A1C RY's statement that "It was [Appellant]." (*See* Pros. Ex. 11.)

All told, the military judge's ruling was not based on an incorrect analysis of the law and was not clearly unreasonable. As such, he did not abuse his discretion. Moreover, even if the military judge did abuse his discretion, Appellant has failed to show prejudice in this case. As such, this Court should deny Appellant's claim.

[10] Notably, in his factual and legal sufficiency issue on this specification below, Appellant makes no argument about the eyewitness's identification of him and, instead, relies solely on the argument that the Government failed to prove Appellant committed the act with the intent to abuse, humiliate, harass, or degrade. (*See* App. Br. at 65-66.)

VII.

APPELLANT'S CONVICTION FOR CHARGE I, SPECIFICATION 9 IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

SrA CS testified that she witnessed Appellant touch A1C RY's breast. (R. at 1634.) SrA CS stated she attended the party at Appellant's house in August 2020 with A1C RY. (R. at 1623.) SrA CS said she considered A1C RY a "very, very close friend of mine" and "a sister." (Id.) At one point during the party, SrA CS said Appellant came and sat next to A1C RY. (R. at 1631.) SrA CS noticed A1C RY's "body language was getting tense" and A1C RY "scoot[ed] farther back in her chair." (R. at 1632.) SrA CS said because of this, she started watching A1C RY more closely "because I could tell she was uncomfortable." (R. at 1633.) SrA CS continued:

> So I just remember that he was getting closer to her. I remember her getting further back in her chair. I remember him trying to -- it's called dapping up. It's like a handshake, like a hello and a goodbye handshake. And I could tell she was very annoyed with that, like she didn't want to be touched.

(R. at 1634.)

SrA CS then said, "So I remember, as he was getting up to leave, I saw him brush her breast as he was getting up to leave." (R. at 1634.) SrA CS continued, "So from what I saw on my side, it looked like he scooped her breast." (R. at 1635.) Though SrA CS could not "100 percent say where he had touched [A1C RY] on her breast," SrA CS said Appellant "touched her breast and then you [sic] stood up and went around her shoulder." (Id.) When testifying, SrA CS held her hand in a cupping motion. When asked if that was how Appellant touched A1C RY's breast, SrA CS responded, "Yes, ma'am." (Id.) On cross-examination, SrA CS described the touch as a "[s]coop, down to up." (R. at 1647.)

SrA CS testified that, from her perception, Appellant's act did not look like an accident and added that if something like that did happen by accident that "you're usually apologetic, and there was no apology from what I remember." (Id.) When asked how A1C RY reacted, SrA CS responded, "She was very closed off. She didn't immediately, like, snap or confront. It was almost like a state of shock, from what I remember." (R. at 1636.)

On cross-examination, SrA CS acknowledged she did not know Appellant's name when she was first notified of the investigation. (R. at 1637.) She also acknowledged not recalling physical characteristics about Appellant, such as his height and build, during a pretrial interview with Appellant's counsel. (R. at 1640.) However, when asked "do you remember seeing his face that night," SrA CS responded, "I do remember. I know it was him. I do not go into a house without meeting the host at least once, or at least knowing who the host is," adding, "I know who he was, because I'm not going to walk into somebody's house and not know who the host is. So I know what he looked like." (R. at 1643-44.)

On redirect examination, SrA CS positively identified Appellant as the person who touched A1C RY's breast. (R. at 1659.) SrA CS said, "I recognized him when I saw him walking up the stairs when I got here, and it was him." (Id.)

AFOSI Special Agent (SA) NC interviewed SrA CS about what she saw that night. (R. at 1759.) When asked, "And in the course of that interview, [SrA CS] understood that she was talking about [Appellant], correct," SA NC replied, "Yes ma'am." (R. at 1769.) When asked, "And you understood that she was talking about [Appellant], correct," SA NC replied, "Yes, ma'am." (Id.)

Standard of Review and Law

The standard of review and law pertinent to this issue is the same as that in Issue III above.

At trial, the military judge instructed the members as to the elements of the offense, as follows:

> (1) That on or about 8 August 2020, at or near Hermersberg, Germany, the accused committed sexual contact upon [A1C RY] by touching her breast with his hand with an intent to abuse, humiliate, harass, or degrade her; and
>
> (2) the accused did so without the consent of [A1C RY].

(R. at 1937.)

Analysis

Within this issue, Appellant does not dispute or raise a legal or factual sufficiency issue with regards to whether Appellant touched A1C RY's breast or whether it was done without her consent. Instead, Appellant for this issue relies solely on his claim that the Government failed to prove Appellant committed this act with an intent to abuse, humiliate, harass, or degrade A1C RY. Instead, Appellant believes the "evidence supports a sexual intent," which he says "was not alleged." (App. Br. at 66.) Appellant is incorrect.

To support his claim, Appellant notes where SrA CS referred to A1C RY as a "very beautiful woman" and that SrA CS described the interaction to AFOSI as "flirting." (Id., *citing* R. at 1631-36, 1763.) Appellant then cites to one sentence in the Government's closing argument by stating, "Even the government, in closing, acknowledged the sexual nature of this interaction: 'the accused seems to be doing some kind of an advance on [RY]. Some sort of *flirting* . . . .'" (App. Br. at 66, *citing* R. at 1965) (emphasis added by Appellant).

Yet, a more thorough review of the trial counsel's closing argument on this point, rather than the highly-selective one-sentence quote provided by Appellant to this Court, disproves Appellant's argument completely. The trial counsel argued:

> Consider the fact that [SrA CS] is in a position to observe this entire night, sitting across the table from her friend [A1C RY]. A friend who she knows very well. A friend who she is keyed in on because she can tell her friend is unhappy. And what did she tell you that she observed? Well first, she observes that *[Appellant] seems to be doing some kind of an advance on [A1C RY]. Some sort of flirting*, some sort of solicitation, nothing criminal. And she observes that initially [A1C RY] is talking back. Engaging with [Appellant]. But then there is a point when that stops. There's a point when that changes. When [A1C RY] sits back in her chair. When she crosses her arms. When she gives that closed off look on her face. And you hear about that closed off look not only from [SrA CS], but also from [SrA TS] who explained that having known her in trying times in the desert on deployment, knowing her as a friend at Ramstein, that he knows that that closed off face is an indication that she is upset.
>
> And [SrA CS] sees her friend getting upset. And then [Appellant] stands up. He hovers behind her, and then he scoops her breast as [SrA CS] testified.
>
> . . .
>
> So as [SrA CS] told you, she doesn't see that [A1C RY's] countenance changes or relaxes. She's still that angry. And then you heard from [SrA TS], and you have that text message in which [A1C RY] says "I'm furious. It was [Appellant]." It's not an accident. There's not an apology. [Appellant] was rejected, and in response to that rejection he demonstrates his power and his control over [A1C RY] when he stands behind her, hovers over her, and then reaches out and grabs her breast.

(R. at 1965-66.) Notably, the italicized portion of the citation above is the only portion of the trial counsel's argument quoted by Appellant in his brief. His omission of these other portions,

especially the last sentence where the trial counsel explains exactly why Appellant had an intent to abuse, humiliate, degrade, or harass A1C RY, is telling.

Here, just as the trial counsel argued, the jurors had ample evidence that Appellant approached A1C RY, sat next to her, and attempted to touch her. (R. at 1633-34.) When she rebuffed him, Appellant got up and, in an attempt to show her he would do what he wanted no matter what she wanted, Appellant cupped A1C RY's breast as he walked and stood behind her shoulder. While Appellant's actions in initially talking and flirting with A1C RY may have had a sexual intent, his basis for grabbing her breast when he got up to leave after being turned down by A1C RY was to abuse, humiliate, degrade, or harass her.

Considering these circumstances, and the fact that the act took place in a crowded room at a party attended by her peers that was witnessed by at least one fellow Airman, this Court should be thoroughly convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, including Appellant's intent to abuse, humiliate, degrade or harass A1C RY in the fashion in which he grabbed her breast. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

VIII.

APPELLANT'S CONVICTION FOR CHARGE I, SPECIFICATION 6 IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts[11]

SrA AN met Appellant in technical school soon after she joined the Air Force in 2016. (R. at 1128.) SrA AN said the two were friends who "would hang out from time to time when we were not working and not doing tech school stuff." (Id.) When she moved to Edwards AFB, the two did not keep in contact.

When SrA AN PCS'd to Vogelweh AB, Germany she met Amn OR. (R. at 1129.) The two were friends who were in training together and arrived to Vogelweh around the same time. Later, Appellant also PCS'd to Vogelweh. SrA AN said when Appellant first arrived to Vogelweh, she, Amn OR, and Appellant hung out. (Id.)

On 27 April 2020, Amn OR received word that he was going to retrain as a paralegal and wanted to celebrate. (R. at 1130.) He asked SrA AN if he could come to her Kaiserslautern apartment that night. Amn OR arrived around 2130 or 2200 hours and the two drank and played trivia in SrA AN's living room. (R. at 1131-32.) Though the two were initially laughing and having a good time, Amn OR soon began calling SrA AN names and was "just being like hateful towards me." (R. at 1132.)

SrA AN began feeling uncomfortable and, at some point, sent Appellant a Snapchat message to come over. (R. at 1133.) When asked why she asked Appellant to come over, SrA

[11] While Appellant does not raise a legal or factual sufficiency issue regarding Charge I, Specification 7, which is the penetration offense involving SrA AN, this section discusses those facts as well since they are pertinent to Issue X below.

AN stated, "I just didn't feel comfortable by myself. [Amn OR] was a bigger man than me. I just didn't want to be there alone." (Id.) She said she called Appellant because he and Amn OR "know each other and they have a good relationship." (Id.)

Once Appellant arrived, the three continued to play trivia and drink. However, Amn OR kept calling SrA AN names, which frustrated SrA AN. SrA AN noticed Amn OR was stumbling into the bathroom and at one point broke one of her candles and was trying to use the bathroom in parts of the house there were not bathrooms. (R. at 1134.) SrA AN knew Amn OR had drank enough, and she asked Appellant "if we can please try to get him out of here." (Id.)

As SrA AN and Appellant attempt to get Amn OR out of the apartment, Amn OR slapped SrA AN and called her a bitch. (R. at 1135.) SrA AN then asked Appellant to give her his phone so she could call Security Forces. At this point, SrA AN said she was crying and upset. Eventually, Security Forces came and took Amn OR away.

At this point, it was the early morning hours of the next day and SrA AN said she was "[s]uper exhausted" and "just wanted to go to bed." (R. at 1137.) Since Appellant had been drinking, SrA AN told Appellant he could stay over. Since she only had a couch that was not very comfortable, SrA AN told Appellant he could sleep in the bed. When asked, "When you offered him the bed were you intending to have sex with him at that point, SrA AN replied, "No." (Id.) On cross-examination, SrA AN stated she was comfortable with Appellant, trusted him, and had known him for years. (R. at 1138.)

When they first laid down, the two started talking about their disbelief of what had happened. Appellant then kissed SrA AN and SrA AN kissed him back. (Id.) SrA AN testified that she was comfortable kissing Appellant and agreed to it. However, things kept progressing. Appellant began getting on top of SrA AN and putting his hand underneath her shirt. SrA AN

told him no, told him to stop, and pushed him off of her. (Id.) However, SrA AN testified that Appellant "would get back on top of me." (Id.)

SrA AN said she could feel Appellant's weight on top of her and that Appellant put his hand under her shirt and touched her breast with his hand, testifying as follows:

> TC: Does he actually touch your breast with his hand?
>
> SrA AN: Yes, the first time he did.
>
> TC: And at that point what did you say to him?
>
> SrA AN: I told him to stop. I kept moving his hands away. He proceeded to do it multiple times. And then once he stopped with like trying to grab my breast, he moved down to my shorts, trying to take them off.
>
> TC: Okay. So after you first tell him "No," it sounds like you push his hand away; is that correct?
>
> SrA AN: Yes.
>
> TC: He then replaces his hand?
>
> SrA AN: He tries to, but I kept pulling away his hands, and then that's when he just, I guess, gave up and then tried to pull my pants down.

(Id.)

On cross-examination, when asked if Appellant touched both of her breasts, SrA AN responded, "Yes." (R. at 1161.) When Appellant's counsel asked, "at no point when he was touching your breast did you push him off," SrA AN replied, "No, I did. When he was touching my breast, I kept pushing him off," later adding, "Pushing him off and moving his hand." (R. at 1165.) Also on cross-examination, Appellant's trial defense counsel asked, "So while he was touching your breasts, he then also went down indicating he wanted to do oral on you, correct?" (R. at 1164.) SrA AN replied, "Yes." (Id.)

SrA AN said Appellant then moved down her body, explaining that "at first he tried to perform oral. So he's trying to take my pants down and then his hand was down there as well, but I kept pulling my pants up and he just continued to try to pull them down." (R. at 1139.) SrA AN "continued to tell him to stop," and tried to physically move him by grabbing his hips. (Id.) SrA AN said she was "panicking" and "felt like I was losing control." (Id.) When later asked what she meant by losing control, SrA AN said, "Just the multiple times I had to say no. I mean, I shouldn't have had to say it that many times." (R. at 1189.) When asked how she was telling Appellant no, SrA AN responded, "I wasn't whispering. He could hear me." (R. at 1139.)

When asked if she began crying, SrA AN responded, "Yes," adding, "After he pulled my shorts and my underwear to the side and he forced himself into me, then I began sobbing." (R. at 1140.) SrA AN said Appellant put his penis inside her vagina. At this point, as she was being penetrated against her will and crying, SrA AN said, "I don't say anything and I kind of give up. And he goes on for about 2 or 3 minutes, and then he stops and gets off me." (Id.) During that two to three minutes, SrA AN said she was crying throughout "pretty loud," adding, "I was having like a panic attack, so I was like breathing really hard." (Id.) SrA AN said she had actual tears running down her face.

Once he was done, SrA AN said Appellant "got off me, got to the side of the bed, and I just told him to leave." (R. at 1141.) On cross-examination, SrA AN said, "I told him I don't care where he goes, I just want him to leave this room." (R. at 1173.) Once he was out of the room, SrA AN immediately sent a text to TSgt MS, someone she knew and trusted.

The text messages sent between SrA AN and TSgt MS are at Prosecution Exhibit 1. (R. at 1230.) The first text message sent by SrA AN read, "Hey I know this is none of your business

but I just got raped and idk what to do and you're the only person that [sic] talk to so yeah. A lot of bad shit happened tonight & I'm very lost." (Pros. Ex. 1.)

SrA AN said her first text was sent five to 10 minutes after the sexual assault took place. (R. at 1141.) SrA AN said she was still crying, upset, and panicking. She said Appellant was still in the house so she locked her door and waited on TSgt MS, who said he was on his way. At that point, she also told Appellant to leave the house because she did not want an altercation between TSgt MS and Appellant. (R. at 1142.)

When TSgt MS arrived, SrA AN told him what happened and TSgt MS said he would handle it. (Id.) TSgt MS told SrA AN to be by her phone and left to go talk to his leadership. SrA AN said she slept for a couple of hours. She asked TSgt MS if she was allowed to shower and he said yes, so she took a shower. (Id.) SrA AN then went to the Air Force Office of Special Investigations (AFOSI) to give a statement and then went to the Landstuhl Regional Medical Center (LRMC) where a SANE kit was performed on her. (R. at 1142-43.)

TSgt MS testified that after he received the text message from SrA AN that Appellant had raped here, TSgt MS tried to call SrA AN but she did not answer. (R. at 1231.) He then got dressed and drove to her house. During the drive, TSgt MS called the First Sergeant and eventually received a call from SrA AN. TSgt MS said she was "shaken up" and crying, adding that she "was kind of whispering because she said he was still there." (R. at 1232.) TSgt MS said that "as she was crying, she was like losing her breath," and that is "was like a panic hyperventilating type cry." (Id.)

When he arrived, TSgt MS said SrA AN told him that "she kept telling [Appellant] to stop and he wouldn't stop," and that she "felt helpless." (R. at 1234.) TSgt MS testified, "She told me that there is no way that [Appellant] couldn't have heard her say stop, because she said it

loud enough." (R. at 1242.) After the two talked, SrA AN fell asleep on the couch while TSgt MS went outside to talk to patrolmen who had responded to the call. (R. at 1235.) Later, TSgt MS drove SrA AN to AFOSI and then to the LRMC. (Id.) TSgt MS agreed that he told SrA AN not to shower or change clothes and to not touch anything in her room. (R. at 1245.)

Ms. MC, a forensic biologist, performed DNA testing on the SANE kits from SrA AN and Appellant. (R. at 1312, 1319.) Her report is at Prosecution Exhibit 12. Ms. MS testified that Appellant's semen was found on SrA AN's body and that SrA AN's DNA was found on Appellant's scrotum sack, pubic mound, and in his underwear. (R. at 1324-1328.)

Standard of Review and Law

The standard of review and law pertinent to this issue is the same as that in Issue III above.

At trial, the military judge instructed the members as to the elements of the offense, as follows:

> (1) That on or about 26 April 2020, at or near Kaiserslautern, Germany, [Appellant] committed sexual contact upon [SrA AN] by touching her breast[s] with his hand with the intent to gratify his sexual desire, and
>
> (2) That [Appellant] did so without the consent of [SrA AN].

(R. at 1932.)

Analysis

Here, SrA AN's testimony plainly shows Appellant touched her breasts without her consent. SrA AN testified that Appellant first touched her breast and that she "told him to stop" and "kept moving his hands away." (R. at 1138.) SrA AN then said Appellant "proceeded to do it multiple times." (Id.) While SrA AN said Appellant kept "tr[ying] to" and that she "kept

pulling away his hands," SrA AN clarified any confusion as to whether Appellant was actually touching her breasts and she was pushing him off or merely *trying* to touch her breasts when Appellant's trial defense counsel asked, "at no point when he was touching your breast did you push him off?" (R. at 1165.) SrA AN definitely responded, "No, I did. When he was touching my breast, I kept pushing him off," later adding, "Pushing him off and moving his hand." (R. at 1165.) SrA AN's use of the word "kept" at this point is notable because it implies she had to physically remove Appellant's hand from her breasts multiple times.

Given the context of SrA AN's testimony, and especially her clarifying statement on cross-examination, the evidence shows that Appellant touched SrA AN's breasts, she told him to stop, and he then kept touching her breasts, requiring SrA AN to "ke[ep] pushing him off." (R. at 1138, 1165.) This sequence of events, based on SrA AN's testimony, was recounted by the trial counsel during the Government's closing and rebuttal arguments when the trial stated the following:

- In closing argument: "[SrA AN] thought that when she told the accused 'no,' he would respect what she said, and he would stop. She said no after she touched her breast and she moved his hand away. He didn't stop. He reached back and he touched her again. That's an abusive sexual contact." (R. at 1956.)

- In rebuttal argument: "[SrA AN] testified that the accused put his hand inside her shirt to touch her breast and she said 'no.' A reasonable person who hears the word 'no' and has someone pull her hand away from their breast is aware that they do not have consent to touch that person's breast. She testified that he proceeded to do it a couple more times. The charge you have is that time he touches her breast after she had said 'no.' That's what's charged." (R. at 2020.)

Still, Appellant claims otherwise, arguing that SrA AN "was explicitly clear that he did not touch her breast again after she removed his hand the first time." (App. Br. at 69.) However, Appellant's brief only cites to SrA AN's testimony on direct examination. Appellant notably fails to cite to SrA AN's testimony during cross-examination when she plainly states that "When he was touching my breast, I kept pushing him off." (R. at 1165.) While Appellant claims that SrA AN "expressly disclaimed" the charged act, SrA AN's testimony, including her statements on cross-examination which are omitted by Appellant in his brief, shows otherwise. The panel, who had the opportunity to hear SrA AN's testimony firsthand, recognized and understood the full context of SrA AN's testimony and properly found Appellant guilty of abusive sexual contact.

Considering the full context of SrA AN's entire testimony, this Court should be thoroughly convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, including Appellant's continual touching of SrA AN's breasts. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

IX.

APPELLANT'S TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.

Standard of Review

Ineffective assistance of counsel claims involve mixed questions of law and fact: "[t]his Court reviews factual findings under a clearly erroneous standard, but looks at the questions of

deficient performance and prejudice *de novo*." United States v. Gutierrez, 66 M.J. 329, 330-331 (C.A.A.F. 2008).

Law

To show ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). In reviewing for ineffectiveness of counsel, the Court addresses issues of performance and prejudice *de novo*. *See* Gutierrez, 66 M.J. at 330-331 (discussing the test for claims of ineffective assistance of counsel).

With regard to the first prong of Strickland's two-pronged test, courts give deference to counsel and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To establish deficient performance, an appellant must establish his counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (quoting Strickland, 466 U.S. at 690). Because an ineffective-assistance claim may be used "as a way to escape the rules of waiver and forfeiture and raise issues not presented at trial...the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." Id.

When addressing the second prong, an appellant must demonstrate a "reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." Strickland, 466 U.S. at 694. That is to say, an appellant has the burden of showing the results of the trial would have been different but for the deficiency. *See* Id., at 694;

see also Harrington, 131 S. Ct. at 787-88 (noting the error or deficiency must be so serious that a defendant was deprived of a fair trial with reliable results).

In addressing claims of ineffective assistance of counsel, the Court of Appeals for the Armed Forces applies the following three-part test to determine whether or not the presumption of counsel's competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance...[ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

In reviewing the decisions and actions of trial defense counsel, a reviewing Court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See* United States v. Davis, 60 M.J. 469, 474 (C.A.A.F. 2005).

In other words, "disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some reasoned basis." United States v. Mansfield, 24 M.J. 611, 617 (A.F.C.M.R. 1987). *See also* United States v. McIntosh, 74 M.J. 294, 296 (C.A.A.F. 2015). In

assessing claims of ineffective assistance of counsel, appellate courts do not look at the success of a defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001)(*citing* United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998).

Analysis

In his brief, Appellant claims that his counsel "wholesale failed to present evidence, however, that [SrA AN] herself had reported consensual sucking of her breasts during the SANE exam." (App. Br. at 72.) His claim centers on the SAFE Report, DD Form 2911, which has a note stating, "sucking consensual." (App. Ex. LXXIX at 5.)

In a response to an Order by this Court, each of Appellant's trial defense counsel provided an affidavit or declaration regarding this allegation. (*See* Aff. of Maj CCD, Aff. of Maj CM, and Dec. of Capt MC.)[12]

Maj CCD stated the "decision to forgo confronting [SrA AN] with her alleged statement to DA regarding 'consensual sucking' was made following significant deliberation by the entire defense team." (Aff. of Maj CCD.) Maj CCD explained the pros and cons of admitting the alleged "consensual sucking" statement into evidence as follows:

> While assessing the value of confronting [SrA AN] with her alleged statement to DA referring to "consensual sucking," we weighted strategic and tactical considerations. In doing so, we concluded we stood to lose more than we could gain by admitting the alleged statement into evidence. We knew [SrA AN] would either deny or claim she did not remember making the statement to DA. In fact, [SrA AN] testified to being so exhausted that she felt 'half asleep' during most of the examination. Therefore, we knew we would need

[12] The Government moved to attach these affidavits and declaration on 20 February 2024. This Honorable Court granted that motion on 29 February 2024.

> to complete the impeachment some other way. Given DA's credibility issues and the facts we were attacking her competency as forcefully as we were, we believed she was not a witness to whom we should rely. That left us with the report DA authored, which was subject to the same credibility attacks. Furthermore, if we introduced the portion of the report containing the statement in question, we risked two things. First, it would have arguably opened the door to the rest of [SrA AN's] (consistent) statements contained in the report. Additionally, it would have caused the defense team to lose some credibility with the panel members, since we were asking them to discount everything DA did, while at the same time telling them to trust DA accurately captured the "consensual sucking" quote in her report.

(Id.)

Considering these issues, the defense team recognized they had, as Maj CCD puts it, "other means to call into question [SrA AN's] trustworthiness." (Id.) Maj CCD stated the defense team impeached SrA AN's testimony using her AFOSI interview, which Maj CCD said "allowed us to argue [SrA AN] was lying about or minimizing her willingness to engage in consensual sexual conduct with [Appellant] on the night in question . . . ." (Id.) Maj CCD also stated the defense team "impeached [SrA AN's] credibility by confronting her with the fact she was flirting and extremely affectionate with [Appellant] shortly before the alleged assault . . . ." (Id.)

Additionally, Maj CCD noted "we were able to elicit, during [SrA AN's] cross-examination, that she had petechiae on her breasts and locked her into her testimony that [Appellant] never sucked her breasts." Maj CCD continued the defense was later able to establish testimony that petechiae may be caused by someone sucking on the skin and that Appellant's DNA was found on swabs taken from SrA AN's breasts. (Id.) Considering these other options for attacking SrA AN's credibility, Maj CCD stated the defense team made the

strategic decision not to pursue introducing evidence regarding the alleged "consensual sucking" statement made during the SANE exam.

Maj CM's affidavit and Capt MC's declaration provide similar reasoning. Maj CM states the defense team "determined that adopting either DA's testimony or her report as the proponent of the evidence would be more likely to hurt our built credibility with the fact finder." (Aff. of Maj CM.) Maj CM also highlighted that the "Government had utilized each presentation of prior inconsistent statements as a mechanism for putting in prior consistent statements." (Id.) Considering the multiple avenues the defense team had attacked SrA AN's credibility and "[h]aving ended the presentation of evidence related to [SrA AN] on strong prior inconsistencies and contradictions," Maj CM said the defense team "believed it would do more harm to open [SrA AN's] case for the Government to put in additional prior consistent statements that a sexual assault had occurred."

Here, each of Appellant's trial defense counsel provide reasonable explanations for why Appellant's defense team did not present the evidence in question. The team recognized they had other means of attacking SrA AN's credibility and that they could get evidence through other witnesses that the presence of petechiae on SrA AN's breast meant Appellant had sucked on them. While Appellant now states his defense team should have gone one step further and either asked SrA AN about her prior statement during the SANE report or introduced the report itself, Appellant fails to take into account the pitfalls of such a strategy.

Appellant's defense team, however, recognized these pitfalls and realized that asking SrA AN would result in a denial, which would necessitate either introducing the report itself or relying on testimony from DA, the very witness the defense sought to discredit throughout the trial. As Maj CCD explains above, the minefield of pursuing these questions had more negative

consequences than positive aspects, including a real possibility that the defense team's own credibility with the panel would be negatively impacted. Appellant notably fails to recognize any of these pitfalls within his brief, let alone explain why his defense team's strategy to avoid these pitfalls was unreasonable or somehow fell measurably below the performance ordinarily expected of fallible lawyers. Instead, Appellant simply asserts that "[f]ailing to present this evidence was a specific and unreasonable error," and there was "no tactical or strategic reason to do so." (App. Br. at 72.) Each of his counsel's statements, however, proves otherwise.

The statements from Appellant's trial defense counsel demonstrate a sound approach to Appellant's defense, and a reasonable, "tactical decision[] made at the trial." Mansfield, 24 M.J. at 617. Thus, Appellant's trial defense counsel did not perform deficiently, and their decision to not introduce SrA AN's SANE report statements does not overcome the "strong presumption" that their conduct was within the "wide range of reasonable professional performance." Strickland, 466 U.S. at 689. Additionally, because this was a tactical decision and this Court should not second-guess strategic or tactical decisions on review, Appellant's ineffective assistance of counsel claim must fail. Strickland, 466 U.S. at 689; Morgan, 37 M.J. at 410.

Likewise, Appellant has failed to show any prejudice as there is no reasonable probability that, absent any alleged errors, there would have been a different result. Each of Appellant's counsel explain how they were still able to argue consensual breast sucking did occur even without introducing the "consensual sucking" statement from the SANE report. Further, while Appellant only addresses the benefits of introducing SrA AN's "prior admission that the encounter had progressed to consensual beast sucking" in his prejudice argument, he again fails to account for the numerous consequences his defense team would have faced if the SANE report had been introduced. As discussed above, the affidavits and declaration from his trial

defense counsel show how Appellant's defense team protected their client from additional damaging information finding its way into the record and being placed before the panel. Thus, Appellant's claim must fail.

X.

APPELLANT HAS NOT DEMONSTRATED PLAIN ERROR IN TRIAL COUNSEL'S FINDINGS ARGUMENT.

Standard of Review and Law

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (*citing* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018), where our superior Court stated it will "continue to review unobjected to prosecutorial misconduct and improper argument for plain error.). Id. The burden of proof under a plain error review is on the appellant. Id.

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005).

Notably, a plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

For improper argument, a court must determine under a plain error analysis, (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Additionally, trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

Analysis

From a general standpoint, Appellant has cherry-picked a few snippets from the trial counsel's nearly one-hour argument, snippets which garnered no objection at trial, and now declares that the trial counsel "committed prosecutorial misconduct." (App. Br. at 73-81.) Such a tactic is a classic example of "surgically carving" out a portion of an argument without regard for context, a tactic frowned upon by our superior Court, and should be dismissed by this Court.

When viewed within the context of the entire court-martial, or simply just within the context of the findings argument itself, the trial counsel did not commit prosecutorial misconduct. The trial counsel's closing argument spanned 19 pages of transcript and lasted approximately fifty-eight minutes.[13] (R. at 1525-38.) Appellant's trial defense counsel did not object to the any of the statements Appellant now claims amounts to prosecutorial misconduct.

The overwhelming majority of the trial counsel's closing argument, 15 of 19 pages, is never cited by Appellant in this issue and Appellant cites to only small portions from the four pages he does mention in his brief. In the 12 pages not cited by Appellant in his brief, the trial counsel explained the evidence of the case and tied it to the elements of each offense.

Moreover, while the majority of Appellant's claims here allege the trial counsel was attempting to vouch for the credibility of A1C KB and SrA AN, he failed to cite to the initial moments of the trial counsel's argument when the trial counsel stated plainly, "It is your duty, and your duty alone to determine which witnesses are credible and which witnesses are not." (R. at 1950.)

[13] Appellant's court-martial convened at 1408 on 24 May 2022. (R. at 1950.) The trial counsel's argument began immediately and ended at 1506 when the court recessed. (Id. at 1969.)

- ***Trial Counsel's Closing Argument– A1C KB***

Appellant first claims the trial counsel "improperly vouched for [A1C] KB's credibility" by stating, "Her report does not gain her anything. Her testimony in court does not gain her anything. She doesn't have a motive to lie in her testimony before this court. She told you what she remembered to the best of her knowledge, her recollection, and her belief. Consider all of that in assessing her credibility and that her testimony establishes that the accused sexually assaulted her and committed abusive sexual contact against her beyond a reasonable doubt." (App. Br. at 76, *citing* R. at 1964.)

Appellant claims error because he believes "CAAF has repeatedly found plain and obvious error in comparable statements." (App. Br. at 76, *citing* United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019), United States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021). Appellant is mistaken.

First, Appellant, in his brief, takes extreme liberties in stating what he claims "the CAAF found 'clearly' improper in Norwood." (App. Br. at 75.) In fact, Appellant himself is forced to admit in a footnote that his examples of "objectionable arguments" come from the parties' briefs, not CAAF's actual opinion. (App. Br. at 76, fn 38.)

Here, the context of the trial counsel's arguments are quite different from those contained in Voorhees or Norwood. The trial counsel never claims that A1C KB's testimony was "the truth" or that her testimony was "not a lie." Instead, the trial counsel was simply rebuffing an argument Appellant made throughout trial and still to this Court – that A1C KB was a liar. (*See* App. Br. at 29, 38, 42, 73.) The trial counsel stating that A1C KB had to motive to lie or anything to gain from her testimony, when read in context, does not vouch for A1C KB's credibly. Vouching for a witness's credibility occurs when a trial counsel "places the prestige of

the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (*quoting* United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1994)). This could occur, for example, by saying that the government would not call a witness to the witness stand who was lying. However, a trial counsel is allowed to argue that a witness should be found to be credible and explain why an appellant's attacks against that witness's credibility are unpersuasive. That is what occurred in this case. There is no error here, let alone plain error.

Next, Appellant takes aim at the trial counsel's statement that A1C KB "told you what she remembered to the best of her knowledge, her recollection, and her belief." (App. Br. at 76, *citing* R. at 1964.) Here, Appellant renews his unpersuasive arguments from Issues IV and V above by stating the government "knew or should have known that her testimony at trial was evasive, incomplete, and inconsistent with her pretrial statements to the government." (App. Br. at 77.)

However, again, as discussed in Issue IV and V, A1C KB's testimony was not evasive, incomplete or inconsistent. A1C KB on numerous occasions did not deny ever kissing Appellant. Instead, she stated that one two occasions she did not recall kissing Appellant. While Appellant continually calls this testimony a denial by A1C KB, her testimony shows otherwise. Further, as previously discussed, A1C KB's pretrial statement to a trial counsel only stated that she *may have* kissing Appellant on the first night she met him, a statement that was not inconsistent with any of A1C KB's in-court testimony. Thus, just as in Issues IV and V above, Appellant has failed to show any improper motive or action by the trial counsel in her closing argument.

Here, the trial counsel's closing argument was not in error, let alone plain error. Further, even if they were in error, Appellant fails to show how any of his complaints resulted in prejudice against him.

To start, the actions of the panel show their decisions were theirs and theirs alone and were unimpacted by any alleged errors on the part of the trial counsel. The panel, by exceptions to Specification 4, excluded the October 2019 allegation made by A1C KB against Appellant. This action alone shows the panel was not impacted by any alleged credibility vouching by the trial counsel.

Further, while he does cite Fletcher and its prejudice test, Appellant's justification that he was actually prejudiced is lacking. Looking at those factors, any "severity" of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to any of Appellant's numerous newfound complaints in his brief.[14] While Appellant again turns to his alleged discovery violation in Issue IV, claiming the "severity is considerably increased when considered in context of the discovery violation" in Issue IV, a review of Appellant's Issue IV above shows that issue does not garner relief in its own right and should likewise not be factored into any prejudice analysis for this issue.

Next, while Appellant complains that "[n]o specific curative measures were taken," Appellant is forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel to which Appellant now takes issue. Further, Appellant fails to note the military judge cured any potential errors regarding alleged vouching for witness

[14] While Appellant did raise an ineffective assistance of counsel claim against his trial defense counsel, that claim was not based on his counsel not objecting to these specific portions of the trial counsel's closing argument.

credibility when the military judge provided the following instruction immediately after the trial counsel concluded her findings argument:

> Members, if you believe you heard either counsel express their personal opinion about a witness's character or strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer their personal opinions, this was merely argument. Neither counsel's personal opinions, personal qualifications, or personal conduct in court are matters relevant for your consideration in considering the matters before you. You and you alone determine the credibility of the witnesses and whether the government has proven the elements of an offense beyond a reasonable doubt.

(R. at 2021.) Court members are presumed to follow the military judge's instructions absent evidence to the contrary. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). Appellant notably fails to discuss this instruction or fails to shown any evidence that the court members did not follow the military judge's instruction. In fact, the record shows the members followed those instructions considering their decision to essentially acquit Appellant of the October 2019 allegation involving A1C KB.

Finally, as shown in the factual and legal sufficiency issue above within this brief, the "weight of the evidence supporting" Appellant's convictions involving A1C KB were very strong. While Appellant claims "weight of the evidence was far from overwhelming," Appellant simply renews the same unpersuasive arguments he raised in Issue III above. For the same reasons discussed in Issue III above, Appellant fails to show prejudice here.

Accordingly, even if the trial counsel's arguments regarding A1C KB were in plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

- ***Trial Counsel's Closing Argument– SrA AN***

Next, Appellant complains that the trial counsel "improperly utilized personal pronouns" when discussing SrA AN's testimony when the trial counsel stated, "What we know from that

report, without any doubt, is that the accused's semen was on [AN's] body," and "We know that the SAFE, the sexual assault nurse who performed the exam was struggling." (App. Br. at 79, *citing* R. at 1953-54.) Appellant also complains, as he did with regards to A1C KB above, that the trial counsel stated that SrA AN had "[n]o motive to lie then, no motive or reason to lie to you in court this week." (Id.)

Notably, Appellant fails to cite to the portion of the trial counsel's argument where she said the following:

> It is your duty, and your duty alone to determine which witnesses are credible and which witnesses are not. And for this specification in particular, for these two, what it really comes down to is whether [SrA AN] testified credibly before you. And this instruction from the military judge is the factors that you'll apply in determining whether that testimony was credible and whether that testimony is sufficient for the prosecution to prove beyond a reasonable doubt that the accused sexually assaulted [SrA AN].

(R. at 1950.) Here, the trial counsel was plainly telling the panel that the issue credibility was left solely to them. Appellant's failure to cite this portion of the trial counsel's argument again only highlights why such "surgically carving" out a portion of an argument without regard for context is a tactic frowned upon by our superior Court, and should be dismissed by this Court.

Additionally, no objection was made at trial concerning this issue. Moreover, despite no objection from Appellant, the military judge still gave an instruction regarding arguments vouching for witness credibility and that the panel members "alone determine the credibility of the witnesses." (R. at 2021.)

Further, while Appellant again attempts to analogize this case to Fletcher, the trial counsel's argument in this case differed greatly from the argument used by the trial counsel in Fletcher, which included repeated use of the pronoun "I." *See* Fletcher, 62 M.J. at 180.

Instead, this case is more analogous to the argument found in United States v. Causey, 82. M.J. 574 (N-M Ct. Crim. App. 2022). There, our sister Court held that repeated use of the word "we" and the term "we know" did not constituted improper vouching. Instead, the Court held that the "trial counsel's use of pronouns was clearly directed toward urging conclusions to be drawn from the evidence." Id. at 582. Examples included, "We know it began as an operation," "we know it did not," "we know he intended to send it to her," "We have the language," "We have the request for child pornography," "we know [appellant] did because he was communicating clearly," "we know he knew exactly what was going on," "we know that his browsing history shows he was actually looking for porn," and "We know he wanted pictures." Id. at 582-83. The Court held these statements were "properly focused on drawing reasoned conclusions from the evidence in the record, as opposed to expressing personal opinions regarding the credibility of witnesses or other evidence." Id.[15]

Here, Appellant complains of statements that are quite similar to those in Causey, including "we know from that report," and "We know that the SAFE, the sexual assault nurse who performed the exam was struggling." (App. Br. at 79.) Just as in Causey, the trial counsel's argument was not expressing personal opinions on the credibility of the witnesses or evidence

[15] *See also* United States v. Smith, ACM 40202, 2023 CCA LEXIS 196 at *32 (A.F. Ct. Crim. App. 5 May 2023) (unpub. op.) (this Court, citing Causey, found various "we know" and "we have heard" comments did not amount to prejudicial error were used to reference matters in evidence and how the members should consider such evidence in light of the military judge's instructions); *see also* United States v. Champion-Flores, No. 202100088, 2022 CCA LEXIS 564, at *34 (N-M Ct. Crim. App. Sep. 30, 2022) (following Causey, our sister Court held statements such as "How do we know," and "We all know the reality," were properly focused on drawing reasonable conclusions from the evidence as opposed to expressing personal opinions regarding the credibility of the witnesses or other evidence.")

but instead was "properly focused on drawing reasoned conclusions from the evidence in the record." *See* Causey, 82 M.J. at 583.

Finally, while the Appellant sites to two times where the trial counsel used the word "we" to allegedly vouch for the evidence, the trial counsel also used the phrase "you heard" over 30 times and "you saw" five times. When viewed as a whole, Appellant did not impermissibly vouch for the evidence in this case.

As to Appellant's complaints regarding the trial counsel's argument about SrA AN's motive to lie, Appellant again takes liberties in stating what he claims "the CAAF found 'clearly' improper in Norwood." (App. Br. at 79.) Overstatements aside, just as with A1C KB above, the context of the trial counsel's arguments are quite different from those contained in Voorhees or Norwood. The trial counsel never claims that SrA AN's testimony was "the truth" or that her testimony was "not a lie." The trial counsel explaining why SrA AN had no motive to lie, when read in context, does not vouch for SrA AN's credibly. There is no error here, let alone plain error.

Appellant has also failed to show how any of his complaints resulted in prejudice against him. First, any "severity" of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to any of Appellant's numerous newfound complaints in his brief.[16] Further, as noted above, the trial counsel began her argument by plainly telling the members that it was there "duty alone to determine which witnesses are credible," a crucial statement omitted by Appellant in his brief.

[16] Again, while Appellant did raise an ineffective assistance of counsel claim against his trial defense counsel, that claim was not based on his counsel not objecting to these specific portions of the trial counsel's closing argument.

Next, while Appellant complains that "[n]o specific curative measures were taken," Appellant again fails to note the military judge cured any potential errors regarding alleged vouching for witness credibility when the military judge provided the instruction listed above. (*See* R. at 2021.) Again, court members are presumed to follow the military judge's instructions absent evidence to the contrary, and Appellant has failed to show any evidence that the court members did not follow the military judge's instruction.

Finally, the "weight of the evidence supporting" Appellant's convictions involving SrA AN were very strong. Even Appellant admits his case here is even weaker than that with the comments made about A1C KB, which have already been shown about to be nonprejudicial. (See App. Br. at 80.) While Appellant claims the weight of the evidence was "not overwhelming," Appellant notably did not raise a factual or legal sufficiency issue with this Honorable Court regarding the penetration offense involving SrA AN. A review of the facts regarding this specification are contained with Issue VIII above and show the overwhelming evidence that Appellant penetrated SrA AN's vulva with his penis. As to the touching offense, Issue VIII above overwhelming shows Appellant touched SrA AN's breast without her consent. Accordingly, even if the trial counsel's arguments were in plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

- ***Cumulative Error Doctrine***

In both this issue and in Appellant's sealed Issue IV, Appellant raises the cumulative error doctrine, stating, "this Court should consider prejudice from this improper argument cumulatively with the prejudice from the Brady violation discussed in A.E. III, as well as any other error this Court finds." (App. Br. at 79.)

"The cumulative effect of all plain errors and preserved errors is reviewed de novo." United States v. Pope, 69 M.J. 328, 334 (C.A.A.F. 2011) (citations omitted). This Court will reverse a conviction only if it finds that the cumulative errors denied Appellant a fair trial. Id. (citations omitted).

As discussed throughout the United States' answer, no errors occurred at the trial level, much less several errors, and therefore nothing prevented Appellant from receiving a fair trial. The cumulative error doctrine requires the finding of error to invoke it. *See* United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999) ("The implied premise of the cumulative-error doctrine is the existence of errors...Assertions of error without merit are not sufficient to invoke this doctrine"). Given the fact none of the issues raised by Appellant are errors, this Court should affirm the findings of guilt and sentence.

XI.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

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

Law and Analysis

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively

held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court recently denied certiorari in Anderson. *See* Order List, 601 U.S. __ (Feb. 20, 2024) (available at https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf.*)* Accordingly, Appellant's claim must fail.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 4 March 2024 via electronic filing.

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4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)))))))))	MOTION TO EXCEED PAGE LIMIT ACM 40363 Panel No. 3

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Supplemental Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his 84-page Assignments of Error brief. Appellant raises a total of 11 issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

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

[redacted]

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I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 4 March 2024 via electronic filing.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 March 2024, appellate government counsel submitted a Consent Motion to Transmit Sealed Materials. Specifically, appellate government counsel requested permission for the Government to electronically transmit—via DoD SAFE—the sealed portion of its answer to Appellant's assignments of error brief to Mr. Scott Hockenberry and Mr. Brad Simon, Appellant's civilian appellate defense counsel, "who are not located at Joint Base Andrews." Appellant's counsel consent to this request.

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

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

ORDERED:

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

Government appellate counsel are permitted to scan a hard copy of the sealed material and to transmit encrypted files containing the above-mentioned sealed material to Mr. Scott Hockenberry and Mr. Brad Simon via DoD SAFE.

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

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

FOR THE COURT

[redacted]

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

4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	CONSENT MOTION TO TRANSMIT SEALED MATERIALS
v.	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant.*	)	Panel No. 3

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

Pursuant to this Honorable Court's Rules of Practice and Procedure, the United States moves for permission to electronically transmit via DoD Safe one copy of the portion of its Answer to Appellant's Assignments of Error that it filed under seal on 4 March 2024 to Mr. Scott Hockenberry and Mr. Brad Simon, Appellant's civilian appellate defense counsel. Transmitting the sealed brief via DoD Safe provides the most time efficient and secure method for service to Appellant's civilian counsel, who are not located at Joint Base Andrews. Undersigned counsel has consulted with Mr. Hockenberry regarding this motion to transmit and he consents to the defense receiving the sealed brief via DoD Safe.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant this motion.

[redacted]

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[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate counsel, and the Air Force Appellate Defense Division on 4 March 2024 via electronic filing.

[redacted]
G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY (FIRST)**
v.	)	Before Panel No. 3
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 4 March 2024

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

Pursuant to Rule 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for an enlargement of time (EOT) to file a Reply to the Government's Answer. The Government filed its Answer to the Brief on Behalf of Appellant on 4 March 2024. Appellant's Reply Brief is currently due on **11 March 2024.** Appellant requests an enlargement for a period of 7 days, which will end of **18 March 2024.**

The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 488 days have elapsed. On the date requested, 502 days will have elapsed.

Good cause exists for this 7-day EOT. The Government's Answer is 118 pages total, to include the portion of the Answer the Government has requested to file under seal. Additionally, Mr. Brad Simon and Mr. Scott Hockenberry, Appellant's civilian appellate defense counsel, have not yet the full and complete Government Answer, since a portion of it will be filed under seal. On 4 March 2024, the Government filed a Consent Motion to Transmit Sealed Materials with this Court requesting permission to send a copy of the portion of the Government's Answer filed under seal to Mr. Hockenberry and Mr. Simon. However, it may take a couple of days for this Court to act on

that motion, and then for the Government to transmit the materials to Mr. Hockenberry and Mr. Simon. The length and complexity of this case, to include the delay in all counsel receiving the portion of the Government Answer filed under seal, justifies a short enlargement.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum.

The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 Prosecution Exhibits, 3 Defense Exhibits, 151 Appellate Exhibits, and 2 Court Exhibits. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 16 clients and is presently assigned 11 cases pending brief before this Court. This case is counsel's first priority.

Through no fault of Appellant, his counsel are unable to fully review the Government's

Answer and file a Reply Brief before this Court's current deadline.

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

Respectfully submitted,

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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 4 March 2024.

Respectfully submitted,

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6 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY ACM 40363 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 does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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CERTIFICATE OF FILING AND SERVICE

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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4 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO FILE ANSWER TO SUPPLEMENTAL ASSIGNMENT OF ERROR UNDER SEAL
v.	)	
	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Panel No. 3

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

Pursuant to Rules 13.2(b) and 23.3(o) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States requests to file under seal its Answer to Issue IV of Appellant's Assignments of Error. The Answer is in response to Appellant's Issue IV, which was also filed under seal, and cites information from documents filed under seal by Appellant.

WHEREFORE, the United States respectfully requests this Court grant this motion to file under seal its Answer to Issue IV of Appellant's Assignments of Error.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 4 March 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY (SECOND)**
v.	)	Before Panel No. 3
Senior Airman (E-4) **SAMUEL A. DOROTEO** United States Air Force *Appellant*	)	No. ACM 40363 11 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, Senior Airman Samuel A. Doroteo, Appellant, hereby moves for an enlargement of time (EOT) to file a Reply to the Government's Answer, until **27 March 2024**.

The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 495 days have elapsed. On the date requested, 511 days will have elapsed.

The Government filed its Answer to the Brief on Behalf of Appellant on 4 March 2024. On the same day (4 March 2024), the Government also filed a Motion to Exceed Page Limitations, a Motion to File Under Seal, and a Consent Motion to Transmit Sealed Materials; Appellant did not oppose any of the motions. This Court has not yet acted on the three Government motions.

Pursuant to A.F. CT. CRIM. APP. R. 17.3, "A Motion to Exceed Page Limit will toll the due date for any responsible filing for opposing counsel until the Court has ruled on such motion." However, out of an abundance of caution, Appellant filed a Motion for EOT for Reply (First) on 4 March 2024. Appellant requested a 7-day enlargement with the due date of Appellant's Reply Brief set for 18 March 2024. This Court approved the EOT.

A.F. CT. CRIM. APP. R. 17.3 seems to indicate that Appellant does not yet have a deadline

for his Reply Brief, since this Court has not yet acted on the Motion to Exceed Page Limit. However, because this Court previously approved Appellant's first EOT request with a due date of 18 March 2024, Appellant files this second EOT request out of an abundance of caution. Assuming this Court is following the approved EOT request (and the Government Motion to Exceed Page Limit is not tolling the due date for Appellant's Reply), then Appellant's Reply Brief is currently due on **18 March 2024.** Appellant requests an enlargement for a period of 9 days, which will end on **27 March 2024.**

Good cause exists for this EOT. The Government's Answer is 118 pages total, to include the portion of the Answer the Government has requested to file under seal. Mr. Brad Simon and Mr. Scott Hockenberry, Appellant's civilian appellate defense counsel, have not yet received the full and complete Government Answer, because the Government's Motions to File Under Seal and Motion to Transmit Sealed Materials are pending before the court. The portion that the Government has requested be filed under seal has not yet been sent to Mr. Simon or Mr. Hockenberry. The length and complexity of this case, to include the delay in all counsel receiving the portion of the Government Answer filed under seal, justifies a short enlargement.

Additionally, military appellate defense counsel will be on pre-approved leave from 13-22 March 2024. She will return to the office on 25 March 2024. The additional time until 27 March 2024 will allow military appellate counsel to assist civilian defense counsel in finalizing the Reply Brief upon her return from leave. If Appellant's Reply Brief is due prior to military appellate defense counsel's return from leave, she will be unable to contribute to the Reply and will need to omit her signature from the filing.

On 25-26 May 2022, at a general court-martial comprised of officer and enlisted members and convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to his pleas, of three specifications of abusive sexual contact and two specifications of sexual assault in violation of

Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (Charge I), and guilty of Charge I. Record of Trial (ROT) Vol. 1, Entry of Judgment. He was found not guilty of two specifications of abusive sexual contact and two specifications of sexual assault under Charge I, and not guilty of one charge and one specification of attempt to commit abusive sexual contact in violation of Article 80, UCMJ, 10 U.S.C. § 880 (Charge II). R. at 2039-40. One specification of Charge I was withdrawn and dismissed. R. at 529. The court-martial members sentenced Appellant to a dishonorable discharge, seven years of confinement, total forfeitures of pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. R. at 2147. The convening authority took no action on the findings and sentence, and denied Appellant's request for the deferment of confinement, reduction in rank, and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum.

The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 Prosecution Exhibits, 3 Defense Exhibits, 151 Appellate Exhibits, and 2 Court Exhibits. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 15 clients and is presently assigned 10 cases pending brief before this Court. This case is both military and civilian counsels' first priority.

Through no fault of Appellant, his counsel are unable to fully review the Government's Answer and file a Reply Brief before this Court's current deadline.

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

Respectfully submitted,

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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 11 March 2024.

Respectfully submitted,

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12 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY No. ACM 40363 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 does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

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CERTIFICATE OF FILING AND SERVICE

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

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 27 March 2024, counsel for Appellant submitted a Motion to Attach Document seeking to attach an affidavit from one of the trial defense counsel dated 16 March 2024. Also on 27 March 2024, counsel for Appellant submitted a Motion to File Under Seal (Excerpts of Appellant's Reply Brief). The Government did not respond to either motion.

The court has considered Appellant's motions, the lack of opposition, the applicable case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 4th day of April 2024,

ORDERED:

Appellant's Motion to Attach Document dated 27 March 2024 is **GRANTED**. The court specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachment until it completes its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review of Appellant's entire case.

Appellant's Motion to File Under Seal dated 27 March 2024 is **GRANTED**. Appellate government counsel and appellate defense counsel may retain copies of the material ordered sealed and in their possession until completion of our Article 66, UCMJ, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31, after which counsel shall destroy any retained copies of this material in their possession.

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*	**MOTION TO ATTACH DOCUMENT**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 27 March 2024

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

Pursuant to Rule 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to attach the following documents to the Record of Trial:

- **Def. App. Ex. G**: Affidavit of Circuit Defense Counsel – 16 March 2024

Def. App. Ex. G is necessary to this Court's evaluation of Assignment of Error IV. Def. App. Ex. G is an affidavit signed by one of the trial defense counsel, explaining that a post-trial disclosure from a government counsel was never previously disclosed to trial defense counsel. Trial defense counsel only learned of this information through the post-trial disclosure and did not have the information prior to, or during, trial.

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. Def. App. Ex. G is necessary to this Court's evaluation of Assignment of Error IV, which is reasonably raised by materials in Appellant's record, but not fully resolvable from the materials in the record.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 March 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**MOTION TO FILE UNDER SEAL (EXCERPTS OF APPELLANT'S REPLY BRIEF)**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 27 March 2024

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file one excerpt of his Reply Brief under seal, specifically Issue IV (pages 21-25).

Pages 21-25 (Issue IV) reference information derived from sealed materials in the record of trial, to include the portion of the Government's Answer that was ordered sealed. The inclusion of this information is necessary for this Court's consideration of the case.

Pages 21-25 have been redacted in Appellant's Reply Brief. These portions will be delivered in hard copy to the Court and Appellate Government. The unsealed filing, redacted to identify which portions have been filed under seal in accordance with Rule 17.2(b), is being filed separately via email on 27 March 2024.

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

[redacted]
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I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 March 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 27 March 2024

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

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Argument

I. THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION, WHERE THE EVIDENCE RAISED A PRIOR INTIMATE RELATIONSHIP BETWEEN APPELLANT AND THE VICTIM, APPELLANT ASKED FOR CONSENT, THE VICTIM DISCLAIMED ANY VERBAL OR PHYSICAL RESISTANCE PRIOR TO THE OFFENSES APPELLANT WAS CONVICTED OF, THE VICTIM ACKNOWLEDGED THAT APPELLANT STOPPED AS SOON AS SHE ASKED HIM TO AT THE CONCLUSION OF THE LAST OFFENSE, AND A THIRD-PARTY WAS SLEEPING IN THE SAME ROOM AT THE TIME OF THE OFFENSES.

1. The parties (mostly) agree on the facts

The parties seem to largely agree on the following relevant facts:

- The evidence raised a preexisting intimate relationship between Appellant and KB;[1]
- There was no evidence of verbal or physical resistance prior to the offenses of which Appellant was convicted;
- Prior to the January 2020 offense, Appellant asked for consent;
- The final charged encounter ended when KB verbalized her lack of consent and Appellant complied when he "listened and got off [KB]." (R. at 1536-37); and
- There was a third-party noncommissioned officer (NCO) (SSgt MB) in the room during both encounters of which Appellant was convicted.

In one notable exception to the general factual agreement of the parties, the government repeatedly contends that KB was "sleeping" and "unconscious" at the outset of the March 2020 incident. *See* (Appellee's Br. at 18). The government places great emphasis on this point, twice

[1] At certain points the government does seem to question this evidence, for example by prefacing its argument on the preexisting intimate relationship with "even if that were true . . . ." (Appellee's Br. at 18). Elsewhere in its brief, however, when defending the government's nondisclosure of evidence of prior intimacy between victim and accuser, the government notes that "there was other evidence from other witnesses (and even A1C KB herself) that she had actually [kissed Appellant]." (Appellee's Br. at 48). The government cannot have it both ways: arguing that its own nondisclosure of evidence of prior intimacy was harmless because the record contained other evidence of prior intimacy, but simultaneously questioning whether the record established prior intimacy.

calling it the "[m]ost pointed[]" fact. (Appellee's Br. at 18, 43). Indeed, the government repeats the contention that KB was asleep or unconscious eighteen times throughout its brief, often italicizing the words for emphasis. (Appellee's Br. at 18, 20, 23, 33, 43, *7 (sealed)). In contrast to the government's contention, KB specifically testified – twice – that she *did not* fall asleep. (R. at 1533-34). In the sentence the government seems to be referring to – which comes immediately after KB's two assertions that she did not fall asleep – KB seems to be describing the respective sleeping positions the group had laid down in. (R. at 1534). She was very clear, however, that she was not actually asleep as the government states.

Regarding the application of the law to the facts, Appellant respectfully submits the following considerations.

2. Standard of review and piercing of the military judge's ruling

The government opens its argument by defending the military judge's process, arguing that the military judge understood the law and did not issue "a blanket denial" of the requested instruction. (Appellee's Br. at 16). These considerations would be more applicable if the standard of review were abuse of discretion, and, as such, the military judge's *process* in arriving at a given conclusion was relevant to deference. Given the de novo standard of review, however, the relevant inquiry is simply whether *this Court* concludes the facts raised "some evidence" of mistake of fact as to consent.

3. Subjective (honest) and objective (reasonable) prongs

A mistake of fact as to consent instruction is required when the record contains "evidence supporting both the subjective 'honest' and the objective 'reasonable' mistaken belief." *United States v. Rodela*, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021), rev. denied, 82 M.J. 312 (C.A.A.F. 2022) (citations omitted). At trial, the government only contested the subjective prong. For

example, when the military judge asked the government "what was missing" with respect to the requirement for a mistake of fact as to consent instruction, the government replied only: "The accused's subjective belief as to consent." (R. at 1847). The military judge also found only the subjective prong was lacking, stating: "With regard to KB, considering the totality of the circumstances at the time of the offenses, the record does not contain evidence supporting that the accused had a subjective honest mistake and belief." (R. at 1893).

The government now seems to go even further, arguing that the evidence also failed to raise some evidence of a reasonable (objective) mistake of fact as to consent. (Appellee's Br. at 17) ("the evidence shows any belief on the part of Appellant would have been objectively unreasonable as well.").

Given the de novo standard of review just noted, this Court does not apply deference to the proceedings below. However, the fact that both the government and military judge below agreed the objective prong was met may be indicative of whether it was, in fact, met. This Court may also find that allowing the government to "tell the military judge one thing" – that only the subjective belief was missing – and then "assert something else on appeal . . . would go against the general prohibition against taking inconsistent litigation positions." *United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) (citation omitted).

4. Direct vs circumstantial evidence of intent

The government repeatedly argues that there was no *direct* evidence as to Appellant's internal thought processes. (Appellee's Br. at 18) ("there is no evidence in the record showing Appellant's *actual thoughts and beliefs* on the nights in question.") (emphasis added); (Appellee's Br. at 20) (noting "the lack of evidence at all as to *what Appellant was actually thinking* at the time . . . .") (emphasis added). In places, the government seems to suggest that *a statement by Appellant*

was necessary. (Appellee's Br. at 17) ("Moreover, Appellant provided no evidence, whether in the form of pretrial statements or otherwise, affirmatively showing that he held an honest belief that A1C KB consented to any of his sexual acts against her."); (Appellee's Br. at 22) ("there is no evidence, whether in the form of Appellant testifying or the introduction of circumstantial evidence (such as a pretrial statement by Appellant) showing Appellant held an actual and honest belief that A1C KB consented on the nights in question.").[2]

It is black letter law that direct evidence of intent is not required, in the context of mistake of fact as to consent or otherwise. For a very recent example, this Court found in *United States v. Lake* that "circumstantial evidence" was sufficient to find beyond a reasonable doubt "that Appellant possessed the required intent . . . ." No. ACM 40168, 2023 WL 6476471, at *10 (A.F. Ct. Crim. App. 5 Aug. 2023); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) ("courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.") (citations omitted). In the specific context of raising a mistake of fact defense, it is settled that direct evidence – whether via the accused's testimony or "pretrial statement" – is not required: "No precedent of this Court has ever required proof by 'direct' evidence nor restricted the proof to 'direct' evidence. Either such holding would contradict [Rule for Courts-Martial (R.C.M.)] 918(c), which provides that '[f]indings may be based on direct or circumstantial evidence.'" *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022).[3]

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[2] While the government seems to think that a "pretrial statement by Appellant" would constitute "circumstantial evidence," a statement by Appellant as to his personal thought process – whether live or pretrial – would be direct evidence, not circumstantial.

[3] The Air Force government appellate counsel in *Thompson* (one of whom is also on the present case) conceded that direct evidence was not required to establish mistake of fact. *Id.* at 5.

Just a few pages after arguing that the circumstantial evidence was insufficient to meet even the "exceedingly low" standard necessary to establish the requisite intent for a mistake of fact as to consent instruction, the government argues that much *less* circumstantial evidence proved beyond a reasonable doubt that Appellant subjectively harbored the charged intent with respect to Specification 9. *See* (Assignment of Error (A.E.) VII). The government does not seem to recognize the dissidence between its protest in A.E. I that there was no evidence of Appellant's "actual thoughts" or what Appellant was "actually thinking" and its adamant contention, mere pages later in A.E. VII, that the details of Appellant's actual thoughts could be established beyond a reasonable based solely on a third-party eyewitness' observations from across the room.

5. *The government assumes the members had to accept the victim's version of the charged events*

The government in several places premises its argument on the facts as testified to by KB, as if they were indisputably true and the members were required to accept them wholesale. *See, e.g.*, (Appellee's Br. at 18) ("No evidence was adduced to show A1C KB did anything to make Appellant think she was interested in sex with him."); (Appellee's Br. at 22) ("[T]here is no evidence or testimony in this case that A1C KB provided Appellant any indication that she consented to sexual activity.") ("There is certainly no testimony that A1C KB at any point pulled Appellant to her and initiated intimate and consensual contact . . . ."); (Appellee's Br. at 23) ("*Certainly*, there was no mutual kissing. . . ") (emphasis added).

The members were *not* required to accept KB's testimony as conclusive. Indeed, it is well settled that factfinders are entitled to consider testimony they disbelieve as *affirmative evidence that the opposite is true*. *See Wright v. West*, 505 U.S. 277, 296 (1992*); see also United States v. Mejia*, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), *abrogated on other grounds*

by Bloate v. United States, 559 U.S. 196, 203 n.5 (2010). The standard for raising a defense is simply that the record contained some evidence upon which the members might rely if they choose. As the members are entitled to "choose" to find from disbelieved testimony that the opposite of the testimony is affirmatively true, such a finding would suffice to put the defense at issue.

This dynamic is particularly relevant to KB's level of participation, to include kissing, during the charged events. While the government argues KB's testimony left no room for the factfinder to find any degree of participation, the members could very well have concluded that KB was an unreliable narrator about her history of intimacy with Appellant. KB denied (or as the government would apparently phrase it, failed to remember) *numerous* instances of consensual intimacy and kissing with Appellant that were confirmed by other witnesses. *Compare* (R. at 1548) with (R. at 1606-08); *compare* (R. at 1548-49) with (R. at 1772-73); *compare* (R. at 1551) with (R. at 1573) with (R. at 1614-16, 1774, 1777). Even regarding the charged conduct, the evidence shows that KB had previously made statements indicating consent and acquiescence. *See, e.g*, (R. at 1604-05) (KB statements to BB that she let Appellant have sex with her during the charged assault because, *inter alia*, she didn't want to disappoint him); (R. at 1774, 1777) (KB statements to AV that charged assault had actually been consensual but she was intentionally and falsely telling people it was nonconsensual for reputational reasons).[4] With this background, it would be perfectly reasonable for the panel to decline to fully accept KB's denials at trial of any participation during the charged events. While KB denied kissing Appellant during the charged encounters, KB also repeatedly denied (failed to remember) kissing Appellant during other

[4] As these prior inconsistent statements, directly endorsing consensual contact during a charged assault, were not objected to, they were admitted substantively. *See* (R. at 1944) (military judge's instruction that unobjected to prior inconsistent statements could be considered substantively); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (29 Feb. 2020) [Benchbook].

occasions when the evidence clearly showed she had, in fact, kissed him. A perfectly logical conclusion the members could choose to draw was that KB repeatedly engaged in kissing with Appellant and then refused to acknowledge it at trial.

As such, the government's assertions that the evidence established with certainty that there was no kissing during the charged assaults should not be taken as such a certainty. *See* (Appellee's Br. at 23) ("*Certainly*, there was no mutual kissing . . . .") (emphasis added). Far from being a "certain[ty]," the panel was free to disbelieve KB's denials of kissing during the charged encounters and treat the testimony as affirmative testimony that kissing *did* occur, just as she denied (failed to remember) other instances of kissing Appellant that the other evidence showed did, in fact, occur.[5] [6]

6. <u>The government inverts the standard: arguing that the instruction should not have been given because the panel could have chosen not to find mistake of fact</u>

An affirmative defense must be instructed on when there is evidence upon which the members might find the defense applicable, "if they choose." *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (citations omitted). For example, the panel could choose to believe that Appellant subjectively thought KB was consenting based on the presence of a third-party NCO in the room during the January 2020 and March 2020 events. The panel might find it improbable that Appellant would knowingly sexually assault a fellow airman just feet from an NCO – particularly when he took no steps, such as covering her mouth, to prevent an outcry – and therefor conclude that he subjectively believed she was consenting.

The government, however, flips the standard 180 degrees, arguing that the instruction

[5] Indeed, the partial acquittal suggests the panel did disbelieve portions KB's testimony.
[6] Appellant also notes that the record contained significant additional reasons why the panel could choose not to fully accept KB's version of events, such as her continued close association with Appellant in the aftermath of the alleged assaults.

should not have been given because the panel *might choose not* to reach this conclusion. For example, the government argues:

> For instance, as detailed by testimony and discussed throughout this brief, SSgt MB was renowned for being a heavy sleeper who was not easily awoken. Thus, Appellant *could* have simply believed, as everyone else knew, that SSgt MB was a heavy sleeper and would not wake up whether the sexual activity was consensual or not.

(Appellee's Br. at 21) (emphasis added). Whether the government's theory negating mistake of fact "could" have been persuasive to the panel is not the standard.[7] The standard is that "a military judge must instruct on a defense when, *viewing the evidence in the light most favorable to the defense*, a rational member *could have found in the favor of the accused* in regard to that defense." *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (emphasis added) (citations omitted).

7. Request for consent / lack of physical or verbal indication of nonconsent

While the government does not dispute that Appellant asked for consent – or that KB did not outwardly manifest nonconsent prior to either of the offenses of which Appellant was convicted – it seems to argue that these considerations are irrelevant to mistake of fact as to consent. The thrust of the government's argument seems to be that consent is affirmatively required, so lack of outward manifestation of nonconsent is irrelevant. The government repeatedly quotes two sources:

- "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." *United States v. McDonald*, 78 M.J. 376, 381 (C.A.A.F. 2019).
- "Lack of verbal or physical resistance does not constitute consent." Manual for Courts-Martial (MCM), pt. IV, ¶ 60.a.(g)(7)(A)

[7] Appellant submits this argument is also relevant to prejudice. Assuming error, this Court would have to find the error harmless beyond a reasonable doubt to affirm. This Court should not be convinced beyond a reasonable doubt that the panel would have accepted (also beyond a reasonable doubt) the government's theory of how the third-party's presence "could" have been explained away consistent with guilt.

Appellant respectfully submits that these sources do not support the government's contention. *McDonald* examines the mens rea required for sexual assault, concluding that, as a general intent offense, the only mens rea required is that the accused "intentionally committed the sexual act." 78 M.J. at 381. The accused must intentionally commit the act, but the accused need not intend that it be nonconsensual. *Id.* ("No mens rea is required with regard to consent, however."). No intent is required with respect to nonconsent because, *inter alia*, (1) consent is determined from the victim's perspective, (2) no reference is made to accused's perception of consent, and (3) the burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent. *Id.* at 380-81. As such, there is no specific intent required that the act be nonconsensual. Indeed, *McDonald* also examined the mens rea for mistake of fact as to consent, determining that the mens rea is contained within the defense itself (honest and reasonable). *Id.* Specifically at issue, the appellant in *McDonald* argued that mistake of fact should require reckless disregard of consent – a proposition the Court of Appeals for the Armed Forces (CAAF) rejected. *Id.* Nothing in *McDonald* limits the mistake of fact as to consent defense to circumstances where the victim affirmatively manifested consent (such a rule would seemingly blur the line between the defense and actual consent), nor leads to the conclusion that the lack of physical or verbal resistance – particularly in combination with other factors – is somehow irrelevant to mistake of fact as to consent.

Similarly, the MCM's definition does not support the government's conclusion. If lack of verbal or physical resistance equaled consent, then there would have been *actual consent* for both offenses at issue. Mistake of fact would never be reached. It does not follow, however, that lack of physical or verbal resistance is irrelevant to mistake of fact as to consent, particularly in combination with other factors such as the request for consent, the preexisting intimate

relationship, and that Appellant stopped when asked (discussed next).

8. Appellant stopped when asked

At the conclusion of the final charged encounter, KB *did* verbalize a lack of consent and Appellant complied when he "listened and got off [KB]." (R. at 1536-37). Appellant's acquiesce to this clear indication of non-consent constitutes some evidence that he previously perceived his actions were consensual. The members could conclude from this evidence that, prior to her request to stop, Appellant perceived that KB was consenting. After all, if he already knew that KB did not want to participate (or if he simply didn't care), KB's request to stop would not have added any new information. If, as the government contends, Appellant knew KB was not consenting from the beginning, then why would he stop when she asked him to? A logical interpretation – one the members certainly could choose to credit – is that Appellant perceived his actions prior to the KB's request to stop as consensual.

By way of comparison, in *United States v. Gans* (where the military judge instructed on mistake of fact as to consent), this Court found relevant in its legal and factual sufficiency review that the "mistake of fact as to consent defense" did not render the evidence insufficient where "Appellant was the initiator to the conduct and disregarded [the victim] repeatedly shaking her head no." No. ACM 39321, 2019 WL 1581421, at *5 (A.F. Ct. Crim. App. 11 Apr. 2019). If disregarding expressions of nonconsent is relevant to disproving mistake of fact as to consent, it certainly follows that complying with an expression of nonconsent is relevant to establishing mistake of fact as to consent. Very similarly, this Court stated in *United States v. Hyppolite* that to "be persuaded by Appellant's argument that he was mistaken, we would have to discount evidence that Appellant initiated sexual contact with [the victim] and that Appellant *continued to touch [the victim] in spite of his protests*." No. ACM 39358, 2018 WL 5516681, at *11 (A.F. Ct.

Crim. App. 25 Oct. 2018), *affirmed*, 79 M.J. 161 (C.A.A.F 2019) (emphasis added). Again, if ignoring requests to stop negates mistake of fact as to consent, complying with a request to stop must support it.

The government makes no reply to the substance of Appellant's argument. (Appellee's Br. at 20-21). Rather, the government stresses that the charged act took place prior to the indication of nonconsent. (Appellee's Br. at 20). But this is exactly the point: Appellant's cessation of sexual advances as soon as he was asked provides insight into his perception of consent leading up to that point. The government fails to engage in any way with this argument, analyze the caselaw cited by Appellant in support thereof, or explain why the member could not choose to find this evidence indicated that Appellant perceived his actions prior to the KB's request to stop as consensual.

9. Prejudice

Within its prejudice analysis, the government argues that any error was harmless beyond a reasonable doubt, *inter alia*, because "the defense case and argument, that the victim was a liar, was weak." (Appellee's Br. at 24). This is a strangely hardline position for the government to take given the evidence that KB confessed she had falsely accused Appellant of sexual assault for reputational reasons. (R. at 1774, 1777). Indeed, even the government seems to concede that KB was an unreliable narrator with regard to her history of intimacy with Appellant – the very subject under scrutiny. *See* (A.E. IV).

The government further argues regarding prejudice: "There is no evidence that the members failed to consider all of the evidence presented in this case." (Appellee's Br. at 23). This is a non sequitur given the issue under consideration. The question is whether the military judge's instructions properly outlined the relevant issues for the panel to consider. Absent the proper instructions, they were not permitted to consider all the evidence for a relevant purpose: evaluating

mistake of fact as to consent.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

II. THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL, OVER DEFENSE OBJECTION, THAT THEY MAY CONSIDER THE CHARGED MISCONDUCT IN SPECIFICATIONS 1 THROUGH 5 OF CHARGE I AS EVIDENCE OF A "COMMON PLAN OR SCHEME" OF CRIMINALITY UNDER MIL. R. EVID. 404(b), AND ALLOWING THE GOVERNMENT TO ARGUE THE SAME.

1. *The government defends the military judge's characterization of Appellant's various accusers as "isolate[d]" despite the fact that there was a third party in the same room and/or the same bed*

The government makes a lengthy argument about how KB was, in fact, isolated (despite MB's presence mere feet away) because MB was asleep and a heavy sleeper. (Appellee's Br. at 31-32). None of the government's imagined rationale about how a sex act with a third party in the room could be "isolated" appears in the military judge's ruling. (App. Ex. XXXIII). Indeed, the government cites exclusively to testimony that was not before the military judge when he made his ruling. (Appellee's Br. at 31-32 (citing R. at 1521, 1560, 1594)).

Regardless of whether this Court considers only what was before the military judge – or also testimony later adduced – Appellant submits that sexual activity *with another individual in the room* is not isolated. If anything, it is notable in its "un-isolated" nature. While the vast majority of sexual interactions take place while two individuals are in a room alone, two of the three encounters the military judge described as "isolated" broke with this trend. Describing the acts as isolated was clearly erroneous.

2. *The government cites "similarities" that it acknowledges did not exist in all of the incidents*

When examining the supposed similarities of the four incidents in question,[8] under the second *Reynolds*[9] prong, the government contends that similarity can be found in the fact that:

- *two of the four* incidents involved a victim in an emotional state;
- *three of the four* incidents occurred while the victim was asleep[10] or wanted to go to sleep;
- *two of the four* incidents involved "touching of the victim's body . . . ."; and
- *three of the four* incidents involved sexual acts.

(Appellee's Br. at 33). The government cites no authority for the proposition that factors which are present in *as few as half* of the incidents under consideration can support finding a common plan or scheme across all the incidents. This sort of "patchwork" commonality would expand the rule significantly. This Court should not engage in such an expansion.

3. <u>The government cites "similarities" that are notably generic</u>

In the most extreme example, the government urges this Court to consider the "similarity" that *two of the four* incidents "involved touching of the victim's body with intent to gratify sexual desire." (Appellee's Br. at 33). This apparently references Specification 1 (alleging touching of the breast with the hand) and Specification 2 (alleging touching of the groin with the penis). The government appears to attempt to draw a parallel with a similarity noted in *Hyppolite*. (Appellee's Br. at 33). No such parallel exists. *Hyppolite* involved touching the genitalia of four same-sex victims, not simply two sundry touchings as alleged here.

Indeed, Appellant suggests that adopting the government's contention that all the incidents were similar because *two of the four* involved various sexual touching and *three of the four*

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[8] While this issue involves five specifications (Specifications 1-5 of Charge I), the government analyzes the varying accusations by occasion rather than specification. Thus, the government treats all three specifications involving EV – which all occurred on the same day – as one occasion. And the government treats the two specifications involving KB – one of which involved two divers occasions – as three incidents.

[9] 29 M.J. 105 (C.M.A. 1989).

[10] As explained in the preceding assignment of error, the government's contention that KB was sleeping at the outset of the March 2020 incident is a misstatement of the record.

involved sexual acts would be equally applicable to nearly any combination of sexual assault and sexual contact charges. Allowing such a patchwork of generic factors to support a "common plan or scheme" instruction would radically expand existing precedent. Unsurprisingly, beyond the halfhearted attempt to analogize *Hyppolite*, the government cites no authority for its suggestion that this patchwork of sundry sexual acts could somehow constitute a relevant commonality.

4. The common plan or scheme the government proposes is only relevant to intent / mistake of fact as to consent

Quoting *Reynolds*, the government attempts to explain a legitimate non-propensity purpose for this evidence: "Appellant's common plan or scheme directly shows Appellant's intent, which was to have sex with these women with or without their consent." (Appellee's Br. at 37). As repeatedly emphasized in *Reynolds*, however, the legitimate non-propensity purpose for the evidence was to establish Appellant's intent. Similarly, in *Hyppolite*, which also uses the same language, "the common plan and scheme evidence was intent evidence because mistake of fact was the only issue in controversy." 79 M.J. at 167. Indeed, the military judge's instruction itself explicitly said it went only to intent, telling the panel the purpose of the evidence was to "to show the accused['s] *intent* in committing the offense." (R. at 1947) (emphasis added).

Given the military judge's ruling that mistake of fact as to consent was not at issue, it is hard to understand what "intent" the Mil. R. Evid. 404(b) instruction was directed at for the general intent offenses against KB. *See United States v. Gamble*, 27 M.J. 298, 304 (C.M.A. 1988) (explaining that evidence of prior sexual offenses has no Mil. R. Evid. 404(b) relevance to intent when only consent versus nonconsent is at issue) (citations omitted); *United States v. Gomez*, 763 F.3d 845, 858-859 (7th Cir. 2014) ("[W]hen intent is not 'at issue' – when the defendant is charged with a general-intent crime *and* does not meaningfully dispute intent – other-act evidence is not admissible to prove intent because its probative value will always be substantially outweighed by

the risk of unfair prejudice."); *United States v. Johnson*, 27 F.3d 1186, 1191 (6th Cir. 1994) ("other acts evidence is not admissible to prove intent unless the defendant places intent in issue or intent is not inferable from proof of the criminal act itself"); *United States v. Soundingsides*, 820 F.2d 1232, 1238 (10th Cir. 1987) (prior bad acts evidence was inadmissible because "there was no real intent issue and no specific intent was required to be proven").

As discussed above, these are general intent offenses, where the only intent required is that the accused intentionally committed the act. No intent is required with respect to the act being nonconsensual. As this is not the rare case where the intentionality of the act itself is at issue, the Mil. R. Evid. 404(b) evidence was certainly not required to show that the act was intentional as opposed to accidental. *See, e.g.*, *United States v. Grant*, 38 M.J. 684, 694 (A.F.C.M.R. 1993) (considering but disbelieving the appellant's assertion that his penis accidentally penetrated the victim's vagina when they were in bed together). As such, the only potential intent at issue goes to mistake of fact as to consent, which the government vigorously maintains was not the purpose of the Mil. R. Evid. 404(b) evidence.

5. Prejudice

The government argues that, assuming error, there was no prejudice because Appellant was acquitted of the specifications against EV. (Appellee's Br. at 38) ("Appellant cannot claim that allegations related to SSgt EV infected his convictions involving A1C KB because they acquitted him of all allegations involving SSgt EV."). This ignores, however, the differing evidentiary standards required for a conviction versus supporting evidence. Additionally, the government's proffered theory is that the intent at issue was merely to "have sex with these women *with or without* their consent." (Appellee's Br. at 37). Under this theory, the fact that EV may have consented would not seem to negate the plan or scheme nor reduce the prejudice.

The government also argues that, unlike the introduction of *uncharged* misconduct under Mil. R. of Evid. 404(b), here "the only Mil. R. Evid. 404(b) evidence at issue is evidence of charged offenses that was going to come into evidence whether Mil. R. Evid. 404(b) was at issue or not." (Appellee's Br. at 36-37). The government cites no authority for the proposition that a Mil. R. Evid. 404(b) instruction is less prejudicial because it involves *charged* misconduct rather than *uncharged* misconduct. Absent the Mil. R. Evid. 404(b) instruction, the panel would have been instructed that they had to keep the evidence with respect to the various offenses separate. *See* (R. at 1947). Unless one presumes the panel would have ignored this instruction, the fact that they still would have heard the evidence about each of the two named victims regardless of the Mil. R. Evid. 404(b) instruction seems immaterial.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

III. THE EVIDENCE SUPPORTING SPECIFICATIONS 4 AND 5 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE, *INTER ALIA*, THERE WAS NO CORROBORATION, THE VICTIM TOLD A NUMBER OF DEMONSTRATED LIES ABOUT HER SEXUAL INTERACTIONS WITH APPELLANT, AND THE VICTIM CONFESSED TO A FRIEND THAT SHE HAD FALSELY ACCUSED APPELLANT OF SEXUAL ASSAULT FOR REPUTATIONAL REASONS.

1. *The government argues that this Court should not be swayed by the exculpatory evidence because it was presented at trial*

The government argues that Appellant "admits" that each of the credibility issues relevant to this Court's legal and factual sufficiency review "were raised at trial" and placed "before the panel to consider in reaching its verdict," apparently suggesting this dynamic should impact this Court's review. However, this is nothing more than a truism; it is axiomatic that this Court's review of legal and factual sufficiency is limited to the evidence admitted at trial. *See United*

States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citation omitted). By necessity, this review involves the same evidence presented to the panel.

2. *The government omits the most damning evidence*

KB admitted to a friend that she had falsely told people Appellant sexually assaulted her because she did not want people to know she consensually had sex with him. (R. at 1773-74, 1777).[11] This evidence should give the government great pause. Judging by the government's brief, it does not. Incredibly, the government does not even mention this evidence when discussing legal and factual sufficiency. (Appellee's Br. at 40-46).

3. *Special considerations for Specification 5 (variance involving "groin" vs. "inner thigh")*

With respect to the legal sufficiency of Specification 5, Appellant raises the separate issue of a variance between the charged language (touching of the "groin") and the testimony (touching of the "inner thigh."). (Appellant's Br. at 43-44). The following considerations apply to this issue:

a. *The government seemingly argues that a denied R.C.M. 917 motion limits or precludes appellate review of legal sufficiency*

The government notes at several points that this issue was raised in an R.C.M. 917 motion which the military judge denied. *See* (Appellee's Br. at 45). The government emphasizes that "Appellant fails to mention his failed R.C.M. 917 motion on this issue or raise a separate issue related to the military judge's denial of the motion." (Appellee's Br. at 45). Despite the government's extensive focus on the R.C.M. 917 motion, it is unclear why or how the government thinks this impacts this Court's review.

To the extent the government is arguing that the denial of an R.C.M. 917 motion limits this

[11] There was also evidence that KB told a separate friend, BB, about a charged assault in terms that made it clear she had consented. (R. at 1604-05, 1614-16).

Court's legal and factual sufficiency review, Appellant respectfully disagrees. Legal sufficiency, including legal sufficiency based on questions of statutory interpretation is an issue of law this Court reviews de novo. *United States v. Brown*, __M.J.__, 2024 WL 134078, at *2 (C.A.A.F. 10 Jan. 2024). The government acknowledges this standard of review. (Appellee's Br. at 39).

While the government seems to suggest that this issue should be raised on the basis of "the military judge's denial of the [R.C.M.] 917 motion" rather than directly, as a matter of legal and factual sufficiency, the government cites no authority in support of such a proposition and Appellant sees no reason why raising these issues directly – under conceded de novo standard of review – in any way impacts this Court's analysis. *See* (Appellee's Br. at 44).

b. The government does not account for the fact that Congress specifically differentiated "groin" and "inner thigh" in Article 120's statutory text

As argued by Appellant, the terms "groin" and "inner thigh" are separately delineated in Article 120's statutory definitions. *See* Article 120(g)(2), UCMJ, 10 U.S.C. § 920(g)(2) (2018) (defining sexual contact as touching of an enumerated body parts and clearly listing "groin" and "inner thigh" as separate body parts).[12] *See* (Appellant's Br. at 43-44). Allowing separate statutory terms to be used interchangeably would seemingly vitiate their individual delineation by Congress. Indeed, the very case the government cites for the definition of groin emphasizes the significance of Congress' separate delineation of body parts. *United States v. McDonald*, 78 M.J. 669, 680 (N.M. Ct. Crim. App. 2018) ("Congress distinguished between the groin and genitalia by listing them separately."). The government does not engage with this argument in any substantive way.

c. United States v. Westcott *is factually different than the present case*

[12] "The term 'sexual contact' means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, *groin*, breast, *inner thigh*, or buttocks of any person. . . ." Article 120(g)(2), UCMJ, 10 U.S.C. § 920(g)(2) (2018) (emphasis added).

The government argues that a victim need not specifically say the anatomical word "groin" in her testimony. (Appellee's Br. at 44 (citing *United States v. Westcott*, ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 March 2022))). In *Westcott*, while not saying the actual word "groin," the victim clearly described touching of the groin in lay-language. Here, it is not just that the victim did not use the specific word "groin" – it is that she used a separate statutorily distinct word. *Westcott*, where the victim used lay-language to extensively describe touching of the groin area – though not using the actual word "groin" – is very different.

Along the same lines as *Westcott*, it is very possible the government could have met its burden here without KB using the word "groin." Unlike *Westcott*, however, this simply did not happen.[13] KB's testimony was very limited and gave no details like those in *Westcott* that would establish Appellant actually touched her groin. In contrast to the lengthy description in *Westcott*, KB here testified very concisely that she felt Appellant's "penis on [her] thigh." (R. at 1535). Trial counsel asked: "What part of your thigh?" (R. at 1535). KB responded: "My inner thigh." (R. at 1535). This testimony did not establish that Appellant actually touched her groin as charged.

Even the government does not contend that "inner thigh" is a complete subset of "groin." As such, the best the government could argue that touching of the "inner thigh" *might* overlap with touching of the groin, which is certainly not proof beyond a reasonable doubt.

d. The government urges a factfinder "could" infer the charged act, even if it wasn't testified to

As a fallback position, the government argues that, even if this Court concludes the charged act itself was not testified to, it should still affirm the conviction because it is *possible* that, based

[13] Even the government's argument does not contend that "inner thigh" is a complete subset of "groin." As such, the best the government could argue that touching of the "inner thigh" *might* overlap with touching of the groin, which is certainly not proof beyond a reasonable doubt.

on the "overall circumstances," a factfinder "could" conclude that Appellant's act of "placing his penis on [KB's] inner thigh, could have *also* resulted in him touching her groin, or the part of her body around that area, with his penis during the overall course of his actions." (Appellee's Br. at 45-46).[14]

This Court should not accept the government's invitation to convict based on an act that was never testified to. This Court has repeatedly found evidence legally insufficient when the complaining witness did not testify as to the specific act occurred – or even when it was testified to in imprecise terms. *See, e.g.*, *United States v. Rodriguez*, ACM 38519, 2016 WL 4191359, at *11 (A.F. Ct. Crim. App. 13 Jul. 2016) (testimony as to "oral sex" legally insufficient to prove the charged act); *United States v. Powell*, 40 M.J. 768 (A.F.C.M.R. 1994) (same); *United States v. Hansen*, 36 M.J. 599 (A.F.C.M.R. 1992) (same). As this Court stated: "criminal convictions are made of stronger stuff than guesswork." *Rodriguez*, 2016 WL 4191359, at *11 (quoting *Powell*, 40 M.J. at 770). If, as these cases show, this Court will not find sufficient evidence based on imprecise descriptions of the charged act, it certainly should not find sufficient evidence based on an act that was never testified to at all, simply because it "could" have happened in the "overall course" of other described actions.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4 and 5 of Charge I.

[14] This Court may once again find government's argument here somewhat in tension with its arguments in A.E. I. There, the government argues that the panel *could not* have found the relevant facts – even by the low standard necessary given the absence of direct evidence. Here, when it suits their litigation position, the government argues the panel could have found beyond a reasonable doubt that Appellant committed an act that was never testified to – simply because it "could" have occurred during the "overall circumstances" of the events described.

IV. SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA A POST-TRIAL *BRADY* DISCLOSURE FROM TRIAL COUNSEL.

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V. SPECIFICATIONS 4 AND 5 OF CHARGE I SHOULD BE DISMISSED WHERE APPELLANT'S ACCUSER PROVIDED FALSE OR MISLEADING TESTIMONY ABOUT HER HISTORY OF INTIMACY WITH APPELLANT, THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN THE TESTIMONY WAS FALSE BECAUSE THE TESTIMONY CONTRADICTED THE ACCUSER'S ADMISSIONS TO THE GOVERNMENT IN A PRETRIAL INTERVIEW, AND THE GOVERNMENT ALLOWED THE TESTIMONY TO GO UNCORRECTED AND FAILED TO INFORM THE DEFENSE OF THE PRETRIAL ADMISSIONS.

Appellant rests on his original brief and his reply to the preceding closely related assignment of error.

VI. THE MILITARY JUDGE ERRED IN ADMITTING AS AN "EXCITED UTTERANCE," A TEXT MESSAGE IDENTIFYING APPELLANT, SENT BY A NON-PARTICIPATING COMPLAINING WITNESS TO A THIRD-PARTY, AT THE CONCLUSION OF TWENTY-FOUR MINUTES OF TEXTING BACK-AND-FORTH.

1. The government agrees the military judge misstated the burden of persuasion

The government concedes (or at least acknowledges without disagreement) that the military judge erroneously stated the burden of persuasion rested with the defense when it actually rested with the government as the proponent of the evidence. (Appellee's Br. at 55). A misstatement of the law is one of the cardinal forms of abuse of discretion and should impact this Court's deference.

While acknowledging the error, the government is unbothered by the judge's erroneous inversion of the burden of persuasion, seemingly arguing that when the evidentiary standard for a motion is "preponderance of the evidence," it does not matter which side has the burden of persuasion. (Appellee's Br. at 55-56). While this is an interesting mathematical argument, the government cites no authority supporting it. Appellant submits that the burden of persuasion is

about more than the mathematical difference between "51%" evidence in one direction or another. Such a rule would meld the concepts of the burden of persuasion and the burden of proof – and make the burden of persuasion largely irrelevant in most instances because the evidentiary standard for most motions is preponderance of the evidence. R.C.M. 905(g).

2. The government concedes the military judge made a clearly erroneous finding of fact

The government concedes that the military judge made a clearly erroneous finding of fact by finding "'He grabbed my titty,' was a text message sent by A1C RY to SrA TS." (Appellee's Br. at 56). The government concedes, this was not accurate: "As shown in Prosecution Exhibit 11, this statement was not part of A1C RY's text messages to SrA TS, but instead was an oral statement made by A1C RY and which was ultimately excluded by the military judge." (Appellee's Br. at 56).

While the government minimizes this rather significant error, Appellant respectfully submits that – unlike all the existent messages – the non-existent message "he grabbed my titty" is much more of a traditional excited utterance. This is a factual exclamation about the startling event – highly distinguishable from the remainder of the more deliberate messages that RY actually sent back-and-forth with TS. Indeed, this is exactly the type of statement, had it existed, that would be highly relevant to an excited utterance analysis. The fact that the military judge thought it existed when it did not should significantly undermine this Court's confidence in the remainder of his analysis and his application of the law to his erroneous understanding of the facts.

3. The government concedes that the message at issue was sent in response to questioning

The government further concedes the primary message at issue (identifying Appellant) was made in response to questioning. (Appellee's Br. at 57-58). It is well settled that: "There may be reason for skepticism about spontaneity when a declarant's statements are in response to

questioning." S. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 803.02[4][a] at 8-92 (7th ed. 2011); *see also United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (listing "whether the statement was made in response to an inquiry" as a factor in "determining whether a declarant was under the stress of a startling event at the time of his or her statement"); *United States v. Jones*, 30 M.J. 127, 129-30 (C.M.A. 1990) (abuse accusations *not* an excited utterance because, *inter alia*, it was made in response to a question ("what is wrong?") to a crying declarant, rather than "being the product of impulse or instinct.").

The government counters, however, that the questioning "was neither leading nor was it directed to get a specific response from A1C RY." (Appellee's Br. at 57). It's unclear where these standards come from. The relevance of questioning to the excited utterance analysis is not that the questioner may have suggested a certain answer. Rather, the relevance is that responding to a question is more deliberate than volunteering a spontaneous utterance.

The government goes on to cite caselaw that whether a statement is made in response to questioning is relevant, but not dispositive, to the excited utterance analysis. (Appellee's Br. at 58). Appellant agrees.

Finally, while the government acknowledges this is a relevant factor, the military judge never addressed it nor acknowledged the controlling precedent holding this is a factor to be examined. (App. Ex. XCVII).

4. Prejudice

The government argues that, assuming error, there was no prejudice because the government's case for Specification 9 was "very strong." Appellant respectfully submits that this case was not "very strong" – particularly with respect to establishing identity – where, *inter alia*, the victim did not testify and the only eyewitness did not know Appellant; could not identify

Appellant's height, build, or race; could not identify Appellant's pictures; and reported details that did *not* match Appellant.

Finally, in the prejudice section, the government acknowledges Appellant's arguments about the identification of Appellant but submits that the eyewitness identification was sufficient and "corroborates A1C RY's statement that 'It was [Appellant].'" (Appellee's Br. at 59 (citing Pros. Ex. 11)). However, this statement by RY (contained in Pros. Ex. 11) *is the very item of evidence at issue*. A prejudice analysis based on the strength of the evidence inherently involves only the strength of the *other* evidence. It cannot consider the strength of the improperly admitted evidence itself.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 9 of Charge I.

VII. THE EVIDENCE SUPPORTING SPECIFICATION 9 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED ONLY "INTENT TO ABUSE, HUMILIATE, HARASS, OR DEGRADE" BUT THE EVIDENCE SHOWED SEXUAL INTENT (WHICH WAS NOT ALLEGED).

1. *Legal and factual sufficiency must be established by reference to the testimony, not the arguments*

The government's citations to the record are primarily to a lengthy passage in trial counsel's closing statement. (Appellee's Br. at 63). Indeed, the government cites nearly a full page of the government's closing argument. (Appellee's Br. at 63). The statements of counsel, of course, are not evidence. The government's closing – while part of "the record" – cannot provide evidence to establish the charged intent, or to exclude the uncharged alternative intent.

2. *The government argues a mind-reading theory about Appellant's intent proves his guilt beyond a reasonable doubt*

Appellate government counsel theorizes that Appellant's intent was "to show [the victim]

he would do what he wanted no matter what she wanted . . . ." (Appellee's Br. at 64). There is little basis in the record for this strangely specific mind-reading argument.

Indeed, the only evidence was the description of a third-party eyewitness' observations from across the room. The evidence that Appellant's intent was "to show [the victim] he would do what he wanted no matter what she wanted" is meager.

Conversely, the evidence fails to exclude in any meaningful way an alternative intent, such as a sexual advance. Given the government's unusual charging decision, Appellant's fondling of the victim for sexual reasons would not meet the charged evidence. It simply cannot be said that the evidence excluded the possibility beyond a reasonable doubt that Appellant harbored a sexual intent when performing the sexual contact at issue. Indeed, Specification 1 involved the exact same act with another woman and there the government charged and argued the evidence proved a sexual intent beyond a reasonable doubt.

3. Interplay with A.E. 1 and Appellant's intent

Both this assignment of error, and A.E. I involve an evaluation of Appellant's subjective intent. In A.E. I, the government argues that there is no evidence – regardless of its source or credibility – upon which the members could find Appellant had an honest belief that KB consented. Yet, here, a few pages later, the government argues that this Court should be convinced beyond a reasonable doubt of Appellant's intent (in very specific terms) based on little more than an imaginative theory.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 9 of Charge I.

VIII. THE EVIDENCE SUPPORTING SPECIFICATION 6 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT ALLEGED APPELLANT TOUCHED THE VICTIM'S BREAST BUT

SHE TESTIFIED THE CHARGED TOUCHING DID NOT OCCUR.

Appellant challenges the legal sufficiency of the evidence because the victim testified that after the first breast-touch, which was consensual, Appellant tried to, but did not actually, touch her breasts again. Appellant points to the following testimony:

> Q. So he puts his hand under your shirt.
> A. Yes, ma'am.
> Q. *Does he actually touch your breast* with his hand?
> A. Yes, *the first time* he did.
> Q. And *at that point* what did you say to him?
> A. *I told him to stop*. I kept moving his hands away. He proceeded to do it multiple times. And then once he stopped with like *trying to grab my breast*, he moved down to my shorts, trying to take them off.
> Q. Okay. So after you first tell him "No," it sounds like you push his hand away; is that correct?
> A. Yes.
> Q. He *then replaces his hand*?
> A. *He tries to, but I kept pulling away his hands*, and then that's when he just, I guess, *gave up* and then tried to pull my pants down.

(R. at 1138) (emphasis added).

The government counters by pointing to AN's testimony on cross examination, emphasizing the following exchange:

> Q. Sorry. Just to repeat the question, at no point when he was touching your breast, did you push him off?
> A. No, I did. When he was touching my breast, I kept pushing him off.
> Q. You were pushing his body off?
> A. Yes, like --
> Q. Or you moved his hand?
> A. No. Pushing him off and moving his hand.

(Appellee's Br. at 70-71 (citing R. at 1165)). This testimony, however, clearly corresponds to the initial – and only – breast touch that AN described on direct examination. As noted a few sentences before, this was the point during the initially consensual encounter where Appellant was touching AN's breasts and AN said "no" or "stop." *See* (R. at 1164-65) (cross examination orienting AN

to the point in the encounter where she said "no" or "stop."); (R. at 1138) (AN explaining that the point at which she said "told him to stop" and said "no" was after the initial – and only – breast touch). This is the same event AN testified to on direct: the one and only breast touch she alleged.

The government seems to place great emphasis on the word "kept", arguing that it indicates multiple breast touches. (Appellee's Br. at 71). This is not a meritorious reading of the record, particularly where AN testified with such clarity on direct that Appellant *did not* actually touch her breasts again after the first uncharged touching.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 6 of Charge I.

IX. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO USE A PRIOR STATEMENT BY THE VICTIM, CORROBORATED BY PHYSICAL EVIDENCE, ENDORSING ADDITIONAL CONSENSUAL SEXUAL CONDUCT DURING THE CHARGED ENCOUNTER, WHICH WAS IRRECONCILABLE WITH HER TRIAL TESTIMONY.

Appellate defense counsel acknowledge trial defense counsel's affidavits and present the following considerations.

1. *Post hoc nature of trial defense counsel's justifications*

The statement at issue directly endorsed extensive consensual conduct during the charged encounter, was corroborated by physical evidence, and directly contradicted AN's trial testimony. Appellate defense counsel respectfully submits that forgoing any use at trial of statement of this magnitude is a grave decision that should be approached and documented with the greatest care.

Despite extensive contact between appellate defense counsel and trial defense counsel during the preparation of the appeal – including inquiries by appellate defense counsel for input on AN's statement to the SANE – trial defense counsel never disclosed any of the lengthy

considerations contained in their affidavits about the nonuse of this evidence.[17] Appellate defense counsel notes that caselaw is clear that "trial defense counsel maintains a continuing obligation to the client beyond the trial's conclusion, which includes providing reasonable assistance where permitted and refraining from acting in a manner inconsistent with the client's right to effective assistance of counsel on appeal." *United States v. Dorman*, 58 M.J. 295, 298 (C.A.A.F. 2003). This duty includes "assist[ing] appellate defense counsel in preparing the appeal." *Id.* Appellate defense counsel respectfully submit that these duties are not well served when trial defense counsel are less-than-forthcoming about topics during the preparation of the client's appeal – and then later provide lengthy post hoc explanations based on tactical considerations not previously revealed.[18]

In addition to failing to inform appellate defense counsel of their now-endorsed tactical considerations, trial defense counsel also did not inform their client. Appellant notes in his affidavit that (1) he was unaware why his counsel did not present the evidence of AN's endorsement of consensual breast sucking and (2) his counsel did not inform him of a strategic or tactical reason not to present this evidence. (Def. App. Ex. F). Trial defense counsel do not dispute these facts. There is also no indication that trial defense counsel documented the significant decision to forego use of this significant evidence.[19]

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[17] Without delving too deeply into intra-party communications, only one trial defense counsel responded to appellate defense counsel's inquiry on the subject at all – providing only a single sentence response. After the affidavits were submitted, trial defense counsel indicated to appellate defense counsel that they did not provide more input during the preparation of the appeal because appellate defense counsel's questions were not specific enough.

[18] Mr. Simon and Mr. Hockenberry respectfully submit that there is a widespread practice amongst military trial defense counsel of being guarded or nonresponsive in their communications with appellate defense counsel and then, after an issue of IAC is raised, endorsing extensive tactical considerations not previously disclosed to appellate defense counsel. It is difficult to reconcile this practice with trial defense counsel's duty to assist appellate defense counsel in preparing an appeal. *See Dorman*, 58 M.J. at 298.

[19] After receiving the affidavits, appellate defense counsel contacted trial defense counsel and asked, pursuant to a previously provided release from the client, for disclosure of any memoranda

Appellate defense counsel respectfully submit that a decision of this magnitude should have been documented contemporaneously, discussed with the client, and disclosed to appellate defense counsel (particularly when the topic was raised during the preparation of the appeal). None of these steps were followed here.

2. Fear of prior consistent statements

It seems trial defense counsel were concerned that introduction of AN's statement to the SANE acknowledging consensual breast sucking during the charged event (in direct and irreconcilable contradiction to AN's trial testimony) would open the door to a "prior consistent statement" that AN told the SANE she was sexually assaulted. As Maj CM puts it: "Ultimately AN told DA that she was sexually assaulted by then-SrA Doroteo which was the crux of the matter" and the defense did not want to open the door to these "additional prior consistent statements that a sexual assault had occurred." (Affidavit of Maj CM at 4-5); *see also* (Affidavit of Maj CCD at 2) (stating trial defense counsel's belief that introducing AN's statement to the SANE "would have arguably opened the door to the rest of AN's (consistent) statements contained in the report.")

a. This is based on an inaccurate understanding of the law

Where a tactical decision is informed by an erroneous view of the law, Appellant submits that it is unreasonable under prevailing professional norms. It is not at all clear how the introduction of the former statement at issue would allow the introduction of all AN's statements to the SANE. Mil. R. Evid. 106's provisions on introduction of the remainder of a "written or recorded" statement do not seem applicable. Nor, of course, would Mil. R. Evid. 304(h)'s

for record (MFRs) or other documentation on this subject. Trial defense counsel responded that they had not documented their decision contemporaneously.

allowance for introduction of the remainder of a prior statement apply – as this rule only pertains to statements of the accused. None of the trial defense counsel explain what rule of evidence they feared this information would come in under. Nor do they endorse any attempt to gain predictability on this subject through motions practice or otherwise.

Additionally, with regard to the fear that the panel would hear "AN told DA that she was sexually assaulted by then-SrA Doroteo which was the crux of the matter," trepidation that this information would come out was not a logical tactical consideration. *Of course*, the complaining witness told the *Sexual Assault* Nurse Examiner (SANE) "she was sexually assaulted[.]" AN's allegation that she was sexually assaulted – obviously – was the very reason why AN was undergoing the exam. There was no shortage of government evidence that AN *alleged* a sexual assault. The fear that the panel would learn that *AN alleged sexual assault during the sexual assault forensic exam* is not logical. Indeed, almost any inconsistent statement describing an alleged assault would be made within the context of a prior recitation of the allegation. Fear that electing the inconsistency will also elicit the fact that it was part of a prior allegation is something of a truism. The point is that inconsistencies in the successive telling demonstrate either unreliability or, as here, an evolving story – thereby impacting credibility. The prior statement here (acknowledging consensual breast sucking) would be particularly potent in that it would tie together the forensic evidence of the marks and DNA on AN's breasts. The fact that AN contemptuously alleged assault cannot justify forgoing this evidence.

3. Sufficiency of circumstantial evidence of consensual breast sucking

All three trial defense counsel argue that – even absent AN's direct endorsement of consensual breast sucking – they introduced enough evidence to argue that consensual breast sucking had in fact occurred because (1) AN had petechia on her breast, (2) Appellant's DNA was

found on her breasts, and, presumably (3) the SANE mentor testified about petechiae in an educational sense (not tied to the facts of this case) and confirmed that it "could be caused by someone sucking on the skin[.]"[20]

This evidence was woefully insufficient to credibility argue that consensual breast sucking had occurred. AN confirmed marks on her breasts in the same sentence as she denied they came from kissing. (R. at 1164). AN was not the proper witness to confirm the results of the exam in the first place. The defense counsel's attempt to ask AN personally if the marks were consistent with sucking injuries further demonstrates the ineptitude of this method of presentation. (R. at 1164). Eliciting some sort of pseudo-expert opinion *from the alleged victim* about the consistency of her injuries with a defense theory she just denied is not convincing.

It simply makes no sense to attempt to argue these data points established consensual breast sucking while forgoing a direct endorsement of consensual breast sucking by the complaining witness herself. Obviously, it was AN's statement that tied the physical evidence together. In the absence of any evidence of the statement, the forensic evidence was not particularly helpful.

4. Knowledge that AN would deny the statement

Maj CD notes that the defense team "knew AN would either deny or claim she did not remember making the statement to DA." (Affidavit of Maj CCD at 2). It is unclear how the defense team could know this. More factfinding might establish whether there was a basis for this knowledge. However, even if AN denied it (1) the panel might disbelieve her denial and (2) the defense had a sworn, videotaped deposition confirming that AN actually made the statement.

5. Concerns about impeaching the SANE

[20] While trial defense counsel do not specifically note the SANE mentor's testimony, it does appear to have been part of their effort to present this evidence at trial. *See* (R. at 1308).

Trial defense counsel note that they were hesitant to rely on the SANE to prove up the prior statement because they were attacking her professionalism during the exam. While it's true that the SANE's collection of evidence was clearly unprofessional, it is questionable how relevant this is to her reliability in recording AN's narrative history. The primary issue with DA's exam was that she didn't properly collect and label the DNA swabs, making it difficult to ascertain what swabs came from what part of AN's body. This allowed the defense to argue that the specific body parts where Appellant's DNA and semen were found was hard to determine. It was clear, however, that Appellant's DNA and semen were on AN – and AN's DNA was also found on Appellant's private region and underwear.

Trial defense counsel seem to think impeaching the SANE was more important than impeaching the victim. Appellant respectfully submits that these are not reasonable tactical considerations justifying the omission of a direct statement by the victim endorsing consensual conduct during the charged assault and directly contradicting her trial testimony.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 6 and 7 of Charge I.

X. TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Appellant largely rests on his initial brief but responds to an interesting procedural issue raised by the government: the validity of referencing underlying briefs when analyzing an appellate decision. Appellant cited to the controlling precedent of *United States v. Norwood*, quoting arguments from that case, in which the CAAF found the trial counsel's arguments were "clearly" improper. (Appellant's Br. at 75-76 (citing 81 M.J. 12 (C.A.A.F. 2021)). As noted in Appellant's initial brief, the *Norwood* opinion did not repeat all the government's "clearly"

improper arguments in their entirety, so Appellant cited to the briefs in that case, available on the CAAF's website. *See* (Appellant's Br. at n. 38).

The government does not dispute that Appellant's quotations to the record are accurate, or that the CAAF found the quoted arguments constituted plain error. Nevertheless, the government accuses appellate defense counsel of "tak[ing] extreme liberties" with precedent by referencing portions of the record cited in the *Norwood* parties' briefs but not quoted in the CAAF's opinion.

Appellate opinions, by definition, do not contain a full recitation of the record. In *Norwood*, for example, the CAAF noted that appellate defense counsel raised the issue of improper argument and then gave a general description of the vouching arguments objected to: "[trial counsel] seemed to personally vouch for [the victim's] credibility in both the opening and closing arguments by referring to her as an 'innocent' child who had no reason to lie, claiming that she was telling the truth, and asserting that her family believed her." 81 M.J. at 18-19. The CAAF then found that trial counsel "clearly committed misconduct during findings by repeatedly vouching" for the victim. *Id.* at 20. It is perfectly proper, particularly given the structure of the CAAF's opinion in *Norwood*, to reference the parties' briefs to give context to the opinion (i.e. to understand what the specific arguments the CAAF found clearly improper were).

Reference to appellate briefs and/or the underlying record to give fuller context to an appellate court's opinion is a common and accepted practice. Less than a month ago, for example, the Coast Guard Court of Criminal Appeals referenced the parties' briefs, available on the CAAF's website, to give context to a CAAF precedent. *United States v. Shafran*, CGCMG 0386, __M.J.__, 2024 WL 768432, at *4, n.6 (C.G. Ct. Crim. App. 26 Feb. 2024). As another very recent example, this very month, Judge Sparks noted during oral argument that reading the record in a precedential case would provide further context to the opinion. *See* Oral Argument Audio, *United States v.*

Wells, No. 23-0219/AF at timestamp 33:45.[21] For a more in-depth example, the Fifth Circuit in *United States v. Emmerson* discussed, at great length, their reference to an underlying brief to give context to a Supreme Court precedent. 270 F.3d 203, 221-24 (5th Cir. 2001).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 4, 5, 6, and 7 of Charge I.

XI. APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Appellant rests on his original brief but acknowledges that between Appellant's original filing and the now the Supreme Court denied certiorari on this issue.

[21] Available at: https://www.armfor.uscourts.gov/newcaaf/CourtAudio12/20240306A.mp3.

Conclusion

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

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Samuel A. DOROTEO	)	**CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 27 March 2024, Appellant moved for leave to file a motion for oral argument out of time on Assignment of Error I in the above-styled case. On 3 April 2024, Appellee opposed the motion for oral argument.

Oral argument is hereby ordered on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION.**

Accordingly, it is by the court on this 23d day of April, 2024,

ORDERED:

Appellant's motion for leave to file a motion for oral argument out of time dated 27 March 2024 is **GRANTED**.

Appellant's motion for oral argument out of time dated 27 March 2024 is **GRANTED** on the issue specified above.

Oral argument on this issue will be heard in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland, at a time and date to be set by future order of the court.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**APPELLANT'S MOTION FOR LEAVE TO FILE OUT OF TIME AND MOTION FOR ORAL ARGUMENT OUT OF TIME**
v.	Before Panel 3
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 27 March 2024

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

Pursuant to Rules 23(d), 23.3(a), and 25 of this Honorable Court's Rules of Practice and Procedure, Appellant, Senior Airman Samuel A. Doroteo, hereby moves for oral argument on the following issue:

I.

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION, WHERE THE EVIDENCE RAISED A PRIOR INTIMATE RELATIONSHIP BETWEEN APPELLANT AND THE VICTIM, APPELLANT ASKED FOR CONSENT, THE VICTIM DISCLAIMED ANY VERBAL OR PHYSICAL RESISTANCE PRIOR TO THE OFFENSES APPELLANT WAS CONVICTED OF, THE VICTIM ACKNOWLEDGED THAT APPELLANT STOPPED AS SOON AS SHE ASKED HIM TO AT THE CONCLUSION OF THE LAST OFFENSE, AND A THIRD-PARTY WAS SLEEPING IN THE SAME ROOM AT THE TIME OF THE OFFENSES.

Good cause exists to grant this motion. Per Rule 25, a motion for oral argument must be filed no later than seven days after the filing of an answer to an appellant's brief. The Government filed its Answer to the Brief on Behalf of Appellant on 4 March 2024. On the same day (4 March

2024), the Government also filed a Motion to Exceed Page Limitations, a Motion to File Under Seal, and a Consent Motion to Transmit Sealed Materials; Appellant did not oppose any of the motions. Per Rule 25, a motion for oral argument would have needed to be filed no later than 11 March 2024. However, this Court did not act on any of the Government motions until 12 March 2024. Therefore, Appellant's two civilian appellate counsel were not in receipt of the full and complete Government Answer until 14 March 2024. By that date, Appellant's military appellate counsel was already on leave and did not return to the office until 25 March 2024. Due to the delays in civilian counsel receiving the full and complete Government Answer, Appellant's appellate defense team did not have an opportunity to finalize whether to submit a motion for oral argument, and which issue to submit for oral argument, until the date of this motion.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 March 2024.

Respectfully submitted,

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3 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF Appellant.	)))))))))	OPPOSITION TO MOTION FOR ORAL ARGUMENT ACM 40363 Panel No. 3

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

Pursuant to Rules 16, 23(c), and 23.3(a) of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument.

Appellant has now had two opportunities to plead his case to this Court, first by filing his 83-page Assignments of Error brief on 15 December 2023, and second by filing a 40-page reply brief on 27 March 2024. Now, Appellant has moved this Court for oral argument on one of his 11 presented issues while providing no justification as to why oral argument is necessary. (*See* App. Mot. at 1.)

Issue I involves an instruction issue that this Honorable Court is well-versed and well-equipped to review without the need for oral argument. In his two briefs, Appellant spent over 24 pages discussing this issue. This, along with the record and the Government's Answer, which includes a 19-plus page response to this issue, speak for themselves and require no further discussion. Further, Appellant provides no justification as to why oral argument is warranted in this case. Instead, Appellant's motion only explains why his motion was late while not addressing at all why Issue I requires oral argument.

As shown, Appellant has been provided sufficient opportunity to make his case before this Court in both his initial and reply briefs. Appellant's motion for a now third opportunity to

address this Court is unnecessary, especially considering the extensive briefing from both parties already before this Court.[1]

Finally, this case was docketed with this Court on 2 November 2022. Appellant filed his Assignments of Error brief with this Honorable Court on 15 December 2023, 408 days after docketing. Appellant made his instant motion for oral argument on 27 March 2024, 491 days (or over 16 months) after docketing. Considering this Court's obligations under United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), partaking in any further delay to schedule and conduct an unwarranted oral argument in this case is unnecessary.

All told, this Court has the record of trial and the written submissions from both parties and Appellant has failed to explain why oral argument is necessary for this Court to decide his case. Here, the positions of each party are clear, and this Court should proceed to issue a decision in due course of its deliberations without the further delay of an unjustified oral argument.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

[1] Altogether, the two briefs from Appellant and the Government's Answer account for nearly 215 pages of discussion on Appellant's various issues.

FOR MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
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, civilian appellate counsel, and the Air Force Appellate Defense Division on 3 April 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 23 April 2024, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR A MISTAKE OF FACT AS TO CONSENT INSTRUCTION.**

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

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Tuesday, the 18th day of June 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	**APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	Before Special Panel
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant*	No. ACM 40363 7 June 2024

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

Pursuant to Rule 16.2(e) of this Court's Rules of Appellate Procedure, Appellant respectfully moves to cite the following supplemental authorities:

1. *United States v. Rocha*, __ M.J. __ (C.A.A.F. 8 May 2024). In this recent case, the CAAF noted that the appellant's attempts to hide his conduct provided some evidence that he subjectively (actually) knew it was criminal conduct. *Rocha*, slip. op. at 10. This Court may find a parallel to the facts of the present case, where Appellant engaged in the conduct of which he was convicted while a third-party NCO was in the same room. If, as the CAAF stated in *Rocha*, taking steps to hide one's conduct evinces subjective belief it is illegal, the inverse must also be true: taking no steps to hide one's conduct evinces subjective belief it is innocent.

2. *United States v. Wright*, No. ARMY 20170486, 2019 WL 3778357 (A. Ct. Crim. App. 9 Aug. 2019). In this case a panel member indicated during voir dire that he did not think a person could hold a mistaken belief as to consent unless an affirmative indication of consent was given. Conversely, he either rejected or resisted the military judge's suggestion that a lack of resistance or verbal rejection could lead to mistake of fact as to consent. The Army Court found

actual bias based on the concern that the panel member "required some sort of affirmative expression of consent" in order to find mistake of fact as to consent, an erroneous view of the law. This case is relevant because the government makes a similar argument in its brief, contending that because, as the CAAF stated in *United States v. McDonald*, "[t]he burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent," a mistake of fact as to consent could not be reasonably held in the absence of an affirmative indication of consent by the victim. (Appellee's Br. at 17, 19-20) (citing 78 M.J. 376, 381 (C.A.A.F. 2019)).[1] Relevant to the present case, and just as the Army Court found in *Wright*, the idea that an affirmative expression of consent is a prerequisite for a mistake of fact defense is incorrect.

Conclusion

WHEREFORE, Appellant respectfully requests this Court grant this motion to cite supplemental authority.

Respectfully submitted,

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[1] Of note, while Appellant does not interpret *McDonald* to have made new law, *Wright*, which was decided in August 2019, post-dated *McDonald*, which was decided in April 2019, so there is no reason to think that anything in *McDonald* would have changed the result in *Wright*.

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 7 June 2024.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 10 June 2024, counsel for Appellant submitted a Motion for Leave to File Supplemental Filing. Appellant's counsel stated that on 7 June 2024, the Government had "provided voluminous additional disclosures" to the Defense, including "56 substantive disclosures, pertaining to all five named victims and to Appellant personally," and including "over 300 pages of prosecution interview notes." Appellant's counsel further stated they are currently drafting a supplemental assignment of error as a result of these disclosures and suggested "an accelerated briefing schedule."

The Government responded on 17 June 2024, stating it "generally does not oppose Appellant's motion . . . provided that any supplemental assignment(s) of error is based on the disclosures provided to Appellant on 7 June 2024."

Accordingly, it is by the court on this 20th day of June, 2024,

ORDERED:

Appellant's Motion for Leave to File Supplemental Filing dated 10 June 2024 is **GRANTED** specifically with respect to the disclosures referenced above. Appellant will file any supplemental assignments of error related to these disclosures **not later than 3 July 2024**, unless an enlargement of time is granted by this court for good cause shown.

The Government may file an answer **within 14 days** after Appellant has filed his supplemental assignments of error, unless an enlargement of time is granted by this court for good cause shown.

Appellant may file a reply brief **within 7 days** after the Government files its answer.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL FILING** Before Special Panel No. ACM 40363 10 June 2024

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

Pursuant to Rules 18.4 and 23(d) of this Court's Rules of Practice and Procedure, Appellant moves for leave to file a supplemental filing.

On 22 March 2023, the government provided the defense with previously undisclosed evidence. This issue was previously briefed. *See* Br. on Behalf of Appellant at Assignment of Error IV, V. After receiving these disclosures, appellate defense counsel inquired as to why the disclosures were not made earlier and requested the government personnel involved in the trial review their files and provide any additional required disclosures.

On 7 June 2024, the government provided voluminous additional disclosures. The servicing Chief of Military Justice listed 56 substantive disclosures, pertaining to all five named victims and to Appellant personally. The disclosures also included over 300 pages of prosecution interview notes.

Following review of the newly disclosed evidence, appellate defense counsel believe a supplemental assignment of error will be required and are currently drafting a supplemental filing. Although Rule 23(d) of this Court's Rules of Practice and Procedure allows a motion for leave to file a pleading to be combined with the pleading, Appellant is filing the motion for leave to file a

supplemental filing now to inform the Court as soon as possible of these new developments, given the late stage of the proceedings in this case. In order to avoid further delay, appellate defense counsel also suggest an accelerated briefing schedule for issues arising from the newly disclosed evidence.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion for Leave to File a Supplemental Filing.

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 Government Trial and Appellate Operations Division on 10 June 2024.

Respectfully submitted,

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17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF Appellant.	))))))))	 RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL FILING ACM 40363 Panel No. 3

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

Pursuant to Rules 18.4 and 23(d) of this Court's Rules of Practice and Procedure, the United States generally does not oppose Appellant's motion for leave to file a supplemental filing provided that any supplemental assignment(s) of error is based on the disclosures provided to Appellant on 7 June 2024.

Additionally, should this Court grant Appellant's motion, the Government will abide by the briefing schedule deemed appropriate by this Court.

[redacted]

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FOR MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate counsel, and the Air Force Appellate Defense Division on 17 June 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40363 Date Filed: 25 June 2024

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

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Additional Assignment of Error

XII. WHETHER APPELLANT'S CONVICTIONS SHOULD BE SET ASIDE FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA POST-TRIAL DISCLOSURES FROM THE PROSECUTING LEGAL OFFICE.

Statement of Facts

On 22 March 2023, the government provided the defense with previously undisclosed evidence. This issue was previously briefed. *See* Br. on Behalf of Appellant at Assignment of Error IV, V. After receiving these disclosures, appellate defense counsel inquired as to why the disclosures were not made earlier and requested the government personnel involved in the trial review their files and provide any additional required disclosures.

On 7 June 2024, the government provided voluminous additional disclosures. The servicing Chief of Military Justice listed 56 substantive disclosures, pertaining to all five named victims and to Appellant personally. *See* Def. App. Ex. H at 1-7. The disclosures also included approximately 300 pages of prosecution interview notes. *See* Def. App. Ex. H at 12-311.

The government made several disclosures during the trial based on government witness interviews. Def. App. Ex. G (Affidavit of Trial Defense Counsel). The new disclosures, however, contain voluminous information that was not previously disclosed. Def. App. Ex. G.

Appellant previously sought and obtained leave to file a supplemental filing on this issue pursuant to Rules 18.4 and 23(d) of this Court's Rules of Practice and Procedure. Order, Motion for Leave to File Supplemental Filing, 20 June 2024.

Argument

XII. APPELLANT'S CONVICTIONS SHOULD BE SET ASIDE FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA POST-TRIAL DISCLOSURES FROM THE PROSECUTING LEGAL OFFICE.

Standard of Review

Appellate courts review allegations of non-disclosure of discoverable evidence *de novo*. *United States v. Roberts*, 59 M.J. 323, 327, n.3 (C.A.A.F. 2004).

Law

In *Brady v. Maryland*, the Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963); *see also* Rule for Courts-Martial [R.C.M.] 701(a)(6) (requiring disclosure of evidence known to trial counsel that tends to negate guilt, reduce guilt, or reduce sentence). The Supreme Court has extended *Brady*, holding "that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted). Under Article 46, Uniform Code of Military Justice (UCMJ), "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, and its implementing rules provide an accused with greater statutory discovery rights than the constitutional right to due process. *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013); *Roberts*, 59 M.J. at 327; *see also United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous.").

Appellate review of an alleged discovery violation follows a two-step process: (1) "determine whether the information or evidence at issue was subject to disclosure or discovery" and (2) "if there was nondisclosure of such information . . . test the effect of that non-disclosure on the appellant's trial." *Roberts*, 59 M.J. at 325.

"In military practice, '[w]here an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.'" *United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (quoting *Roberts*, 59 M.J. at 327). "'Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.'" *Id.* (quoting *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013)).

When there are a number of disclosure violations, a court must analyze whether the cumulative effect of all such evidence suppressed by the government raises a reasonable probability that its disclosure would have produced a different result. *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004); *see also Kyles v. Whitley*, 514 U.S. 419, 419 (1995) (noting that, in reviewing the materiality of the withheld evidence, it must be considered cumulatively, not in isolation, item-by-item) (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

Analysis

It must be noted at the outset that the government has placed Appellant in a very difficult position. The government disclosed the evidence discussed below over two years after the conclusion of Appellant's trial, and after his appellate briefs had already been filed. It is difficult, particularly on an abbreviated timeframe, to reopen counsel's files and analyze where the

voluminous newly disclosed evidence might have impacted Appellant's trial, particularly after further development by trial defense counsel during trial preparation.

The extreme delay in disclosing this information is disturbing. Nonetheless, appellate defense counsel laud government counsel for providing the post-trial disclosures and will do their best to analyze the evidence in a manner helpful to this Court's review.

For organization's sake, the evidence is analyzed in the same order it was disclosed by the government (mostly victim-by-victim).

1. Disclosures Involving KB

By Appellant's count, the government made 13 substantive disclosures about KB in the Chief of Justice's email. *See* Def. App. Ex. H at 1-3.[1] Review of the attached notes reveals additional evidence that should have been disclosed. Appellant highlights the following points of particular significance.

The government disclosed that, during a 17 March 2021 interview with trial counsel, KB "mentioned [Appellant] attempted oral sex, but she could not remember details about the incident." Def. App. Ex. H at 1. While not specified in the disclosure, reference to the underlying interview notes clarifies this related to the January 2020 sexual assault of which appellant was convicted in Specification 4 of Charge I. Def. App. Ex. H at 15. This statement directly contradicts KB's sworn statement to OSI, where the ROI directly stated: "SUBJECT did not attempt to give her oral sex." 1st Indorsement to DD Form 458, *Charge Sheet*, dated 7 April 2021, Attachment 2.b., Air

[1] In addition to the disclosures under the heading "Allegations re: [KB]," disclosure numbered "7" under the heading "Allegations re: [EV]," actually relates to KB.

Force Office of Special Investigations (AFOSI) Report of Investigation (ROI), K.B., 17 November 2020 at 22.[2] This is a directly contradictory statement about a charged assault.

The government disclosed information about a number of emotional and romantic attachments between witnesses. In particular, the government disclosed a statement by MB that BB "was obsessed with [KB] and wanted to pursue [KB] romantically." Def. App. Ex. H at 1. BB was a key government witness, and her purported obsession with the named victim should have been disclosed because it is relevant to her perception and personal alliances or biases when it comes to KB.

While not listed in the Chief of Justice's email, the notes from trial counsel's interview with BB reveal that, in the immediate aftermath of the charged January 2020 encounter, KB told BB about it. Specifically, KB told BB "'Sam *tried* to do it again.'" Def. App. Ex. H at 75. BB asked KB whether Appellant had "put it in," and BB did not remember how KB responded. Def. App. Ex. H at 75. KB said she had told Appellant: "No. Stop. You shouldn't sleep with other females." Def. App. Ex. H at 75. The handwritten notes, apparently from this same interview, record KB telling Appellant: "you're with [AV (Appellant's girlfriend at the time)] and you shouldn't be sleeping with other females." Def. App. Ex. H at 83. These statements are inconsistent with KB's trial testimony and her previous statements about this assault. R. at 1525-28. The endorsement of concern about Appellant's relationship status is additionally significant. KB's mention of Appellant's relationship with AV during a charged assault is particularly relevant in that KB herself was romantically and intimately involved with AV. For example, though also undisclosed, AV told trial counsel that "KB told her she was in love with AV at a [New Year's

[2] The undisclosed statement to trial counsel was also inconsistent with the sequence of events KB described in her trial testimony, where she also made no mention of attempted oral sex during her trial testimony. *See* R. at 1526-28.

Eve] party." This New Year's Eve party would presumably have been only a short time before the January 2020 charged assault, where, undisclosed to the defense, KB was talking to Appellant about his relationship with AV (the woman KB was apparently in love with). Additionally, KB's ambiguity as to whether intercourse had even occurred is significant.

The government disclosed that MB made several statements about KB's romantic and intimate feelings and interactions with Appellant. Def. App. Ex. H at 1. Some of this was drawn out at trial. *See, e.g.*, R. at 1560-62, 1572-74. Some of it, however, seemed to expand on, and/or contradict MB's trial testimony. MB testified at trial that he did not see KB and Appellant sneak back to the group during get-togethers, but he knew (apparently second-hand) that it would sometimes happen. R. at 1572-74. The disclosure states: "During parties, SrA Doroteo and [KB] would sneak away and make out." Def. App. Ex. H at 1. This suggests a greater degree of personal knowledge of these events than MB later acknowledged. Nondisclosures on the topic of prior intimacy between KB and Appellant are particularly aggravated by the government's questioning of the existence and veracity of such evidence at trial and, at least to some extent, on continued questioning of its veracity on appeal.[3] *See also* Def. App. Ex. H at 3 (disclosure of indication of additional instance of prior intimacy between KB and Appellant, where apparently KB manually stimulated Appellant).

While not listed in the Chief of Justice's email, the notes from trial counsel's interview with MB reveal that KB told MB about the March 2020 incident of which Appellant was convicted in Specification 5 of Charge I and stated, *inter alia*, that KB did not want to have sex with Appellant on this occasion *because* MB was in the room. Def. App. Ex. H at 45 ("It was Sam trying to

[3] For example, in A.E. I, the government prefaced its argument on the preexisting intimate relationship between KB and Appellant with "even if that were true . . . ." (Appellee's Br. at 18).

initiate some sort of sexual advance and I was weirded out he would do that while I was in the room asleep. *That is why she was uncomfortable*.) (emphasis added). This motivation was not mentioned in KB's testimony or prior statements and seems in tension with her trial testimony, which endorsed no sexual interest in Appellant and alleged that Appellant had sexually assaulted her twice in the months leading up to this event. R. at 1510, 1514, 1528. In KB's narrative at trial, her unwillingness to reciprocate Appellant's physical advances in March 2020 had nothing to do with MB's presence. A statement in which KB espoused a different reason for not consenting to charged sexual activity should certainly have been disclosed.

The notes from MB's interview also show he told trial counsel that, after learning about the March 2020 encounter, he "realized by the way that [KB] had been acting that [KB] had been closer to [Appellant] that night than usual." Def. App. Ex. H at 38. It is significant that the victim and accused were acting closer than usual in the leadup to a charged incident.[4] It is particularly significant because it contradicts KB's testimony that there was no flirting or similar interaction on this night. R. at 1536. In its appellate brief, the government emphasized that there was no evidence at trial about flirting between appellant and KB the night of this charged March encounter. *See* Appellee's Br. at 8. The government also emphasized this evidence at oral argument. It has now come to light that, while the government was making these arguments, there was evidence in the government's possession that contradicted them.

The government disclosed numerous statements by AV in an 8 November 2021 interview with trial counsel that suggested additional sexual history between KB and Appellant and an opinion by AV that KB lied to her about an incident where Appellant asked KB to spend the night

[4] This evidence would also have been clearly relevant to mistake of fact as to consent. *See* (A.E. I).

with him. Def. App. Ex. H at 3. The underlying notes are handwritten and unfortunately very difficult to decipher, but the known disclosures are relevant to both KB's relationship with Appellant and KB's credibility. Def. App. Ex. H at 3, 235-46.

The government further disclosed that, on 20 May 2022, "[TP] described to Trial Counsel how he has seen [KB] kiss SrA Doroteo." Def. App. Ex. H at 5. This seems to be the same incidence of kissing BB testified to at trial. *See* R. at 1606-08. However, additional evidence from an additional witness confirming it should, of course, have been disclosed, particularly where, as noted above, the government seemed to question the veracity of this evidence. While not listed in the Chief of Justice's email, the notes from this interview reveal additional relevant information. TP described that KB had told him about two incidents between her and Appellant. The first was in KB's dorm (the October 2019 charged offense) and the second instance was in the attic area (the June 2020 charged offense). Regarding the first offense, KB told TP that Appellant was persistent in trying to "make a move on her" and, eventually, "she got tired and just said yes." Def. App. Ex. H at 183. This contradicts KB's trial testimony, where she never indicated saying yes to Appellant's persistence. R. at 1513-14. Obviously, any indication that the victim "said yes" during a charged offense has massive implications both to guilt or innocence and to the victim's credibility. TP made similar statements elsewhere, stating that KB basically gave in to Appellant's repeated requests, but, to Appellant's knowledge, this is the only time he specifically described her saying "yes."

While also not listed in the Chief of Justice's email, the notes from this interview record that KB told TP, in regard to the January 2020 charged offense, that "she was too drunk to consent to anything" on this occasion. Def. App. Ex. H at 183. KB's apparent statement that this event was nonconsensual because of her level of intoxication should have been disclosed. While it was

clear that there was evidence KB had been drinking on this occasion, the evidence was mixed as to her level of intoxication. At trial, KB arguably endorsed a relatively low-level of intoxication, stating "I had a little bit too much to drink . . . ." R. at 1524. KB's interpretation that the act was nonconsensual due to intoxication would have been relevant for the defense to explore, especially as her conclusion may have been informed by legally erroneous training on alcohol and consent. *See, e.g.*, *United States v. Newlan*, NMCCA 201400409, 2016 WL 4791945, *7 (N.M. Ct. Crim. App. 2016) (decrying the erroneous "SAPR-perpetuated" "'one drink and you can't consent' axiom"). This was a statement directly from the named victim, directly about the charged offense and why it was supposedly nonconsensual.

Further complicating the topic of KB's level of intoxication on this occasion, the government disclosed BB told trial counsel that in January 2020 (Specification 4, Charge I), KB was "drunk but still able to know what was going on around her." Def. App. Ex. H at 2-3. A large part of the government's narrative at trial was that KB was extremely intoxicated during the charged event. *See, e.g.*, R. at 1963 (government closing arguments about how KB was too drunk to communicate to BB, Appellant, or MB during the charged assault). While BB testified at trial that KB was "not necessarily incoherent," any additional statements elucidating KB's ability to perceive and interact during this incident should have been disclosed. *See* R. at 1595.[5]

An undated typed page of notes indicates, with respect to KB, that "OSI was unable to *keep* the audio portion of the interview." Def. App. Ex. H at 32. Appellate defense counsel's understanding is that the government represented to the defense at trial that OSI's recording devices recorded video but not sound during KB's interviews (i.e. the sound was never recorded

[5] Evidence as to a lower level of intoxication would also have clearly been relevant to mistake of fact as to consent. *See* (A.E. I).

in the first place). Any indication that sound might have been recorded, but OSI was "unable to keep" it, would have obvious ramifications for Jencks Act / R.C.M. 914 purposes. Had trial defense counsel known that the audio from KB's interview was simply not kept, they could have moved to compel its production after KB testified. R.C.M. 914. Since the government would have seemingly been unable to produce this audio, the Defense could have then sought powerful remedies from the court, including ordering the trier of fact to disregard KB's testimony. *Id.* This would have severely affected the government's ability to meet its burden as to offenses involving KB. The remedies under R.C.M. 914 are so powerful, in fact, that the Court of Appeals for the Armed Forces recently held it was ineffective assistance of counsel for trial defense counsel to not pursue them when they were available. *United States v. Palik*, 84 M.J. 284, 2024 CAAF LEXIS 181, at *28 (C.A.A.F. 2024). Indeed, the indication that OSI was unable to keep the interview audio is similar to the note in *Palik* that a recording was deleted, and when combined with the "presumption of regularity," it could have similarly led to the conclusion that the government lost a recorded statement of a key witness. *Id.* at *22-23 (citing *United States v. Mark*, 47 M.J. 99, 101 (C.A.A.F. 1997)). Given the case-dispositive consequences of a recorded but subsequently lost recording of the alleged victim's relevant statements, this Court should order a factfinding hearing to determine definitively what happened to the audio of OSI's interviews of KB.

Notes from interviews with BB report that Appellant told her he had sex with KB after the charged October offense. Def. App. Ex. H at 74-75. This is exculpatory as to that incident, as Appellant would be unlikely to tell KB's best friend about having sex with KB unless he thought it was consensual.

Finally, the notes from trial counsel's interview of LD (another named victim) reveal significant pre-report crosstalk between LD and KB (two named victims). Def. App. Ex. H at 112.

While not fully developed, it seems that LD was talking directly to KB about their respective allegations just days before KB's report. In this multi-victim, "quantity over quality" case with a complex web of relationships between victims and witnesses, this indication that the various victims were discussing their allegations with each other, especially immediately before reporting Appellant, should have been disclosed because it goes to the credibility of witnesses. This would have also tied in significantly with the expert testimony how confirmation bias can pollute memory in a situation – like this – where a person hears that others have accused a past-partner of sexual abuse. *See* R. at 1840.

2. Disclosures Involving EV

By Appellant's count, the government made 21 substantive disclosures about EV in the Chief of Justice's email. *See* Def. App. Ex. H at 3-5. Review of the attached notes reveals additional evidence that should have been disclosed. While Appellant was acquitted of all offenses against EV, these specifications (Specifications 1, 2, and 3 of Charge I) were part of the Military Rule of Evidence (Mil. R. Evid.) 404(b) "common plan or scheme" instruction and thus intertwined with the offenses against KB (Specifications 4 and 5 of Charge 1). R. at 1947. The undisclosed information would have further undermined the credibility of EV's report and reduced its evidentiary value as "common plan or scheme" evidence to bolster the charges against KB. Appellant highlights the following points of particular significance.

The government disclosed MB told trial counsel that EV had a history of memory lapses when drunk. Def. App. Ex. H at 3. This seems particularly relevant to the charged offenses given that the charged offenses took place after a night of drinking, Appellant asked for consent, and EV did not remember how she responded to Appellant's request for consent. R. at 1357, 1386-87.

The disclosures contain extensive evidence about prior intimacy between EV and Appellant, to include considerable evidence that EV was pursuing Appellant sexually, which should have been disclosed because it is exculpatory and affects EV's credibility as a witness. Of particular relevance, on "[t]he night of the incident between [EV] and SrA Doroteo," there was contemporaneous evidence that "[EV] was trying to go home with SrA Doroteo." Def. App. Ex. H at 4-5. Similarly, MM also told trial counsel EV was "being pretty handsy" with Appellant on the night in question. Def. App. Ex. H at 149. Indications that the named victim was pursuing Appellant sexually in the lead-up to charged conduct is certainly information the defense should have had the opportunity to develop following disclosure by the government.

The notes from trial counsel's interview with JH state that EV said, "[W]e [her and Appellant] hooked up. Witness interpreted it as sex. She talked about it a couple of times. She said she was into him and liked him." Def. App. Ex. H at 130. It is certainly relevant and exculpatory that EV described what was later charged as a sexual assault as "hooking up" with Appellant and directly stated she was "into" and "liked" Appellant afterwards. JH did testify at trial that EV told him about a sexual encounter with Appellant – to include joking about it. R. at 1790-91. However, the testimony did not have the same level of detail or include the crucial aspect that EV stated she was into Appellant and liked him in the aftermath of the charged events.

The disclosures contain extensive evidence about prior acts of dishonesty on the part of EV, often in considerable detail. Def. App. Ex. H at 4-5, 140-55. For instance, the government disclosed that Appellant had told MM, apparently on the night of the charged offense, "[EV] had asked SrA Doroteo if she could sleep in SrA Doroteo's bed, but SrA Doroteo told her to sleep on the floor. Later, SrA Doroteo woke up to [EV] performing oral sex on him." Def. App. Ex. H at 5. This was an exculpatory statement on the part of Appellant and, indeed, a report that EV had

sexually assaulted *him* (by performing sexual acts on him while he was asleep in violation of Article 120(b)(2)(B), UCMJ). This exculpatory statement was also bolstered by MM's report to trial counsel that EV had done the same thing to him: "[EV] had previously woken [MM] up with oral sex on at least one occasion." Def. App. Ex. H at 5. Trial counsel possessed undisclosed evidence that EV had committed two sexual assaults, one against Appellant. The idea that EV had sexually assaulted Appellant during the charged events would certainly create a motive for her to deflect attention from herself by accusing him. *See, e.g.*, *United States v. Salem*, 578 F.3d 682, 687 (7th Cir. 2009) (evidence a witness may have committed a crime, even if not necessarily admissible (e.g. under Fed. R. Evid. 608(b)), may still be relevant to defense preparation and presentation for other reasons, such as showing motive to avoid prosecution.).

Although not listed in the Chief of Justice's email, the notes from trial counsel's interview with MM reveal considerable mental health issues on the part of EV that should have been disclosed. Def. App. Ex. H at 140-55.

While also not listed in the Chief of Justice's email, the notes from trial counsel's interview with MM reveal that EV described being sexually assaulted by another individual in Korea. Def. App. Ex. H at 145. Additionally, there was evidence EV's prior report of sexual assault might have been false. Def. App. Ex. H at 145. MM reported to trial counsel that, the way he understood her story, he "thought it was pretty messed up that she SARC'd this person because it sounded like a one-night stand, and then she didn't find him attractive, then she SARC'd him." Def. App. Ex. H at 145. That information significantly impacts a witness's credibility, and it should have been disclosed, allowing the defense to follow up on its impeachment value.

3. Disclosures Involving LD

The government made two substantive disclosures about LD in the Chief of Justice's email. *See* Def. App. Ex. H at 5-6. Review of the attached notes reveals additional evidence that should have been disclosed. Appellant highlights the following points of particular significance.

First, the government disclosed that "[BB] told Trial Counsel that when SrA Doroteo put his hand on [LD's] breast, [BB] believed it was possible that SrA Doroteo's hand slipped as he was falling asleep." Def. App. Ex. H at 5. This was a charged offense (Specification 8 of Charge I). Any statement by a witness that it might have been unintentional is exculpatory and should, of course, have been disclosed.

While not listed in the Chief of Justice's email, the notes from trial counsel's interview of LD reveal significant pre-report crosstalk between LD and KB (two named victims). Def. App. Ex. H at 112. While not fully developed, it seems that LD was talking directly to KB about their respective allegations just days before KB's report. In this multi-victim case with a complex web of relationships between victims and witnesses, this indication that the various victims discussing their allegations with each other, especially immediately before reporting Appellant, should have been disclosed.

Appellant was acquitted of all offenses against LD. Nevertheless, these nondisclosures are disturbing and add to a clear pattern of withheld evidence in this case. Additionally, the pre-report crosstalk between LD and KB also impacts the charges against KB, and LD's credibility as a witness.

4. Disclosures Involving AN

The government made three substantive disclosures about AN in the Chief of Justice's email. *See* Def. App. Ex. H at 6. Review of the attached notes reveals additional evidence that

should have been disclosed. Appellant highlights the following points of particular significance.

The government disclosed that: "On 12 October 2021, [MS] told Trial Counsel that [AN] told [MS] that SrA Doroteo told [AN] that SrA Doroteo didn't hear her say stop multiple times and apologized." Def. App. Ex. H at 6. This was a hugely significant point at trial. Interestingly, MS seems to have made a similar concession in an interview with the defense. *See* R. at 1242-43. At trial, however, MS denied the previous statement to the defense. *See* R. at 1242-43. MS said that, contrary to defense counsel's implication, AN "never told me she was crying when that happened" at all and suggested defense counsel was confused about MS's statements in the prior interview. *See* R. at 1243. The impression left by MS's testimony was that defense counsel's implication that AN reported an exculpatory statement by Appellant was either mistaken or intentionally misleading. Had the defense known that MS had made the same statement to the government – in no uncertain terms – it would have drastically altered the presentation of this evidence.[6] Rather than correct MS's testimony, which the government knew did not match up with his statements to trial counsel, the government sat by silently while the defense's evidence on this point floundered.

AN also adamantly denied making this statement to MS. *See* R. at 1171 ("Q. And you told [MS] that Senior Airman Doroteo had not heard you prior to him stopping? A. I never told him that."). The dual denials by AN and MS were all the more significant because of the evidence they had a prior relationship with each other, raising the specter of bias and coordination. *See* R. at 1175-76 (AN's concession that she had engaged in an intimate relationship with MS in Germany). The undisclosed evidence that MS had repeated the statement that he and AN later denied directly

[6] For example, defense counsel could have called a government representative to contradict MS's denials at trial. Presumably the government would also have been open to a stipulation.

to trial counsel was hugely significant.

This evidence was perhaps additionally significant in connection with Appellant's repetition of a similar story to others. *See, e.g.*, Def. App. Ex. H at 275 (Appellant's statement to EV that AN got on top of him and initiated sex).

While not listed in the Chief of Justice's email, the notes from trial counsel's interview of MS also note that AN "had a previous encounter like this before as a civilian. [AN] told [MS] that she felt helpless." Def. App. Ex. H at 212. This is not fully developed in the notes, but it seems as if AN was drawing some sort of parallel between her accusations against Appellant and a prior experience and possibly connecting the prior experience with her feelings during the charged incident.

While not listed in the Chief of Justice's email, the notes from trial counsel's interview of Col RT, a commander who issued two search authorizations, contains information that should have been disclosed. RT issued search authorizations for a Sexual Assault Forensic Exam (SAFE) exam of Appellant and a search of Appellant's residence. R. at 204-20. The defense tried to suppress the former search, which would have greatly reduced (if not completely eliminated) the forensic evidence presented at trial. The government called RT as a witness in opposing the suppression, to include the following exchange:

> Q. During those, generally speaking, did -- were you familiar with the standard for granting search authorization?
>
> A. I don't know how to answer that. That is exactly why I was at legal so I could make sure that what I was being asked for and what I was actually authorizing were in that statement, right? Because I didn't want to trust my gut on this or any of these situations. I wanted to know what was being asked and what I was granting had met that standard.

R. at 207. By contrast, when asked privately by trial counsel, RT gave a different answer:

> Did the legal office describe PC or level of probability to authorize a search?

> Yes, Gut tells you something is more likely than not, plus the legal standards. Gut is often good enough.

Def. App. Ex. H at 220. RT further told trial counsel that, after issuing the search authorization for Appellant's SAFE, he had changed the process for granting search authorizations, because he thought he might have done something wrong. Def. App. Ex. H at 219 ("Gut tells me I might have done something wrong."). All of these statements call the credibility of RT's ultimate testimony, as well as his decision to grant the search authorization, into question and should therefore have been disclosed.

While not listed in the Chief of Justice's email, the notes from trial counsel's interview of TG record that the witness "Noticed that he's starting to forget things." Def. App. Ex. H at 52. This should have been disclosed because its bearing on his credibility makes it impeachment evidence.

5. Disclosures Involving RY

The government made six substantive disclosures about RY in the Chief of Justice's email. *See* Def. App. Ex. H at 6. Review of the attached notes reveals additional evidence that should have been disclosed. Appellant highlights the following points of particular significance.

The government disclosed that, on 19 Noember 2021, CS described poor memory about the charged events to trial counsel. Specifically, "[CS] said the more [CS] talks about the incident, the more she forgets." Def. App. Ex. H at 5. Later in the disclosure, the government goes on to list additional failures of CS's memory about the party in question to include what RY said to Appellant, whether RY got up and left after the charged events, and how CS left the house and got to BB's house later in the evening. Def. App. Ex. H at 5. The accuracy of CS's perception and recall was of crucial importance. Because RY, the named victim, declined to testify, CS's eyewitness testimony was the only evidence establishing the occurrence of the charged events.

The fact that the only eyewitness to the charged conduct admitted she was progressively forgetting about the incident is highly relevant and should have been disclosed. *See, e.g.*, *United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2011) (evidence that a witness had "difficulty with remembering key facts" should have been disclosed as both exculpatory and impeachment evidence).

While not listed in the Chief of Justice's email, the notes from trial counsel's interview with CS reveal that she told trial counsel, "When that stuff is happening, you don't care about the specifics. You just care about the person." Def. App. Ex. H at 196. While this is an understandable sentiment, it should have been disclosed that the only eyewitness to the charged offense told the government she "didn't care about the specifics" of what she witnessed.

While also not listed in the Chief of Justice's email, the notes from trial counsel's interview contain relevant information underlying CS's opinion that the charged touching was intentional rather than accidental.[7] In response to trial counsel's question: "Why did you say from your perspective do you think it was on purpose?" CS responded "more opinion than factual info." Def. App. Ex. H at 194. CS elaborated that, "in retrospect it seems in his character to do that purpose [sic]." Def. App. Ex. H at 195. When asked whether there was anything in Appellant's body language that made CS think the touching was intentional, CS responded by again referencing her underlying opinion on Appellant's character:

> I always got bad vibes from him. His body language. The way he would talk. I am good about sending [sic] those kinds of things. When I met him I did now [sic] want to know him.

Def. App. Ex. H at 195. The notes reveal several more statements to the effect that CS had a

[7] A major subject of controversy was whether the touch could have been accidental. CS testified at trial, from her perspective, the touching did not appear to be an accident. *See* R. at 1635-36.

preexisting dislike for Appellant. Def. App. Ex. H at 194 ("I never got good vibes from him.") ("Never wanted to be his friend.") ("She met him at a party before and got bad vibes."); Def. App. Ex. H at 195 (". . . I got sketchy vibes from him. . . ."); Def. App. Ex. H at 198 ("[CS] got bad vibes from SUB that first time she met SUB. That friend group loved Sam but [CS] immediately got bad vibes. There wasn't any reason why, she just did."). In short, (1) CS disliked Appellant and (2) based on her dislike for him, she speculated that intentionally touching RY was in his character. Had this been disclosed, the defense could have used this evidence to challenge the credibility, and perhaps even the admissibility, of CS's testimony that, from her perspective, the touching did not appear to be an accident. R. at 1635. "[A] lay witness must always have a proper foundation to offer an opinion." *United States v. Eslinger*, 70 M.J. 193, 199 (C.A.A.F. 2011) (citing Mil. R. Evid. 701). CS's opinion that an intentional touch was in Appellant's character because she always got bad vibes from him did not have a proper foundation or meet the requirements of Mil. R. Evid. 701. Certainly, this evidence was very relevant to bias and could therefore have been used to impeach CS if it had been properly disclosed. Indeed, CS's expressed dislike for Appellant was, in and of itself, disclosable. *See e.g.*, *Sipe*, 388 F.3d at 481, 493 (withheld evidence that witness "disliked" defendant even before the incident, and thought defendant had an abrasive personality, could have been used as "a source for impeaching [the witness] for bias" and, along with other withheld evidence, justified reversal).

While also not listed in the Chief of Justice's email, the notes from trial counsel's interview reveal that CS told the government that RY "reacted so well and so calmly to the situation." Def. App. Ex. H at 195. This would have been, and is still now, relevant to the hotly contested excited utterance litigation in this case. *See* Assignment of Error VI.

While also not listed in the Chief of Justice's email, the notes from trial counsel's interviews reveal at least two other witnesses at the party saw the charged interaction but did not witness the alleged touching. SP stated he saw Appellant sitting closely but in separate chairs with a female and talking to her, but he "wasn't all over her" – "They were just talking." Def. App. Ex. H at 182. While not fully developed, this seems like it could be the charged interaction, and SP did not witness the charged conduct.[8] MV, meanwhile, heard RY say later (in the car) that Appellant had grabbed her breast. However, he himself witnessed the charged interaction and "Didn't see him touching her." Def. App. Ex. H at 286-87. MV reported that he saw Appellant and RY interacting, and even heard him asking her out, but did not see the charged touching. Def. App. Ex. H at 286-87. This is exculpatory evidence from an eyewitness that absolutely should have been disclosed.

While also not listed in the Chief of Justice's email, the notes from trial counsel's interview with CS discuss, in considerable detail, how RY only reported Appellant because KB – a friend of RY's – reported Appellant and RY wanted to "stand up for her friends." Def. App. Ex. H at 195-96. There is also a reference to RY disclosing the breast-touch on a five-way group phone call, which included at least two other named victims. Def. App. Ex. H at 196. In this multi-victim case with a complex web of relationships between victims and witnesses, the fact that one named victim reported Appellant to be supportive of another named victim whom she was friends should have been disclosed.

Relatedly, the notes reveal that people told CS that when Appellant gets drunk, he likes to take advantage of women and that CS personally "facetimed'd" with Appellant's girlfriend to tell

[8] SP said he had seen the girl before but wasn't sure of her name. He did guess a name that was not RY. Further development would be needed. But his description seems to match the charged events.

her (the girlfriend) "about the [KB] situation." Def. App. Ex. H at 198-99. While not fully developed, it seems CS was speaking with Appellant's girlfriend either to tell her Appellant had assaulted KB, to ask her whether Appellant had also assaulted her (his current girlfriend), or some combination of the two. This level of personal involvement by CS in the web of accusations against Appellant should have been disclosed. In the absence of RY, CS was the only eyewitness to a charged assault. The fact that she had personally taken it upon herself to call Appellant's girlfriend, apparently about the very subjects under scrutiny at the trial, calls into question her objectivity as a witness (particularly when combined with her above-discussed preexisting distain for Appellant). Thus, it is impeachment evidence that should have been disclosed.

6. Additional Disclosures

The disclosures and notes also contain information about Appellant personally and contain several relevant statements of Appellant. To the latter point, the defense requested all prior statements of the accused in discovery:

> a. Disclosure of and production of all statements by the Accused, including the contents of all oral, written, electronic, and/or recorded statements made by the Accused that are relevant to any charged or uncharged offenses, regardless of whether the Government intends to use the statements at trial or any hearing. M.R.E. 304(d)(1); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993).

App. Ex. XXVII, Attachment 11, Government Response to First Defense Discovery Request, 24 August 2021 at 9 (page 82 of App. Ex. XXVII). The government granted this request. *Id.* ("**Government Response:** GRANTED"). Despite granting the request, the newly disclosed material reveals that the government had multiple undisclosed statements of Appellant in its possession. See, e.g., Def. App. Ex. H at 5, 74-75.

7. The Government Failed to Disclose Discoverable Evidence

It is clear based on the government's disclosures and the underlying notes that the evidence should have been disclosed at or before trial. Many of the items of withheld evidence individually, but even more so cumulatively, were material to the defense. *See Kyles*, 514 U.S. at 419 (noting that, in reviewing the materiality of the withheld evidence, it must be considered cumulatively, not in isolation, item-by-item) (citation omitted).

Additionally, as affirmed by trial defense counsel, the evidence discussed herein was not previously disclosed. Def. App. Ex. G.

The harmless beyond a reasonable doubt prejudice standard is clearly triggered. *See Claxton*, 76 M.J. at 359. In the first place, for all the above reasons, the nondisclosure constituted prosecutorial misconduct. Additionally, the defense made multiple specific requests that should have resulted in the disclosure of the withheld evidence. On 3 August 2021, defense counsel requested, with respect to any potential witnesses, "summaries of conversations with representatives of the government." App. Ex. XXVII at 67.[9] In this same request, the defense requested: "Any evidence tending to diminish the credibility of any potential witnesses . . . ." (App. Ex. XXVII at 68.[10] The defense further requested notification regarding government communications with complaining witnesses. App. Ex. XXVII at 72.[11] *See also* Def. App. Ex. C (additional defense request for discovery about government communications with complaining witnesses). These specific requests should have elicited the undisclosed evidence, but the

[9] App. Ex. XXVII is the Defense Motion to Dismiss: Charge I Specifications 6-7. Attachment 10 of App. Ex. XXVI is the Defense First Discovery Request, dated 3 August 2021. Attachment 10 is pages 60-73 of App. Ex. XXVII. Appellant specifically directs this Court to paragraph 4(g) on page 67 of App. Ex. XXVII.
[10] Appellant specifically directs this Court to paragraph 4(h) on page 68 of App. Ex. XXVII.
[11] Appellant specifically directs this Court to paragraph 8(i) on page 72 of App. Ex. XXVII.

government still failed to disclose it.

8. The Nondisclosure was not Harmless Beyond a Reasonable Doubt

The nondisclosure was not harmless, especially when viewed cumulatively. *See Sipe*, 388 F.3d at 478 (noting that, when there are multiple disclosure violations, a court must analyze whether the cumulative effect of all such evidence suppressed by the government raises a reasonable probability that its disclosure would have produced a different result).

The full prejudice of the nondisclosures is likely greater than can be fully articulated because the defense was deprived not just of the undisclosed evidence itself, but also of the ability to use it in further preparing and developing its case.

a. Offenses Against KB

The nondisclosures about KB impact KB's credibility, as well as the credibility of BB, a key government witness. The nondisclosures reveal additional evidence of prior intimacy between Appellant and KB, including on the night of one of the charged offenses. The nondisclosures went both to the credibility of the elements and to Appellant's ability to argue mistake of fact as to consent. The cumulative prejudice is increased by the nondisclosures about the charged offenses against EV which, via the military judge's Mil. R. Evid. 404(b) ruling, were used as a "common plan or scheme" of criminality to bolster the charges involving KB.

Critically, the evidence supporting these offenses was already weak. KB's allegations were not corroborated by eyewitness testimony, physical evidence, forensic evidence, or admissions of the accused. KB was clearly an unreliable narrator on the exact topic in question: her sexual interactions with Appellant. KB denied any knowledge of multiple instances of prior kissing or intimacy with Appellant that were confirmed by third party testimony. *Compare* R. at 1548-59 with R. at 1772-73; R. at 1548-59 with R. at 1772-73; R. at 1551 with R. at 1573; R. at 1510 with

R. at 1572-73, 1604-05, 1614-16, 1774, 1777. KB told at least two friends that the first charged assault had actually been consensual. R. at 1515, 1540-42, 1774, 1777. Most disturbingly of all, KB confessed to AV that she was falsely telling people her sexual encounter with Appellant was nonconsensual for reputational reasons. R. at 1774, 1777. KB's story also contained inherent improbabilities. During both encounters of which Appellant was convicted, there was a third-party NCO (MB) sleeping close at hand, yet KB made no effort to ask for assistance, and Appellant seemed unconcerned about being discovered in any illegal activity. R. at 1525, 1531-32. KB also continued to associate closely with Appellant in the aftermath of the alleged assaults, making the affirmative decision to move into Appellant's house not once, but twice, after allegedly being assaulted by him, even though she maintained a perfectly adequate dorm room on base the entire time. R. at 1550, 1546-47, 1609. The weakness of the evidence is discussed further in Assignment of Error III.

b. Offense Against RY

The prejudice of the undisclosed evidence is arguably even higher when it comes to the offense against RY. As RY herself did not testify, the testimony of CS was critical to the government's case, and the undisclosed evidence would have undercut CS's credibility. CS's preexisting dislike for Appellant was relevant to bias and perception. CS's acknowledgments that she didn't care about the specifics when she was observing the charged events and was progressively forgetting them thereafter were significant to the accuracy of her perception and recall.

The undisclosed evidence would have also impacted the litigation of the excited utterance issue in this case. *See* Assignment of Error VI. While arguing that RY's emotional state was sufficiently heightened to meet the excited utterance standard, the government possessed but

withheld evidence that CS—who the government portrayed at trial as highly adept at reading RY's emotions—described RY as "react[ing] so well and so calmly to the situation." Def. App. Ex. H at 195.

The inter-connection between these events and the web of other victims and charges in this case was also relevant to bias, with RY apparently reporting Appellant in an effort to stand in solidarity with her friends who were also reporting him, CS's seeming admiration for this decision, and CS's personal contact with Appellant's girlfriend to tell her about accusations against Appellant by another victim (KB).

c. Offenses Against AN

The government withheld evidence that contradicted AN and MS's denials on an important point. Whether or not Appellant heard AN's indications of nonconsent was critical to the defense theory and strategy for the case. MS acknowledged to both the defense and the government in pretrial interviews that AN told him Appellant made a contemporaneous statement to the effect that he didn't hear her say stop multiple times and apologized. This evidence was critical to the defense strategy for the case. Defense counsel mentioned it in opening statement. R. at 1121. It would have greatly assisted the defense theory of mistake of fact as to consent in closing. *See, e.g.*, R. at 1973.

Perhaps unsurprisingly, AN denied the prior statement. R. at 1171. The defense was obviously caught off guard, however, when MS also denied it at trial. *See* R. at 1242-43. If the defense had known MS had made similar concessions to trial counsel, it could have more effectively dealt with the unexpected denial. Instead, the defense plan floundered and, indeed, backfired – leaving the strong impression that defense counsel was either confused about the evidence or intentionally trying to misrepresent it. Trial counsel, meanwhile, left Appellant and

his counsel flailing while withholding evidence that would have totally changed the trajectory of this issue. The defense had the right to know that MS had made a similar statement to the government, directly contrary to his trial testimony.

The impact was doubly significant in light of the relationship dynamics between AN and MS and Appellant's past exculpatory statements about these same events. *See, e.g.*, Def. App. Ex. H at 275 (EV tells trial counsel Appellant told her AN initiated sex).

The undisclosed evidence also would have impacted the litigation of the propriety of the commander authorization for the forensic examination of Appellant's person. The commander's candid discussion with trial counsel, that a "gut" feeling "is often good enough" for him to authorize a search, seems to directly contradict his later testimony. *Compare* Def. App. Ex. H at 220 with R. at 207 ("I didn't want to trust my gut on this or any of these situations."). Trial counsel then argued to the military judge that the search authorization of Appellant's person was no different than any other search RT had been a part of. R. at 337 ("[T]here is no evidence before you or any reason to believe that this was any different than the other search authorization he was a part of."). This argument is in tension with RT's apparent disclosure to trial counsel that, after issuing the search authorization of Appellant's person, he had changed the process for granting search authorizations, because he thought he might have done something wrong. Def. App. Ex. H at 219 ("Gut tells me I might have done something wrong."). Had these admissions by RT been disclosed, the defense may have developed substantially different evidence and/or arguments on the critical issue of the suppression of the SAFE of Appellant. If successful, suppression of this evidence would have drastically altered the trajectory of the trial.

It cannot be said that the nondisclosures are harmless beyond a reasonable doubt. The evidence on this charge was not overwhelming. AN's testimony was impeached on a number of

matters. *Compare* R. at 1139, 1162, 1166-67 (AN denials of continued consensual kissing of Appellant after he attempted to advance the sexual intimacy) with R. at 1357 (Office of Special Investigations (OSI) agent testimony that AN told him that she resumed kissing Appellant after he had touched her breasts); R. at 1152-54 (AN denials of holding Appellant's hand, stroking his arm, and calling him a hero during law enforcement response to her prior report on the same night) with R. at 1260, 1268-72 (PB testimony she did all of these things). There was motive to fabricate presented: AN violated the COVID lockdown rules on the night in question and AN was fingerprinted, apparently in connection with a charge of mutual assault, in connection with the evening's earlier events. R. at 1150, 1154, 1266-67. The evidence was particularly vulnerable in terms of mistake of fact as to consent, the specific subject the undisclosed evidence went to (in addition, of course, to witness credibility), in that AN acknowledged the encounter began consensually, to include what she described as "pretty intimate" kissing and "face grabbing" – and the defense presented expert testimony about the risk of miscommunication in situations where non-verbal forms of communication might be missed due to being in a dark room. R. at 1159-60, 1820-21, 1833-35, 1837-38.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 June 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	**MOTION TO ATTACH DOCUMENTS** Before Special Panel No. ACM 40363 Date Filed: 25 June 2024

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

Pursuant to Rules 23 and 23.3(b) of this Court's Rules of Practice and Procedure, Appellant, Senior Airman (SrA) Samuel Doroteo, moves to attach the Appendix to this motion to his Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals 325 pages in length and consists of the following:

Affidavit of Major CM, with attachments, dated 16 June 2024 (Def. App. Ex. G): Maj CM served as one of Appellant's trial defense counsel. Her affidavit describes the disclosures she and other members of the trial defense team received from the government before and during trial, and it includes copies of these disclosures as attachments. This affidavit confirms for the Court that significant portions of the information disclosed in June 2024 were not previously disclosed by the government.

Additional Post-Trial Disclosures, disclosed to the Defense on 7 June 2024 (Def. App. Ex. H): This is the entirety of the post-trial disclosures received on 7 June 2024 and includes an email from the Chief of Military Justice at the prosecuting base legal office as well as voluminous notes from multiple interviews. These documents show what information the government had in its possession but failed to disclose until two years after trial.

These documents are relevant and necessary to resolve this Court's consideration of Appellant's twelfth assignment of error, raised in the Supplemental Brief on Behalf of Appellant, and to determine whether the government fulfilled its discovery obligations, a question raised by, but not resolved by, the record of trial. This Court previously granted a motion for supplemental briefing on this issue. Order, Motion for Leave to File Supplemental Filing, 20 June 2024.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach Documents.

Respectfully submitted,

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Appendix

1. Affidavit of Major CM, with attachments, dated 16 June 2024, 14 pages (Def. App. Ex. G)
2. Additional Post-Trial Disclosures, disclosed to the Defense on 7 June 2024, 311 pages (Def. App. Ex. H)

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 25 June 2024.

Respectfully submitted,

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9 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	
	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Panel No. 3

ANSWER TO SUPPLEMENTAL ASSIGNMENT OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	
	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Special Panel

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

ISSUE PRESENTED

XII.

WHETHER APPELLANT'S CONVICTIONS SHOULD BE SET ASIDE FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA POSTTRIAL DISCLOSURES FROM THE PROSECUTING LEGAL OFFICE.

STATEMENT OF THE CASE

The United States' statement of the case is contained in its original brief.

STATEMENT OF FACTS

Facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

XII.

THE GOVERNMENT DID NOT COMMIT A DISCOVERY VIOLATION WARRANTING DISMISSAL OF APPELLANT'S CONVICTIONS.

Standard of Review

Absent a ruling by the military judge, this Court reviews issues of undisclosed evidence *de novo*. *See* United States v. Jackson, 59 M.J. 330, 334 (C.A.A.F. 2004).

Law

Under Brady v. Maryland, 373 U.S. 83 (1963), trial counsel has a constitutional duty to disclose evidence if the evidence is material and favorable to the defense. *See* United States v. Bagley, 473 U.S. 667, 682 (1985). However, "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." United States v. Agurs, 427 U.S. 97, 109, 96 S. Ct. 2392, 2400 (1976) (internal citations omitted). Further, "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." Bagley, 473 U.S. at 675 n.7.

Indeed, "[t]he Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial" Id. at 675.

The test for materiality is if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012). "[T]he evidence must have made the likelihood of a different result great enough to undermine confidence in the outcome of the trial." Id.

An inquiry into the materiality of undisclosed evidence calls for assessment of the omission in light of the evidence in the entire record. United States v. Stone, 40 M.J. 420, 423 (C.M.A. 1994). If a constitutional error is established, the Government must persuade the court

the error was harmless beyond a reasonable doubt. United States v. Hall, 58 M.J. 90, 94 (C.A.A.F. 2002).

R.C.M. 701(a)(6) requires trial counsel to disclose to the defense the existence of known evidence that reasonably tends to negate or reduce the degree of the accused's guilt, or to reduce punishment if the accused is found guilty. Trial counsel has a duty to learn of any evidence favorable to the accused known to others acting on the Government's behalf. Jackson, 59 M.J. at 334 (citation omitted). If the Government fails to disclose discoverable evidence, the error is tested for prejudice in light of the entire record. Id., *citing* Stone, 40 M.J. at 423. Generally, erroneous non-disclosure will entitle an appellant to relief only where the appellant demonstrates a reasonable probability of a different result at trial had the evidence been disclosed. Id. A "reasonable probability of a different result" is a probability sufficient to undermine confidence in the outcome. United States v. Morris, 52 M.J. 193, 197 (C.A.A.F. 1999). If an appellant establishes the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant is entitled to relief unless the Government can demonstrate the nondisclosure was harmless beyond a reasonable doubt. United States v. Gonzalez, 62 M.J. 303 (C.A.A.F. 2006) (*citing* United States v. Roberts, 59 M.J. 323, 327 (C.A.A.F. 2004)).

Analysis

Appellant claims the Government committed discovery violations worthy of dismissing all of his convictions. (App. Supp. Br. at 3.) Appellant is mistaken.

- *Maj CM's Affidavit*

Maj CM's affidavit highlights that the Government provided Appellant's counsel multiple disclosures throughout the pretrial discovery process. Further, as it relates to the current

disclosures, Maj CM is silent on whether she or any of Appellant's six other trial defense counsel otherwise knew about any of the evidence contained in the current disclosures. Indeed, Maj CM's affidavit could have specified which disclosures were previously unknown to her. As shown throughout this brief, much of the current disclosures is duplicative of information already known to the defense (for example, disclosures related to Appellant and A1C KB kissing, a past relationship between the two, and information contained within Air Force Office of Special Investigations (AFOSI) Reports of Investigations (ROIs) that were provided to Appellant prior to his trial). Still other disclosures involve witnesses telling Government trial counsel about their interviews with Appellant's defense counsel, which again, is information previously known by the defense.

Considering Maj CM's silence on her previous knowledge of the current disclosures, as well as the lack of affidavits from any of Appellant's other trial defense counsel discussing which of the current disclosures were or were not already known by them, this Court cannot be certain a discovery violation even occurred. *See* Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000) ("[T]here is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source.")[1]; *see also* United States v. Erickson, 561 F.3d 1150, 1163 (10th Cir. 2009) ("Furthermore, a defendant is not denied due process by the government's nondisclosure of evidence if the defendant knew of the evidence anyway.") (*citing* Spears v. Mullin, 343 F.3d 1215, 1256 (10th Cir. 2003) ("[T]here can be no suppression by the state of evidence already known by and available to the defendant prior to trial."); United States v.

[1] Our sister court cited this case in its own United States v. Behenna opinion. *See* United States v. Behenna, 70 M.J. 521, 529 (A.C.C.A 2011).

Quintanilla, 193 F.3d 1139, 1149 (10th Cir. 1999) ("If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial."); Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998) (no Brady violation is possible when defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information" or when the evidence is available to him from another source, such as a witness "to whom he had as much access as the police.")) *See also* Holland v. City of Chicago, 643 F.3d 248, 256 (7th Cir. 2011) ("A defendant in a criminal case that actually goes to trial has the responsibility to probe the witnesses and investigate their versions of the relevant events.") (internal quotation omitted).

Yet, even if this Court were to assume Appellant's trial defense counsel were unaware of the disclosures with which Appellant cites in his supplemental brief, Appellant has failed to show how the disclosures were material to his case or how he was prejudiced by their nondisclosure. Notably, Maj CM is silent as to how knowledge of any of the disclosures cited throughout Appellant's brief would have impacted their preparation and strategy, and the affidavit provides no specific details as to what theories or strategies would have been implemented that the defense team did not already have before them.

- *SSgt EV*

As he acknowledges in his brief, the panel acquitted Appellant of all specifications involving SSgt EV. (App. Supp. Br. at 12.) Thus, as it relates to those specifications, any nondisclosure was harmless.

Still, Appellant alleges fault because the "undisclosed information would have further undermined the credibility of EV's report and reduced its evidentiary value as 'common plan or scheme' evidence to bolster the charges against KB." (Id.) Appellant then discusses disclosures

involving SSgt EV's supposed memory lapses, prior intimacy with Appellant, and mental health issues.[2] (Id. at 12-14.)

Again, the panel acquitted Appellant of all allegations involving SSgt EV so "further undermining" SSgt EV's credibility is irrelevant. Moreover, Appellant's argument that these same allegations somehow "bolster[ed] the charges against KB" is unsupported considering the panel fully acquitted Appellant of 60% of the specifications included in the military judge's Mil. R. Evid. 404(b) instruction. To that end, Appellant cannot claim that allegations related to SSgt EV infected his convictions involving A1C KB because they acquitted him of all allegations involving SSgt EV.

Further, the panel essentially acquitted Appellant of the October 2019 allegation made by A1C KB when they excepted that date out of Specification 4. Considering these acquittals and excepted language, the panel's findings show it reviewed each specification, including separate specifications involving the same victim, individually and obeyed the military judge's instruction that "[e]ach offense must stand on its own." (R. at 1946.)

- *A1C LD*

Again, Appellant acknowledges the panel acquitted him of all specifications involving A1C LD. (Id. at 15.) Appellant's only argument as to how disclosures involving A1C LD impacted his convictions is his statement that, "While not fully developed, it seems LD was talking directly to KB about their respective allegations just days before KB's report." (Id.) Yet,

[2] As with the rest of the victims below, the record shows Appellant already had notice of many of his claimed discovery violations. For instance, he claims that he was not aware that SrA MM had told the Government that Appellant had told SrA MM that he had woken up to SSgt EV performing oral sex on him. (App. Supp. Br. at 13.) However, the AFOSI ROI involving SSgt EV shows that SrA MM told AFOSI agents this very thing, as the ROI states that SrA MM said "[Appellant] fell asleep, and woke up to [SSgt EV] giving him oral sex." (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2e, Report of Investigation at p. 15.)

this information was readily available to the defense prior to Appellant's trial. In the AFOSI ROI involving A1C KB, the report details an interview AFOSI conducted with A1C LD. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 15.) There, the ROI states A1C LD told AFOSI that A1C KB spoke with A1C LD on at least two occasions about incidents she had Appellant, including one in which Appellant got on top of her and said, "Let me put the tip in." (Id.) Then, in the AFOSI ROI involving A1C LD, the report details an interview AFOSI conducted with A1C KB where A1C KB stated that A1C LD told her about an incident involving Appellant touching A1C LD inappropriately. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2c, Report of Investigation at p. 8-9.)

Here, despite Appellant's assertions, his counsel were well on notice that A1C LD and A1C KB had discussed their allegations with one another prior to making their reports. Thus, there are no prejudicial discovery violations involving A1C LD.

- *A1C RY*

Appellant's contentions regarding his convicted action against A1C RY centers on SrA CS, the eyewitness who saw Appellant touch A1C RY's breast. (App. Supp. Br. at 18-22.) Appellant first claims SrA CS "described poor memory about the charged events to trial counsel" during a pretrial interview conducted on 19 November 2021. (Id. at 18.) Appellant gloms onto the part of the interview notes that read "The more I talk about it the more I forget." (Def. App. Ex. H at 5.) However, Appellant fails to place this note in context. That portion of the notes reads in full:

> Sam was sitting really close to her. My view was wasit up. I couldn't see anything waist down oneither of them. I focused on the situation when I noticed she was getting uncomfortable. Her face was unamused. He got up and fell into her chest. It was a bean dip where you scoop under. To me it looked like it was on purpose and he was trying to make it look like an accident. He gets up and falls into her breast. He stands up next to her and is hovering next to her. She said something to him – I can't remember what she said to him. The more I talk about it the more I forget.

(Id. at 194.) Here, when placed in context, the interview notes show she is talking about remembering exactly what A1C RY said to Appellant in this moment. Which is exactly what SrA CS testified to at trial when she stated, "And then I remember him hovering over her right shoulder. I don't know if he said something to her or what he said to her, but then after that, he had walked away." (R. at 1634.) Appellant's trial defense counsel reinforced this point on cross-examination by asking, "And you had said earlier that it looked like he was trying to say something to her?" (R. at 1649.) SrA CS replied, "I believe he said something to her when he was standing above her shoulder. However, I don't know what he said." (Id.) Again, this is not new information to the defense.

Appellant goes on to cast doubt on SrA CS's overall recollection of that night. However, a review of the interview notes from SrA CS's 19 November 2021 reveals five pages of notes where SrA CS provides very specific details about the night in question. While SrA CS may not have been able to recall every single moment of an entire evening, the interview notes (as well as SrA CS's testimony at trial which mirrored her pretrial interview) show SrA CS had an excellent recollection of that night.

Furthermore, Appellant's trial defense counsel cross-examined SrA CS about her recollection of that night, and SrA CS admitted to not remembering some things, such as whether the party was loud, the exact time she got to the party, what day of the week the party was on, the placement of everyone in the room, whether Appellant was stumbling around the house, (*See*, for

example, R. at 1641-42, 1644.) Finally, Appellant's counsel repeatedly referenced a pretrial interview the defense team had with SrA CS where her memory about Appellant and the events of that night was discussed.[3] (R. at 1639-49.)

In fact, the interview notes reference this very interview. (Def. App. Ex. H at 197.) There, the notes state the Defense asked SrA CS to "go into detail about other details (e.g., hand placement, thumb or thumb down)." (Id.) The notes then state, "If I didn't know 100%, I let them know." (Id.) This note, as well as the actions by Appellant's counsel, show the defense was well aware that SrA CS could not recall every moment of the night in question and had ample opportunity before the panel to question SrA CS about her memory of that night.

Appellant next pigeon-holes an interview note that reads, "When that stuff is happening, you don't care about the specifics." (App. Supp. Br. at 19, *citing* Def. App. Ex. H at 194.) Again, Appellant takes this out of context. The full portion of this note reads as follows:

5) For the bean dip, you saw his hand literally touch her breast?
   a) Yes, I saw him touch her breast.
   b) As far as which breast, it was like the center, so I don't know what boob more per se.
   c) When that stuff is happening, you don't care about the specifics. You just care about the person. I beat myself up for not intervening. In that moment I was focused on her and waiting on her cue.
   d) After he left, especially after he completely left the situation, I was trying to figure out if she wanted to leave. If she wanted to get up and do something. I could tell that she was pissed off at that time.
   e) I could tell she was pissed by her face, her whole body was tense, we were giving each other the eyes.

(Def. App. Ex. H at 194.)

Here, when read in context, the notes show SrA CS was very specific as to whether Appellant touched her breast. The only issue she had was which breast he touched the most. Also, when read in context, SrA CS was describing how she was worried about her friend at the time of the incident and how she was "focused on [A1C RY]."

[3] The interview notes cited by Appellant also show SrA CS spoke with the defense team prior to this 21 November2021 interview. (Def. App. Ex. H at 197.)

Finally, at trial, Appellant's trial defense counsel elicited testimony on this very topic, asking SrA CS, "Did you notice [A1C RY's] breast move," to which SrA CS replied, "I was not focused on her boobs." (R. at 1648.) Appellant's counsel then reinforced this point, asking, "When I asked you earlier if you noticed if [A1C RY's] breast moved when the man's hand touched her breast, you said, 'I was not focused on her boob' Is that correct?," "You are focused on her face, not her boob?," and "So you were focused on her face, not her boob before and after the action. Thank you." (R. at 1653-54.) Here, Appellant's counsel's entire point in this questioning was that SrA CS was more focused on A1C RY as a person (i.e., watching her face and emotions), rather than focused on which breast was touched. Again, there was no discovery violation here. The defense already knew cumulative information and made use of it.

Appellant next focuses on why SrA CS thought Appellant's act was intentional. (App. Supp. Br. at 19.) The portion of this note reads as follows:

3) Why did you say from your perspective do you think it was on purpose?
   a) I could tell he was hitting on her
   b) This is more opinion than factual info. I never got good vibes from him. Never wanted to be his friend. She met him at a party before and got bad vibes. R[redacted] is a very attractive woman and most guys want to hit on her. Sam was too. Sam seems like an aggressive drunk. He's going to do whatever he wants. It did not seem like an accident. The way he was leaning in and talk to her. It seemed like he wanted to get something out of the conversation.
   c) I don't remember him apologizing. I was focused on R[redacted] because I was focusing on Reign. I was watching r[redacted] to see if she needed backup at that point.
   d) They were on the same side of the table. I was sitting across from them.
   e) Sam pulled up a chair right next to R[redacted]
   f) When Sam stood up, it wasn't to leave. He was just hovering right over her shoulder.
   g) I'm pretty sure she told him to get away – but I can't even remember that now.
   h) Sam got up. Touched her boob. He was talking in her ear. Getting really close. He was doing that before too when they were sitting talking. He was in her personal space.
   i) Sequence: Sam stood up, fell into her, then hovered over her.
      I) It all happened like fluidly. He stood up, fell into her, like I couldn't see from the wasit down. If he would have tripped I wouldn't have seen it. But to me it seemed intentional because hitting on her, getting in her personal space, and in retrospect it seems in his character to do that purpose.
   ii) How long was he on top of her as he falls into her?
      (1) Only a couple of seconds. He didn't linger on her breast that would have made it way too obvious.
   iii) Was there anything about his body language that made it look intentional?
      (1) I always got bad vibes from him. His body language. The way he would talk. I am good about sending those kinds of things. When I met him I did now want to know him.
   iv) So in that moment, based on what he's saying, his eyes, his body language, made it look intentional?
      (1) Yes.

(Def. App. Ex. H at 195.) Appellant contends SrA CS's opinion that the touching was intentional versus accidental was based on her "underlying opinion of Appellant's character." (App. Supp. Br. at 19.)

However, the full context of the notes show why SrA CS thought Appellant's acts were intentional. She thought he was "hitting on her." She knew, as she testified at trial, that A1C RY was "a very attractive woman and most guys want to hit on her." (Def. App. Ex. H at 195; *see also* R. at 1635.) She saw "The way [Appellant] was leaning in and talk[ing] to her," adding, "It seemed like he wanted to get something out of the conversation." She said Appellant was "in her personal space," "getting really close," and "talking in her ear." Here, Appellant's physical actions towards A1C RY shaped SrA CS's perception of the incident.

Moreover, yet again, Appellant's counsel, within their own pretrial interview of SrA CS, had ample opportunity to learn of SrA CS's "vibes" toward Appellant. Considering Maj CM's silence on the issue in her affidavit, there is a strong possibility that SrA CS's feelings toward Appellant were discussed during that interview.

Further, while Appellant claims that he would have attacked SrA CS's credibility on her opinion of Appellant had he known about SrA CS's "vibes" toward him, such an argument would have gone completely against the focal point of his attacks both at trial and on appeal surrounding SrA CS's testimony - namely that she did not know and *could not even recognize* Appellant. (*See* App. Br. at 17, where Appellant states, "There were significant issues with CS's identification of the man who touched RY;" App. Br. at 59, where Appellant states, "While CS was able to describe the charged act, she did not know Appellant and her identification of him was extremely weak;" App. Br. at 65, where Appellant states, "The only other evidence about

the charged act came from CS, whose identification was weak in the extreme and objectively did not fit Appellant.")

Appellant next focuses on SrA CS's description of how A1C RY reacted to Appellant's actions, keying in on the interview note that states, "That's why she reacted so well and so calmly to the situation." (App. Supp. Br. at 20.) The full context of that note reads as follows:

> l) Did r[redacted] say "did you see that?" or anything like that?
> i) Nothing explicit. We didn't make a scene out of it or anything. I guess what's frustrating is that's something that happens to her so often that we didn't make a scene out of it. That guys are getting in her space and touching her. We've had conversations about it. That's why she reacted so well and so calmly to the situation. It's not new to her. That's why I didn't make a scene. I knew if she wants to make a deal, she will, and I'll back her up.

(Def. App. Ex. H at 195.)

Here, SrA CS was simply telling the trial counsel how A1C RY outwardly responded to the situation, which is exactly what SrA CS testified to at trial. There, SrA CS said, "She was very closed off. She didn't immediately, like, snap or confront. It was almost like a state of shock, from what I remember." (R. at 1636.) Again, like all of Appellant's complaints in his brief, this information is not new.

Yet, a further review of the interview notes show SrA CS knew exactly how A1C RY felt internally. The notes state, "I could tell that she was pissed off at that time," and "I could tell she was pissed by her face, her whole body was tense, we were giving each other the eyes." (Def. App. Ex. H at 196.) Appellant's brief does not mention these notes.

Notably, SrA CS's thoughts on how A1C RY was reacting internally match perfectly with A1C RY's own motion testimony where she stated she was frustrated, annoyed, angry, upset, and in a state of desperation. (R. 367, 371.) Undoubtedly, one can easily understand how A1C RY, not wanting to make a public scene, may outwardly react "calmly," while internally

actually feeling angry, upset, and, as SrA CS put it, "pissed." The two reactions are certainly not mutually exclusive.

In sum to this point, A1C RY reacting "well" and "calm" (i.e., not causing a big scene at a party) was well known to the defense at trial. Also well known was that internally, A1C RY was angry, upset, and frustrated, factors that led the military judge to correctly allow A1C RY's text messages into evidence as excited utterances. While Appellant claims prejudice by arguing that SrA CS seeing A1C RY outwardly reacting "well" and "calmly" impacts whether A1C RY's text messages were excited utterances, the controlling factor on that issue is A1C RY's own testimony as to how she was reacting internally, which was corroborated in the notes where SrA CS told trial counsel that A1C RY was "pissed" after Appellant's actions. Again, there is no prejudicial discovery violation here.

Appellant next complains that SrA CS discussed how A1C RY only reported Appellant because A1C KB reported Appellant and that there was a "five-way group phone call, which included at least two other named victims." (App. Supp. Br. at 21.) Again, none of this is new information. In the AFOSI ROI involving A1C RY, the report details an interview AFOSI conducted with SrA CS where she stated that while at SrA BB's residence, A1C RY told SrA BB, A1C LD, A1C KB, and SrA KG that Appellant touched her breast. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2d, Report of Investigation at p. 10.) This coincides with the interview note cited by Appellant that stated the first time SrA CS heard A1C RY say Appellant touched her breast "was when [A1C RY], [A1C KB], [SrA BB], [A1C LD] were on phone with [A1C RY] while there were at [A1C KB's] house. And [SrA KG]." (Def. App. Ex. H at 196.) Again, there is no discovery violation here, since this discussion had already been disclosed to Appellant.

Appellant next takes issue with SrA CS's statement that, at some point, she Facetime'd with Appellant's girlfriend to tell her about "the A1C KB situation." (App. Supp. Br. at 21-22, *citing* Def. App. Ex. H at 198-99.) However, a review of those notes show that SrA CS did not know the name of the person she was talking to and did not know who Appellant's girlfriend was. Considering this, there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and there is no "likelihood of a different result great enough to undermine confidence in the outcome of the trial." *See* Behenna, 71 M.J. at 237-38.

Finally, Appellant claims error because he states the notes "reveal at least two other witnesses at the party [who] saw the charged interaction but did not witness the alleged touching." (App. Supp. Br. at 21.) However, Appellant then softens his stance by saying that the notes only show that one witness, Mr. SP, "seem[ed] like" he "could" have seen the charged interaction. (Id.) In fact, the notes show Mr. SP saw Appellant sitting next to a girl that was "maybe named Chelsea" and that they were just talking. (Def. App. Ex. H at 182.) Chelsea is not A1C RY's name. Considering the vast uncertainly as to whether Mr. SP ever saw Appellant and A1C RY interact that night, there is no prejudicial discovery violation here.

As to the second witness, Appellant claims that A1C MV "witnessed the charged interaction and 'Didn't see him touching her.'" (App. Supp. Br. at 21, *citing* Def. App. Ex. H at 286-87.) Yet again, this is not new information since the AFOSI ROI involving A1C RY states that during an interview with AFOSI, A1C MV stated that he did not witness Appellant touch A1C RY's breast. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2d, Report of Investigation at p. 11.)

As to prejudice regarding A1C RY, Appellant centers on issues discussed, and dispelled, above. Any supposed "preexisting dislike for Appellant" on the part of SrA CS could have easily been discoverable through the defense's own interview of CS and, as shown, would have contradicted Appellant's central attack on SrA CS – that she could not even identify Appellant. The defense acknowledging that SrA CS not only knew Appellant, but also had an opinion of him, would have seriously undercut this contradictory theory.

Next, Appellant again claims that SrA CS "didn't care about the specifics." (App. Supp. Br. at 25.) However, as already discussed above, when read in context, the notes show SrA CS was very specific as to whether Appellant touched her breast, which was the charged offense. The only issue she had was which breast he touched the most.

Finally, no undisclosed evidence impacted the excited utterance issue at trial. First, the fact that A1C RY outwardly remained calm and did not cause a scene at the party after Appellant's actions was well known to all parties. The evidence also well showed that inwardly A1C RY was frustrated, angry, and, as SrA CS put it, "pissed." Again, none of this is new information. Thus, there is no discovery violation.

- *SrA AN*

Appellant's first issue related to SrA AN involves the portion of Maj JB's 7 June 2024 email that states the following: "On 12 October 2021 TSgt [MS] told Trial Counsel that [SrA AN] told TSgt [MS] that [Appellant] told [SrA AN] that [Appellant] didn't hear her say stop multiple times and apologized." (Def. App. Ex. H at 6.)

Yet again, this is not new information. The AFOSI ROI involving SrA AN stated that during an interview with AFOSI, TSgt MS discussed this very topic, as the ROI states TSgt MS told AFOSI that "[Appellant] apologized to [SrA AN] as he left the residence and did not know

or hear [SrA AN] tell [Appellant] to stop." (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2a, Report of Investigation at p. 6.) Again, this ROI was provided to Appellant and his counsel well before trial. Thus, TSgt MS's statement to trial counsel on 12 October 2021 stating the exact thing contained in the ROI that was previously provided to Appellant is not new information.

Still, Appellant claims, "Had the defense known that MS had made the same statement to the government – in no uncertain terms – it would have drastically altered the presentation of this evidence." Yet, before trial, Appellant was provided information that TSgt MS had made the same statement to the government (that being AFOSI). There is no discovery violation here.

However, to this point, Appellant then claims that TSgt MS denied making this statement during his testimony. (App. Supp. Br. at 16 *citing* R. at 1242-43.) Appellant is mistaken again. On those pages, the questions from Appellant's counsel to TSgt MS centered on whether Appellant heard SrA AN *crying*, not whether or not Appellant heard her saying stop. In fact, TSgt MS tried to explain how SrA AN had told him there was no way that Appellant could not have heard her say stop, but Appellant's counsel cut him off and said the question was specifically "about the act of crying." (R. at 1242.) That portion of the transcript reads as follows:

> DC: Okay. She also told you that morning that it's possible he -- meaning the person who allegedly assaulted her -- didn't hear her cry, correct?
>
> TSgt MS: She told me that there is no way that he couldn't have heard her say stop, because she said it loud enough.
>
> DC: I'm asking you about the act of crying, not the act of sexual assault.
>
> . . .
>
> DC: So I'm asking you about the act of crying. She told you that it was possible that he didn't hear her crying, right?

> TSgt MS: When are you -- I'm not understanding your question. Like what time?
>
> DC: When you were in her house that morning, when you talked to her about what happened, she said it's possible he didn't hear her crying?
>
> TSgt MS: Yeah, when? When he was still there? When she 1 called me or when? That's what I'm not understanding.
>
> DC: Sure, let me explain. While they were engaging in that sexual act it's possible that he didn't hear her crying, correct? Based on what she told you.
>
> TSgt MS: She never told me she was crying when that happened, she said that she was telling him to stop.

(R. at 1242-43.) This exchange never involved TSgt MS denying his statement to the Government that SrA AN had told him that Appellant had apologized and claimed to have not heard her say stop. Instead, here he denied that SrA AN ever told him that she was crying during the encounter.

Next, Appellant states that SrA AN denied making this statement to TSgt MS. (App. Supp. Br. at 16, *citing* R. at 1171.) However, a review of this portion of her testimony shows that the questioning between SrA AN and Appellant's trial defense counsel involved whether or not Appellant heard SrA AN crying. SrA AN testimony here was not about whether or not Appellant heard her say stop. Further, SrA AN never denied telling TSgt MS that Appellant had apologized to her and claimed to have not heard her say stop. (*See* R. at 1169-1172.)

Appellant next states that TSgt MS told the trial counsel during an interview that SrA AN "had a previous encounter like this before as a civilian." (App. Supp. Br. at 17, *citing* Def. App. Ex. H at 212.) However, Appellant fails to explain any significance to this statement. Appellant also makes no attempt to explain how this statement would have been admissible under Mil. R.

Evid. 412 or how SrA AN being a victim in a previous, unrelated incident would have made any difference in his trial. Notably, the defense has not demonstrated how a "previous encounter like this" which occurred prior to SrA AN joining the military would somehow undermine her credibility concerning the events involving Appellant. In United States v. Velez, 48 M.J. 220, 227 (C.A.A.F. 1998), our superior court held that a prior report of rape was not logically or legally relevant to attack the credibility of a complaint in an unrelated case. The Velez court observed that "the mere filing of a complaint is not even probative of the truthfulness or untruthfulness of the complaint filed." Id. *See also* United States v. Morrison, 321 U.S. App. D.C. 170, 98 F.3d 619, 628 (D.C. Cir. 1996). Our superior court reiterated that view in United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000), and upheld a trial judge's ruling that a prior report of rape was inadmissible to impeach the victim in an unrelated rape trial. Again, there is no discovery violation here.

Appellant next appears to claim Col RT gave a contradictory answer during his pretrial interview with the Government as opposed to his testimony during the motion at trial. (App. Supp. Br. at 17.) However, a review of the interview notes compared with Col RT's testimony show consistent statements from Col RT that he met with the legal office to ensure that his "gut" feelings were backed up by information. Notably, Appellant in his brief omits a key part of the interview notes from Col RT. The full note reads as follows:

> *Did the legal office describe PC or level of probability to authorize a search? Yes, Gut tells you something is more likely than not, plus the legal standards. Gut is often good enough.* If I wanted more info on PC then I would ask questions. This is very important to me, to uphold the legal standard. Always counted on it and depended on it.

(Def. App. Ex. H at 220, emphasis on portion of note cited by Appellant in his brief.) While Appellant did not cite it in his brief, Col RT's pretrial interview statement to trial counsel that

upholding the legal standard was "very important to me" and that he asked questions if more information was needed for probable cause is consistent with his trial testimony that the reason he was "at legal" was so that he "could make sure that what I was being asked for and what I was actually authorizing were in that statement." (R. at 207.) Considering Col RT's pretrial interview did not differ from his motion testimony, there is no discovery violation.

Finally, Appellant states that the trial counsel notes for MSgt PB[4] state MSgt PB "Noticed that he's starting to forget things" during a 6 May 2022 interview. (App. Supp. Br. at 18, *citing* Def. App. Ex. H at 52.) Those notes are as follows:

> Noticed that he's starting to forget things.
>
> Asked by Def "During the hand holding and the caressing of the arm, what color shirt was Doroteo wearing?" "What kind of pants was Amn N[redacted] wearing?"
>
> Defense did not provide pictures for him to review or his previous statements.
>
> Def brought up things he did not know about: Amn N[redacted] scratched R[redacted] chest? That Amn N[redacted] had previously been a victim in a case.
>
> There was a COVID violation, but doesn't remember the result. Would have learned about it in 2020, but forgot about it until this year. Only remembers because ADC brought it up. ADC asked if he remembered talking about it.
>
> Knows about it because there were more people than were supposed to be at the time (only supposed to be one person, but there were two). Was texting with the Ops team about it.

However, these notes closely mirror the following notes from a different trial counsel for an interview with MSgt PB:

- Defense convo
  - Starting to forget things, but things are coming back up
  - During handholding and arm caressing
    - Short sleeved white short
  - Amn N[redacted] cratched R[redacted] chest
    - Had no idea
  - Did not know N[redacted] was also a subject (in another case)
  - Covid violations
    - Likely he had a convo over the phone
    - Called ops team about a covid violation and they weren't going to move forward with it
    - Rules at the time: more people than were supposed to be in the house
      - Could only have one visitor, but obviously two
    - How do you know that was the rule at the time?
      - Don't know, but if there was a covid violation, that would have been it
    - Not sure how he learned that was a covid violation
    - Would have learned that back in 2020, but forgets now in 2022
    - Only knows now bc ADC brought it up
    - Was tecting about this w/ the ops team while it was happening

[4] Appellant's cites to Defense Appellate Exhibit H at 52, which are notes for MSgt PB, not "TG" as Appellant states in his brief. (*See* App. Supp. Br. at 18.)

(Def. App. Ex. H at 62.) These notes, which both reference the same subjects in the same order, including "starting to forget things," handholding, and caressing, show this portion of MSgt PB's pretrial interview with the trial counsel was MSgt PB telling them about what was discussed during his conversation with the defense. In other words, these notes show MSgt PB either (1) specifically told Appellant's trial defense counsel that he was "starting to forget things;" or, (2) when placed in context with other notes from the same interview, he was telling the trial counsel that he was "starting to forget things" that he had discussed with the defense. Either way, there is no discovery violation since the context of this whole conversation was about what he and the defense discussed, information that was undoubtedly known to the defense.

As to any prejudice involving SrA AN, Appellant again confuses TSgt MS's statements about "crying" and "stopping" as explained above. As detailed there, there was no prejudice. Appellant next argues again about Col RT's "gut" statements. The analysis above shows there was no discovery violation and no prejudice because Col RT's statements, when placed in context, were consistent with his motion testimony. In sum, the disclosures provided to Appellant regarding SrA AN contained no new information that had not otherwise been previously provided to Appellant's defense team. Thus, there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and there is no "likelihood of a different result great enough to undermine confidence in the outcome of the trial." *See* Behenna, 71 M.J. at 237-38.

- *A1C KB*

As to A1C KB, Appellant first highlights trial counsel notes from A1C KB's interview that state, "Mentioned attempted oral, but cannot remember details about the incident." (Def. App. Ex. H at 32.) In another trial counsel's notes, A1C KB said she remembered Appellant's

face "down in that area and traying to make contact and trying to perform the action," but could not remember if she was squirming or moving around and did not know if his mouth, tongue, or any body part came into contact with her vagina. (Id. at 15.) Appellant says this contradicts a statement made in the AFOSI ROI involving A1C KB which states that during her interview with AFOSI, "[Appellant] did not attempt to give her oral sex." (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 22.)

However, Appellant then makes no argument as to how this alleged discovery violation was prejudicial to him other than broadly stating, "This is a directly contradictory statement about a charged assault," and that the "nondisclosures about KB impact KB's credibility." (App. Supp. Br. at 6, 24.) To start, Appellant was not charged with either performing or attempting to perform oral sex on A1C KB that night. Further, as detailed throughout Appellant's three briefs, the Government's Answer brief, and discussed throughout oral argument, A1C KB's credibility and recollection of the events of the January incident were squarely at issue at Appellant's trial. Whether or not A1C KB recalled Appellant attempting to perform oral sex on her would have been cumulative on this point. *See* Behenna, 71 M.J. at 238 (*citing* United States v. Gonzalez, 62 M.J. 303, 307 (C.A.A.F. 2006) (noting that the overlapping nature of the evidence undercuts an argument that the failure to disclose pursuant to Brady was prejudicial); *see also* Agurs, 427 U.S. 97 (noting that the alleged Brady material did not contradict any evidence already admitted and was similar to other evidence in the record in holding that there was no Brady violation).

Next, Appellant discusses the disclosure that SSgt MB told trial counsel that SrA BB "was obsessed with [A1C KB] and wanted to pursue [A1C KB] romantically." (App. Supp. Br. at 6.) Appellant claims this "should have been disclosed because it is relevant to [SrA BB's] perception and personal alliances or biases when it comes to [A1C KB]." (Id.) However, during

her trial testimony, SrA BB openly testified that she suggested to A1C KB that she and Appellant should kiss. She also testified regarding things A1C KB told her after the October incident, including agreeing that A1C KB told her she did not want to disappoint Appellant and that she let Appellant have sex with her. (R. at 1604.) Notably, this testimony was elicited by Appellant's trial defense counsel and used by Appellant's counsel as evidence *against* A1C KB. Appellant's suggestion here that SrA BB's testimony was somehow biased in favor of A1C KB or that she falsely testified to protect A1C KB is unsupported.

Next, Appellant cites the portion of the trial counsel notes with SrA BB when SrA BB told trial counsel that A1C KB told her that "[Appellant] tried to do it again." (App. Supp. Br. at 6, *citing* Def. App. Ex. H at 75.) Again, however, this is not new information. In the AFOSI ROI involving A1C KB, SrA BB told AFOSI, "The following day, [A1C KB] told [SrA BB] that [Appellant] tried to have sex with her while [A1C KB] tried to sleep." (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 10.) SrA BB's statement to trial counsel simply repeated what she had told AFOSI months earlier – a statement that was provided to Appellant. Again, there is no discovery violation.

Appellant next highlights statements allegedly made by A1C KB during his attack on her, namely that he was dating another person and should not be sleeping with other females. (App. Supp. Br. at 6.) Yet, Appellant fails to explain the relevance of these statements or how the result of his trial would have been different had it been disclosed. *See* Behenna, 71 M.J. at 237-38. If anything, this information was detrimental to Appellant as it would have *further* undercut any claimed mistake of fact as to consent regarding the January incident. Here, per SrA BB, A1C KB was attempting to explain to Appellant, as he was attacking her, why he should not be sleeping with other females, by saying the words "No," "Stop," and "You shouldn't sleep with

other females," – which, to a reasonable person, would have been a clear indication to Appellant that A1C KB did not want to have sex with him.[5] Again, there is no discovery violation here as this information was detrimental to Appellant's case.

Next, Appellant discusses additional disclosures related to A1C KB's and Appellant's prior relationship. (App. Supp. Br. at 7.) However, as discussed throughout the multiple briefs in this case, as well as at length during oral argument before this Court, evidence of a prior relationship between A1C KB and Appellant (including kissing and potential sexual intimacy in October) was well before the panel. Appellant asking SSgt MB if he had ever seen the two "sneak away and make out" would have been cumulative and only served to overlap other testimony that A1C KB and Appellant had kissed in the past. *See* Behenna, 71 M.J. at 238 (*citing* Gonzalez, 62 M.J. at 307; *see also* Agurs, 427 U.S. at 97.)

Next, Appellant takes SSgt MB's statement to trial counsel about the March 2020 incident out of context. Appellant claims that SSgt MB told trial counsel that A1C KB "did not want to have sex with Appellant on this occasion because MB was in the room," by quoting the portion of the interview notes that say, "It was [Appellant] trying to initiate some sort of sexual advance and I was weirded out he would do that while I was in the room asleep. That is why she was uncomfortable." (App. Supp. Br. at 7, *quoting* Def. App. Ex. H at 45.) However, a review of the full portion of the interview notes paints a different picture:

> It was Sam trying to initiate some sort of sexual advance and I was weirded out he would do that while I was in the room asleep. That is why she was uncomfortable. I still think how she felt regretful, it wasn't something she wanted. I can't speak for her… but I want to say I don't know for sure if anything happened because I was asleep. From what she said, he did try to initiate something that made her uncomfortable. She didn't want it that I know of and I could assume based on the way she was acting

(Def. App. Ex. H at 45.)

[5] Appellant's claimed mistake of fact defense is the focal point of Appellant's original Issue I and was the subject of this Court's oral argument for this case.

Here, reading these notes in context shows SSgt MB was saying that A1C KB was "uncomfortable" because Appellant tried "to initiate something" and was likely even more "uncomfortable" because Appellant chose to do it while SSgt MB was in the room. Furthermore, while Appellant intimates that these words were something A1C KB actually said to SSgt MB, there is no indication that A1C KB ever told SSgt MB she was "uncomfortable" with the situation only because of SSgt MB's presence. In fact, the notes contain this very sentiment when SSgt MB said, "I can't speak for her." (Id.) Moreover, based on the notes, it was SSgt MB himself who was "weirded out" that Appellant would attempt such an act while SSgt MB was in the room.[6] Again, Appellant has failed to show how SSgt MB's interpretation of A1C KB's statements to him (*see*, for example, SSgt MB saying, "I still think,") are material or how the result of his trial would have been different had it been disclosed. *See* Behenna, 71 M.J. at 237.

Appellant next notes a portion of the disclosure from SSgt MB's interview that says, "Then in March something happened and [A1C KB] told [SSgt MB] about it weeks later. SSgt MB then realized by the way that [A1C KB] had been acting that [A1C KB] had been closer to [Appellant] that night than usual." (App. Def. Ex. H at 38.) A review of these notes show SSgt MB was discussing with trial counsel the relationships between the various persons living at Appellant's house. Appellant conflates this note to mean that "the victim and [Appellant] were acting closer than usual in the leadup to a charged incident" – that being the March dorm room incident. (App. Supp. Br. at 8.)

[6] *See also* Def. App. Ex. H at 39 ("[SSgt MB] was weirded out that [Appellant] would try to initiated while [A1C KB] was asleep."); Def. App. Ex. H at 43 (SSgt MB told trial counsel "I was disgusted that he would do that while someone else is in the room. I was only thinking about myself like that is weird why would he do that while I am around.")

However, interview notes from the same interview with SSgt MB, but from a different trial counsel, provide additional context as follows:

> It was January or early February. They weren't super close. K[redacted] ended up moving in with me. All four of us T[redacted], B[redacted] me and K[redacted] were living with S[redacted], and A[redacted] I forget about her because she PCS'd end of Jan or early Feb. She also had her own apartment so she wasn't around too often. It wasn't until we went out that time in March and she told me weeks later. Once she told me, I kinda figured something was up... I could tell by the way she was acting, she was like reminiscing on her emotional attraction and she was like thinking about it.

(Def. App. Ex. H at 45.) With this context, the first note with SSgt MB saying A1C KB had been "closer" to Appellant that night was him recognizing that something happened between A1C KB and Appellant that night which caused her to begin acting different the next day and the coming weeks. As SSgt MB said, "I kinda figured something was up." In this context, SSgt MB stating A1C KB and Appellant "had been closer" on the night in question was referring to the incident itself (i.e., something happened between them that made A1C KB act different the next day and coming weeks) – not any activity between A1C KB and Appellant that night prior to the incident.

When read in context, this note provides no contradictory evidence showing any sort of flirtatious behavior took place between Appellant and A1C KB on the night in question. Moreover, it does nothing to dispel the clear evidence that, once back in the room, A1C KB told Appellant he could sleep on the floor, she got into her bed, she continuously attempted to go to sleep despite Appellant's attempts to keep her awake, and, once it was clear A1C KB was not going to positively respond to Appellant's advances, Appellant abruptly pulled A1C KB off of her bed and on top of him, and grinded his penis on her. Considering these facts, SSgt MB's vague statement about A1C KB and Appellant seeming "closer" that night would have made no difference at trial.

Appellant next discusses the portion of the disclosure email that states SrA AV in an 8 November 2021 interview "suggested additional sexual history between KB and Appellant." (App. Supp. Br. at 8.) However, that "additional sexual history" appears to be SrA AV telling trial counsel what Appellant told SrA AV – the email states, "[SrA AV] recalls [Appellant] telling [SrA AV] that [A1C KB] 'jerked off' [Appellant] in November." (Def. App. Ex. H at 3.) Considering this is information Appellant presumably told SrA AV, Appellant would undoubtedly be aware of his own belief that this incident occurred and of his own statement to SrA AV that he and A1C KB had engaged in some sort of "additional sexual history."

Additionally, Appellant cites a disclosure where SrA AV believed SrA KB had lied about an incident involving Appellant. (App. Supp. Br. at 8-9, *citing* Def. App. Ex. H at 3.) However, Appellant and his counsel were well on notice that SrA AV believed SrA KB had lied about incidents involving Appellant. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 19, which states SrA AV "felt [A1C KB] lied about the sexual incident with [Appellant], and thought the sex was consensual between [Appellant] and [A1C KB].) Moreover, SrA AV testified during Appellant's trial as a defense witness called for the express purpose to discredit A1C KB by testifying that she had seen Appellant and A1C KB kiss in the past and to testify that A1C KB had told her the October encounter between she and Appellant was consensual. Considering this, Appellant and his counsel had ample opportunity to discuss with SrA AV other instances in which she felt A1C KB had lied to her about incidents involving Appellant.

Appellant next discusses disclosures involving Amn TP. Appellant first cites to the email disclosure that reads Amn TP "described to Trial Counsel how he has seen [A1C KB] kiss [Appellant]." (App. Supp. Br. at 9, *citing* Def. App. Ex. H at 9.) Again, the record shows

Appellant's counsel interviewed Amn TP prior to trial and, thus, had the opportunity to ask whether Amn TP had ever seen A1C KB and Appellant kiss. Furthermore, Appellant acknowledges that Amn TP said he saw A1C KB and Appellant kiss on "the same incidence of kissing BB testified to at trial" – that being when SrA BB suggested to A1C KB that A1C KB should go kiss Appellant. (App. Supp. Br. at 9, *citing* R. at 1607-08.) Thus, any testimony on this point by Amn TP would have been cumulative and only served to overlap other testimony that A1C KB and Appellant had kissed in the past.[7] *See* Behenna, 71 M.J. at 238 (*citing* Gonzalez, 62 M.J. at 307; *see also* Agurs, 427 U.S. at 97.)

As to Amn TP saying that A1C KB "got tired and just said yes" during the October incident, the most important point here is that Appellant was not convicted of the October incident. Further, the AFOSI ROI involving A1C KB details AFOSI's interview with Amn TP and states that Amn TP said "[A1C KB] did not want to deal with it anymore and gave in to having sex with [Appellant]." (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 17.) Here, Appellant's counsel were well aware that Amn TP had told the Government that A1C KB told him that she "gave in to having sex" with Appellant. His statement to the trial counsel was not new information and, thus, not a discovery violation., especially considering Appellant was not convicted of the October incident.

Next, Appellant takes issue with Amn TP's statement that A1C KB told him she "was too drunk to consent to anything" regarding the January 2020 incident. (App. Supp. Br. at 10, *citing* Def. App. Ex. H at 183.) Appellant claims A1C KB's "apparent statement that this event was nonconsensual because of her level of intoxication should have been disclosed." Yet, the AFOSI

[7] As noted by the Government in its original Answer for Issue V, the members at Appellant's court-martial were well aware of at least two allegations that A1C KB may have kissed Appellant prior to the incidents in question.

ROI, which was provided to Appellant, shows that A1C KB told AFOSI multiple times that she was drunk during the January 2020 incident. In detailing AFOSI's interview with A1C KB, the ROI states, "[A1C KB] did not remember what type of alcohol she consumed nor how much, but recalled she took many shots and as a result was drunk." *See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 5.) Also, regarding the January 2020 incident, the ROI states that A1C KB told AFOSI that she was "very intoxicated and threw up, but was not drunk to the extent to blacking out." (Id. at 6.) Here, Appellant well knew that A1C KB had stated that she was drunk on the night in question.

Still, Appellant claims the issue of A1C KB's intoxication is "complicat[ed]" because the Government disclosed that A1C BB told trial counsel in a pretrial interview that A1C KB was "drunk but still able to know what was going on around her." Again, this is not new information as Appellant seemingly admits that A1C BB testified at trial about A1C KB's intoxication level that is consistent with the pretrial interview with trial counsel. At trial, A1C BB said A1C KB had started to "not slur her words, but say stupid things that don't make sense," and agreed that A1C KB was "not necessarily incoherent, but she would say things that don't necessarily make sense." (R. at 1595.) She also had to help A1C KB up the stairs to the attic due to her intoxication. Further, while Appellant attempts to downplay A1C KB's own testimony on her level of intoxication, Appellant omits the portion of her testimony when A1C KB says, "I'm still sad, super emotional and drunk and tired." (R. at 1524.) The additional information disclosed would not have made any difference in Appellant's trial.

Next, Appellant takes an interview note that reads "OSI was unable to keep the audio portion of the interview" and engages in vast speculation as to its meaning. Appellant states, "Appellate defense counsel's understanding is that the government represented to the defense at

trial that OSI's recording devices recorded video but not sound during KB's interviews (i.e. the sound was never recorded in the first place)," but then takes this one interview note made by a trial counsel to mean AFOSI actually did have a sound recording of A1C KB's interview but it was "simply not kept." (App. Supp. Br. at 11.) Appellant's conjecture is not met with reality.

At Appellant's court-martial during a pretrial motion hearing, SA NC testified that there was a technical issue with the recordings of A1C KB's interviews. (R. at 237.) In fact, this testimony was elicited by Appellant's own trial defense counsel during SA NC's cross-examination. When asked by Appellant's counsel, "And that technical issue means that the videos were recorded but the audio was lost," SA NC responded, "That is correct." (Id.)

Thus, while Appellant now asks this Court to "order a factfinding hearing to determine definitively what happened to the audio of OSI's interviews of KB," Appellant's counsel already had the opportunity to determine what happened and were directly, and "definitively," told by AFOSI exactly what happened to the audio of A1C KB's interview. Considering this evidence, Appellant's unsupported speculation as to the meaning of the word "keep" in a trial counsel's interview notes should be disregarded by this Court.

Appellant next complains about a disclosure from A1C BB's interview that Appellant bragged about having sex with A1C KB in October and that "This is exculpatory as to that incident, as Appellant would be unlikely to tell KB's best friend about having sex with KB unless he thought it was consensual." (App. Supp. Br. at 11.) Again, however, Appellant was not convicted of this incident, meaning there is no prejudice to Appellant.

Finally, Appellant renews his "cross-talk" complaint involving A1C KB and A1C LD talking about their allegations. However, as detailed above, this information was readily available to the defense prior to Appellant's trial. In the AFOSI ROI involving A1C KB, the

report detailed an interview AFOSI conducted with A1C LD. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at p. 15.) There, the ROI states A1C LD told AFOSI that A1C KB spoke with A1C LD on at least two occasions about incidents she had Appellant, including one in which Appellant got on top of her and said, "Let me put the tip in." (Id.) Then, in the AFOSI ROI involving A1C LD, the report details an interview AFOSI conducted with A1C KB where A1C KB stated that A1C LD told her about an incident involving Appellant touching A1C LD inappropriately. (*See* ROT, Vol. VII, Pretrial Advice, Attachment 2c, Report of Investigation at p. 8-9.)

As to prejudice regarding disclosures involving A1C KB, Appellant's cursory argument on this topic centers on A1C KB's and A1C BB's credibility. Appellant claims the "nondisclosures reveal additional evidence of prior intimacy between Appellant and KB, including on the night of one of the charged offenses." (App. Supp. Br. at 24.) However, as discussed above, there is no indication in any of the disclosures that any "intimacy" occurred between A1C KB and Appellant "on the night of one of the charged offenses." Moreover, any additional evidence of a prior relationship between Appellant and A1C KB was (1) either already in the possession of the defense (via AFOSI ROIs) or (2) cumulative to evidence already in the defense's possession, including other witness testimony and statements. Finally, as noted throughout the Government's original sealed and unsealed briefs, Appellant had ample opportunity to attack A1C KB's credibility using much of the same information Appellant now claims is new.

As to A1C BB, Appellant notably makes no specific arguments in his prejudice argument about how A1C BB's credibility was somehow impeached by the disclosures he discusses.

All told, just as with the other victims in his case, Appellant has failed to show how any disclosures involving A1C KB were either (1) not already known to Appellant; or (2) material, as none of Appellant's claims create a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See* Behenna, 71 M.J. at 237-38.

- *Appellant Disclosures*

Next, Appellant complains that the disclosures involve statements by him. (App. Supp. Br. at 22, *citing* Def. App.. Ex. H at 5, 74-75.) However, the first disclosures cited by Appellant, on page 5 of Def. App. Ex. H, regard the allegation involving SSgt EV. As Appellant was acquitted of those specifications, he has shown no prejudice. As to the disclosures on pages 74-75, this is the same disclosure discussed above where A1C BB in an interview said that Appellant bragged about having sex with A1C KB in October. Again, however, Appellant was not convicted of this incident, meaning there is no prejudice to Appellant. Notably, Appellant makes no argument either in his "Additional Disclosures" or prejudice sections detailing how he was prejudiced by any supposed undisclosed statements made by him. (*See* App. Supp. Br. at 22, 24-28.)

As to the prejudice standard overall, the harmless beyond a reasonable doubt standard should not apply in this case. While Appellant did request "summaries of conversations with representatives of the government," such a broad request does not make all interview notes of all witness interviews by the Government automatically discoverable. As our Supreme Court stated over 75 years ago:

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have said to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces

> the attorney to testify as to what he remembers or saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence. To use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Hickman v. Taylor, 329 U.S. 495, 512-13 (1947). Such direction by the Supreme Court is especially true where, as here, in practically every disclosure mentioned by Appellant, his defense team was already on notice of the disclosure or the disclosure was cumulative to evidence previously disclosed to the defense. Accordingly, Appellant's claim must fail.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was hand-delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 9 July 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	**SUPPLEMENTAL REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Before Special Panel
Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	No. ACM 40363 Date Filed: 16 July 2024

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

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Argument

XII. APPELLANT'S CONVICTIONS SHOULD BE SET ASIDE FOR THE GOVERNMENT'S DISCOVERY VIOLATIONS WHICH WERE REVEALED VIA POST-TRIAL DISCLOSURES FROM THE PROSECUTING LEGAL OFFICE.

1. General Considerations

a. Defense Opportunity to Independently Interview Witnesses

In several places, the government argues there was no disclosure violation because the defense had the opportunity to unearth the undisclosed information themselves, through defense witness interviews. *See, e.g.*, Government Supplemental Answer Brief, 9 July 2024 (Appellee's Br.) at 11, 26, 27 (arguing that defense had the opportunity to independently learn of the undisclosed evidence through their own pretrial interviews). Such a rule would relieve the government of any and all disclosure obligations stemming from witness interviews as long as the defense had the ability to interview the witnesses themselves. The government cites no provision within the UCMJ or the R.C.M. that would support such a rule, and this Court should not adopt one.

The government cites two civilian cases – *Holland v. City of Chicago*, 643 F.3d 248, 256 (7th Cir. 2011) and *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) – that discuss some degree of defense due diligence requirement, but makes no attempt to reconcile these cases with the fact that military discovery "is broader than in federal civilian criminal proceedings. . . ." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (citations omitted); *see also United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous."). Additionally, Appellant understands such considerations to be against the modern trend of civilian jurisprudence as well. *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263 (3d Cir. 2016) (holding, in clarification of prior precedent, that: "[T]he United States Supreme

Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be."); *see also Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed."); *Lewis v. Connecticut Com'r. of Correction*, 790 F.3d 109 (2d Cir. 2015) (holding "the state habeas court contravened clearly established federal law as determined by the Supreme Court in *Brady* and its progeny when it held the defendant was required to exercise 'due diligence' to obtain exculpatory evidence" because the defense has no duty "to take affirmative steps to seek out and uncover such information."); *Amado v. Gonzalez*, 758 F.3d 1119, 1136–37 (9th Cir. 2014) ("The Court of Appeal's requirement of due diligence would flip that obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself. The proposition is contrary to federal law as clearly established by the Supreme Court and unsound public policy. . . No *Brady* case discusses such a requirement, and none should be imposed.").

This Court should not excuse the government's nondisclosures simply because the defense had the opportunity to interview the witnesses from whom the government learned of the undisclosed information.

b. Obligation to Disclose Statements of the Accused

In a somewhat related subject, the government suggests that several nondisclosures of prior relevant statements made by Appellant personally were not error because Appellant should have already known of his own statements. The government cites no authority for this proposition. As cited in Appellant's prior brief, in *United States v. Dancy*, 38 M.J. 1, 3 (C.M.A. 1993) the court found the government had erred by failing to disclose a letter from the accused to his sister. There

was no exception because the accused should have known about his own prior statements even absent government disclosure.

Additionally, in the present case, as also pointed out in Appellant's prior filing, the defense requested all prior statements of the accused in discovery:

> a. Disclosure of and production of all statements by the Accused, including the contents of all oral, written, electronic, and/or recorded statements made by the Accused that are relevant to any charged or uncharged offenses, regardless of whether the Government intends to use the statements at trial or any hearing. M.R.E. 304(d)(1); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993).

App. Ex. XXVII, Attachment 11, Government Response to First Defense Discovery Request, 24 August 2021 at 9 (page 82 of App. Ex. XXVII). The government granted this request. *Id.* ("**Government Response:** GRANTED"). The defense should have been able to rely on the government's express statement that it would disclose all statements of the accused in its possession.

c. Establishing Necessary Facts

Throughout its brief, the government suggests not enough facts have been established for this Court to make an informed ruling. While Appellant has genuinely done his best to establish necessary facts (and continues to do so),[1] he is at least somewhat sympathetic to the government's point. Indeed, Appellant opened his own brief by discussing this dynamic – how difficult it is to reconstruct the relevant facts two years after trial. *See* Defense Supplemental Brief, 25 June 2024 (Appellant's Br.) at 4-5. Ideally, the Court has the facts it needs to make an informed decision

[1] Appellate defense counsel continue to diligently work with trial defense counsel to establish relevant facts via affidavit. Trial defense counsel, while aware of their continuing duty to Appellant, have communicated to appellate defense counsel that it is very difficult to provide a comprehensive analysis remotely given their other duties, especially while geographically separated from each other and temporally separated from the case itself. Appellate defense counsel are still hoping to receive additional useful information from trial defense counsel to supplement the record, but cannot hold this reply brief to wait for it.

based on the provided appellate exhibits. To the extent more factfinding is required, however, the proper remedy is to order more factfinding, not simply to deny relief.

While hopefully this Court will have enough facts to decide the issue, it is true that there are substantial difficulties in establishing facts remotely via affidavit. Appellant's trial defense counsel have scattered, and the case is not fresh in their minds. The volume of the post-trial disclosures further complicates the process. Defense appellate resources are also strained by the delay, as the disclosures came after all appellate briefs had already been filed, the standard clock for appellate review had already expired, and two of Appellant's appellate defense counsel are largely indisposed.[2] These obstacles would not exist but for the government's extreme tardiness in making the disclosures. The government cannot fairly place the defense in such an enormously difficult position, then turn around and criticize the defense efforts to overcome the obstacles the government itself created – and then ask this Court to respond by simply dismissing the issue. To the extent the Court requires additional factual development via a post-trial hearing, a post-trial hearing should be ordered.

2. <u>Disclosures Involving KB</u>

a. Undisclosed Contradictory Statement About Charged Assault

The government does not dispute that KB told trial counsel she remembered Appellant's face down in her private area trying to make contact and perform oral sex on her (and possibly making contact). *See* Appellee's Br. at 20-21; *see also* Def. App. Ex. H at 1, 15, 32. The government does not dispute that this directly contradicts KB's statement to the Air Force Office of Special Investigations (OSI) that "[Appellant] did not attempt to give her oral sex." *See*

[2] Though they remain counsel of record, Mr. Simon has moved to another job and Maj Crouch is on family leave.

Appellee's Br. at 20-21; *see also* ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at 22.[3] The government does not dispute the fact it withheld this directly contradictory statement or contend the defense had any alternate path of learning of it. Appellee's Br. at 20-21.[4]

Indeed, while the government does not directly say so, it seems to accept error and jump straight to prejudice. Appellee's Br. at 21.

Regarding prejudice, the government makes two arguments. First, it posits that "Appellant was not charged with either performing or attempting to perform oral sex on A1C KB that night." Appellee's Br. at 21. The government cites no authority for the proposition that contradictory statements about a charged sexual encounter can be excused by the fact that the contradiction did not involve the charged act itself, or that a remedy would be appropriate only for withheld contradictory statements precisely about the penial/vaginal penetration. This Court should use its opinion to forcefully reject this proposition.

Second, the government argues the undisclosed inconsistent statement about the charged event would have been "cumulative" because there was other, different evidence which called KB's credibility and recollection into question. Appellee's Br. at 21. This Court should not excuse the government's discovery violation because its witness's credibility was already so low that additional impeachment might have struggled to lower it further. *See, e.g.*, *United States v. Yepiz*, 718 F. App'x 456, 466 (9th Cir. 2017) (rejecting the government's argument that undisclosed impeachment evidence did not merit a new trial simply because the witness was otherwise

[3] In addition to being inconsistent with KB's pretrial statements, KB's undisclosed statement was also inconsistent with her trial testimony. *See* R. at 1525-28.
[4] As previously documented, the defense was unable to conduct a pretrial interview with KB. *See* (Def. App. Ex. D at 1).

impeached.) (citing *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997) ("[T]he government cannot satisfy its Brady obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative.")); *see also Napue v. Illinois*., 360 U.S. 264, 270 (1959) (rejecting the argument that because the defense had access to "other grounds" for impeaching the witness, it cured taint from nondisclosure of witness' promised consideration in exchange for testimony); *United States v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) (rejecting government argument that undisclosed impeachment evidence was cumulative because defense had access to other impeachment evidence) (citations omitted); *United States v. O'Conner*, 64 F.3d 355, 359 (8th Cir. 1995) ("[T]he fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial.") (citations omitted).

As a thought experiment of sorts, what would the government be arguing if its case with respect to KB was very strong? Of course, it would likely be emphasizing the common prejudice factor that, where the evidence is strong, error is less likely to have made a difference, and prejudice is correspondingly harder to establish. Apparently, the government would like the benefit of an inverse rule as well: when the strength of the evidence is low, error is also less likely to make a difference, because the defense already had access to other avenues of attack. Under such a framework, when, if ever, would the strength of the evidence favor a finding of prejudice? Perhaps only when it was in fell into a "Goldilocks zone" precisely between being strong and weak? This Court should follow the standard rule here: when the strength of the evidence is low, prejudice is more likely to be present.

b. Key Witness Was "Obsessed with" Charged Victim

The government does not dispute that BB was a key witness, that the government possessed evidence that BB was "was obsessed with [KB] and wanted to pursue [KB] romantically," or that

this information was not disclosed to the defense. Appellee's Br. at 21-22.

The government's only defense is that BB's testimony was not uniformly favorable to KB's side of the story. Appellee's Br. at 22. For example, as the government points out, BB confirmed that KB admitted to BB that a charged sexual assault was, in fact, consensual, and confirmed prior kissing between KB and Appellant that KB denied remembering. *See* R. at 1603-04, 1606-08, 1615-16.

The defense was still entitled to know that BB was obsessed with and romantically interested in KB. While it is true that portions of BB's testimony undercut KB's credibility, portions of BB's testimony were also damaging to Appellant. By way of example, government appellate counsel extensively cited BB's testimony both in the prior briefings and in the recent oral argument in this case. The defense was entitled to evidence that would have shed light on BB's personal allegiances or feelings towards KB – especially when they were apparently so strong ("obsessed"). *See, e.g.*, R. at 1944 ("Consider also the extent to which each witness is either supported or contradicted by other evidence, *the relationship each witness may have with either side*, and how each witness might be affected by the verdict.") (emphasis added).

Additionally, to the extent that BB's testimony *undercut* KB's story, BB's feelings for KB were still important. When even witnesses who are personally aligned with the victim can't support her story, the impeachment value is even more powerful.

c. Undisclosed Statements of KB to BB About Charged January Assault

The government legitimately points out that a small portion of the undisclosed statements was contained in the ROI. Appellee's Br. at 22. With regard to the other undisclosed statements by KB, the government does not dispute that they were directly inconsistent with KB's trial testimony, that the government possessed the prior inconsistent statements, or that the government

failed to disclose them. Appellee's Br. at 22-23. Rather, the government posits that the undisclosed prior inconsistent statements were not exculpatory, and therefore did not have to be disclosed. Appellee's Br. at 22-23. No point of American law is clearer than that the government's disclosure duty "encompasses impeachment evidence *as well as* exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted).[5]

KB's prior inconsistent statements – directly about the charged assault – had to be disclosed *because they were inconsistent*, regardless of whether they were exculpatory. It is a credibility issue that KB was telling BB a different story than she told the Court. The credibility issue is heightened by the fact that KB's undisclosed inconsistent statements directly connected dynamics related to AV – Appellant's girlfriend who KB was apparently in love with herself – to the very events under scrutiny at trial.

d. Undisclosed Statements About Prior Intimacy/Relationship Between Appellant and KB

The government does not dispute that it possessed but failed to disclose additional statements regarding KB's romantic and intimate feelings and interactions with Appellant. Appellee's Br. at 23. Jumping straight to prejudice, the government argues that because the defense already possessed other evidence of prior consensual intimacy between KB and Appellant additional evidence on this subject would have been cumulative. Appellee's Br. at 23.

As previously briefed, in pretrial litigation, the government questioned the veracity of prior intimacy between KB and Appellant. *See* Brief on Behalf of Appellant, 15 December 2023 (Appellant's AOE Br.) at 50 (sealed). Even on appeal, the government, at times, has continued to

[5]The government also granted a defense discovery request for notice of any prior inconsistent statements, stating "the Government will comply with its discovery obligation and provide notice of any potential impeachment evidence." App. Ex. XXVII, Attachment 11, Government Response to First Defense Discovery Request, 24 August 2021 at 13.

question the evidence of prior intimacy between KB and Appellant. *See* Answer to Assignments of Error, 4 March 2024 (Appellee's AOE Answer Br.). at 18 (prefacing its response to Appellant's arguments that there was evidence of a preexisting consensual sexual relationship between Appellant and KB with "even if that were true"). Any additional evidence confirming KB and Appellant's prior consensual intimacy clearly should have been disclosed.

The new disclosures also reveal that MB told trial counsel that KB and Appellant had been acting closer than usual on the night of the March 2020 charged assault. Def. App. Ex. H at 38. The full passage from the interview notes reads:

> Then in March something happened and [KB] told [MB] about it weeks later. [MB] then realized by the way that [KB] had been acting that [KB] had been closer to [Appellant] that night than usual.

Def. App. Ex. H at 38. Through a convoluted string of conclusory assumptions, the government argues that this passage did not mean what it said ("that [KB] had been closer to [Appellant] that night than usual") but actually referred to the assault itself. This is not a reasonable reading of the record. The undisclosed statements clearly refer to closeness between Appellant and KB on the night in question. If the government wants this Court to find trial counsel's notes mean something other than what they say, it should attempt to establish as much through an affidavit from trial counsel – not appellate government counsel's bare assertions.

Disputing the facts is the government's only option with respect to this nondisclosure because of the position it has so strongly taken on appeal: that there was no evidence at trial about flirting between Appellant and KB the night of this charged March encounter. *See* Appellee's AOE Answer Br at 8. Government appellate counsel also emphasized this lack of evidence at oral

argument, even after the previously undisclosed statement at issue was belatedly provided.[6] The government cannot now admit that even while it was making these arguments to advocate for Appellant's continued incarceration, there was evidence in the government's possession that contradicted such arguments.

e. Missing Audio from KB's OSI Interviews

As previously noted, the government disclosed a note that stated, with respect to KB, that "OSI was unable to *keep* the audio portion of the interview." Def. App. Ex. H at 32 (emphasis added). As also previously noted, appellate defense counsel's understanding is that the government represented to the defense at trial that OSI's recording devices recorded video but not sound during KB's interviews (i.e. the sound was never recorded in the first place).

The government responds that OSI represented at trial that OSI's recording devices recorded video but not sound during KB's interviews (i.e. the sound was never recorded in the first place). Appellee's Br. at 28-29. As such, the government concludes, it has already been "definitively" established what happened. But this is exactly the point: the newly disclosed notes call into question the government/OSI story at trial. The government offers no evidence – or even any theory – as to what the notes mean. It merely points to the prior testimony and posits the issue has been resolved and "should be disregarded by this Court." Appellee's Br. at 29.

The clear implication of the notes – stating that OSI was unable to "keep" the audio – is that OSI had it but lost it. It's not clear from the notes, but it seems this information may have

[6] As pointed out in appellant's original brief, the undisclosed evidence also contradicted KB's trial testimony that there was no flirting or similar interaction on this night. R. at 1536.

come from KB's victim's counsel (VC).[7] To the extent the record is not clearly developed, it's because this information was not disclosed in time to allow development.

3. Disclosures Involving EV

The government offers very little substantive defense of these nondisclosures, focusing almost exclusively on prejudice. For instance, the government offers no defense of its nondisclosure of evidence that the named victim was pursuing Appellant sexually on the night of the charged offense or that, after the charged encounter, the named victim told a friend she was into Appellant and liked him. *See* Appellant's Br. at 13.

These extreme nondisclosures clearly constitute prosecutorial misconduct and trigger the harmless beyond a reasonable doubt prejudice standard.

The parties agree – and indeed it is obvious – that as Appellant was acquitted of all offenses against EV, no relief is to be had with respect to those offenses.

The disagreement has to do with the impact of the nondisclosures on the offenses against KB (Specifications 4 and 5 of Charge I) because the offenses against EV were part of the Military Rule of Evidence (Mil. R. Evid.) 404(b) "common plan or scheme" instruction and thus intertwined with the offenses against KB. The government takes the position that the "the panel acquitted Appellant of all allegations involving SSgt EV so 'further undermining' SSgt EV's credibility is irrelevant." Appellee's Br. at 6. This ignores, however, the differing evidentiary standards required for a conviction versus supporting evidence. The panel could very well have acquitted Appellant of the offenses against EV but still felt they were strong enough to serve as

[7] In appellate defense counsel's experience, VCs work very closely with OSI on victim interviews, so the VC would presumably be in a strong position to know about the facts at issue.

persuasive Mil. R. Evid. 404(b) evidence. Acts offered under Mil. R. Evid. 404(b) do not have to be proven beyond a reasonable doubt before they may be considered.

The government does not address this dynamic at all. The government cannot meet its high burden to prove harmlessness beyond a reasonable doubt by demurring on error then summarily declaring the subject irrelevant. Certainly, the government at trial did not feel the Mil. R. Evid. 404(b) evidence was irrelevant. It has only changed its position now to escape the consequences of its own conduct below.

The closest the government comes to a substantive argument on prejudice is that the panel acquitted Appellant of one instance of charged conduct against KB (the October 2019 incident included within the divers occasions alleged in Specification 4 of Charge I) and, therefore, the Mil. R. Evid. 404(b) evidence must not have been particularly impactful. Of course, KB told multiple people this encounter was consensual – and literally told AV that she was falsely accusing Appellant of assaulting her on this occasion for her own manipulative reasons. The fact that Appellant was acquitted of this incredibly weak allegation is unsurprising. What is surprising is that he was convicted of the remaining specifications against KB: two uncorroborated, inconsistent, deeply delayed accusations by a witness who was clearly an unreliable narrator and had confessed to at least two people that a third alleged assault was actually consensual.

Under these circumstances, the government cannot establish beyond a reasonable doubt that the Mil. R. Evid. 404(b) evidence – even if not strong enough to independently support convictions for Specifications 1-3 of Charge I – did not impact Appellant's convictions for Specifications 4 and 5 of Charge II.

4. Disclosures Involving LD

Regarding prejudice, the government is correct that Appellant was also acquitted of all offenses against LD, and they were not part of the Mil. R. Evid. 404(b) instruction. As such, both sides have focused primarily on nondisclosures that may impact other charges.

The government posits that the crosstalk between LD and KB (some of which occurred only "two to three days before she reported the incident with [Appellant]") may have been duplicative of information in the ROIs about discussions between these two charged victims. Appellee's Br. at 7 (citing ROT, Vol. VII, Pretrial Advice, Attachment 2b, Report of Investigation at 15 and Attachment 2c, Report of Investigation at 8-9.). It is true that the ROIs contain some discussion of crosstalk between these two victims. Neither of the ROIs, however, contain the most significant undisclosed fact: that these two victims apparently discussed their respective allegations just "two to three days" days before KB's report. *See* Def. App. Ex. H at 112. This is particularly significant given that KB's report was so deeply delayed.

This dynamic also ties in with the related nondisclosure – which the government does not address or defend – that a third charged victim (RY) only reported Appellant because KB – a friend of RY's – reported Appellant and RY wanted to "stand up for her friends." Def. App. Ex. H at 195-96. The undisclosed evidence, particularly in combination, suggests a chain reaction motivated several of the accusations faced by Appellant. In a multi-victim case, showing interrelationships like this between the accusations is crucial to the defense.

5. Disclosures Involving AN

a. AN Statement to MS (Appellant didn't hear her say stop multiple times and apologized)

While the government makes some legitimate points in this section, nothing in the government brief changes the facts that (1) AN testified she had *not* told MS Appellant had not

heard her prior to stopping or had that type of conversation at all with MS, R. at 1171, (2) MS confirmed to trial counsel that he and AN had, in fact, had that type of conversation and AN told MS that Appellant had not heard her, (3) MS's statement to trial counsel contradicted AN's testimony, and (4) trial counsel did not disclose the statement – even after AN's testimony, which it directly contradicted.

Indeed, the government seemingly concedes all but the third point. The government's only response thereto is an assertion that AN's denial of telling MS Appellant had not heard her related to AN crying, not AN telling Appellant to stop. Appellee's Br. at 17 (citing R. at 1169-1172). This reading is not supported by the record. Immediately before AN denied her prior statements to MS, she testified: "I just know that I said no multiple times and he did not listen to that." R. at 1171. The government does not explain why it thinks her following testimony related only to her crying, and not her telling Appellant to stop – given that it came immediately after this discussion of the latter rather than the former.

Regardless of the other factors highlighted by the government, after AN's testimony, trial counsel should have disclosed that MS had made statements to trial counsel that contradicted AN's testimony.

b. Prior Encounter

The government's response states there is not enough information to know whether this evidence would have been relevant or admissible. Appellee's Br. at 17-18. This is true to an extent. As noted in Appellant's prior brief, this evidence was not fully developed. Appellant's Br. at 17; Def. App. Ex. H at 212. However, that is exactly the point. The reason the evidence was not developed is because the government did not disclose it – and therefore the defense had no opportunity to develop it.

This harkens back to the axiomatic rule that the government's discovery obligations are not limited to evidence admissible at trial, but also evidence relevant to the defense preparation. *See United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) ("The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial."). The government cannot withhold information, thereby preventing further development, and then complain that the defense has not sufficiently developed the information to demonstrate admissibility.

Additionally, as noted in Appellant's prior brief, it seems as if AN was drawing a parallel between her accusations against Appellant and a prior experience and possibly connecting the prior experience with her feelings during the charged incident. Appellant's Br. at 17These factors make it more relevant and susceptible to development. Indeed, this is the focus of Appellant's argument: that AN herself related her accusation against Appellant to a similar prior encounter, but the government's nondisclosure denied the defense the opportunity to explore this connection and its possible impact on AN's perception or recall of the events in question.

c. RT's Gut's Probable Cause Determination

Regarding the undisclosed statements by RT – the commander who issued the contested/litigated search authorizations – the government contends that "RT's pretrial interview did not differ from his motion testimony" and, therefore, was not disclosable. Appellee's Br. at 18-19.

This is a difficult position to understand. RT privately told trial counsel that his understanding of probable cause was "Gut tells you something is more likely than not, plus the legal standards. *Gut is often good enough*." Def. App. Ex. H at 220 (emphasis added). Later on,

RT publicly testified: "I *didn't want to trust my gut* on this or any of these situations. I wanted to know what was being asked and what I was granting had met that standard." R. at 207 (emphasis added).

The government theory as to how RT's earlier statement that gut is often good enough for probable cause "did not differ" from his later statement that he didn't want to trust his gut for probable cause is that RT also told trial counsel:

> If I wanted more info on PC then I would ask questions. This is very important to me, to uphold the legal standard. Always counted on it and depended on it.

Appellee's Br. at 18 (citing Def. App. Ex. H at 220). Nothing in these additional statements, however, cures the contradiction in RT's private vs. public statements on his contemporaneous understanding of probable cause. The fact that RT believed a gut feeling equated to probable cause was not cured by the fact that he would have asked more questions if he thought he needed to. Similarly, his placement of import on the legal standard does not cure his misunderstanding of what the legal standard was.

Additionally, the government does not dispute or address that RT further told trial counsel that, after issuing the search authorization for Appellant's SAFE, he had changed the process for granting search authorizations because he thought he might have done something wrong. Def. App. Ex. H at 219 ("Gut tells me I might have done something wrong."). As undisputed by the government, the fact that the issuing commander thought he had done something wrong in issuing a disputed/litigated search authorization – and felt so strongly about it that he afterwards changed his search authorization process – should clearly have been disclosed.

6. Disclosures Involving RY

a. CS Memory Issues

Regarding CS's disclosure to trial counsel that she was progressively forgetting ("The more I talk about it the more I forget"), government appellate counsel contend that this statement related only to CS progressively forgetting "exactly what A1C RY said to Appellant in this moment." Appellee's Br. at 7-8. This is a particularly strained interpretation. In the first place, it would be strange that CS's memory was progressively failing, but only with respect to one small portion of the events in question. Additionally, the government itself in their post-trial Brady disclosure phrased it this way: "[CS] said the more that [CS] talks about *the incident*, the more she forgets." Def. App. Ex. H at 5 (emphasis added). It would be very strange phrasing indeed for the government to disclose that CS was progressively forgetting about "the incident" but only be referring to one limited aspect thereof. While the government is unitary in theory, the government representatives who tried the case are in a better position to interpret their own trial materials than appellate government counsel. Nevertheless, for all the government's bluster about the defense's supposed lack of documentation, the government makes no effort to provide documentation from its own trial branch to support its theory about the meaning of trial counsel's notes. Rather, government appellate counsel merely speculates that the notes mean something different than the prosecuting legal office itself disclosed.[8]

Of note, besides disputing the facts, the government offers no substantive defense of this nondisclosure. That is to say, if this Court does not accept appellate government counsel's theory

[8] The government's quotes to the record – where CS acknowledged not knowing what appellant said to RY – are somewhat inapposite even to the government's theory. The government's theory is that CS's failing memory had to with what RY said to appellant, not the other way around. *See* Appellee's Br. at 8 (citing R. at 1634, 1649).

– that CS was only forgetting about one aspect of the event in question and its own representative's description of her failing memory about "the incident" was either factually mistaken or extraordinarily oddly phrased – the government does not seem to dispute that nondisclosure of progressive memory failure as to the incident as a whole would constitute a discovery violation.

The government's post-trial *Brady* disclosure also specified additional failures of CS's memory about the party in question:

> [CS] could not recall some other details of the party (e.g., what time she arrived, what [RY] said to SrA Doroteo, whether [RY] drank alcohol, whether [RY] got up and left, how [CS] got to [BB's] house later).

Def. App. Ex. H at 5. Government appellate counsel posits these memory failures did not need to be disclosed because CS did remember other details and, overall, "SrA CS had an excellent recollection of that night." Appellee's Br. at 8. The government cites no authority for the proposition that it does not have to disclose significant memory gaps on the part of a witness simply because the witness claims to remember other aspects. Indeed, the utility of such evidence to the defense may well be to question the credibility or reliability of the endorsed memory, in light of its contrast with the acknowledged memory gaps (e.g. "the witness seems very certain about X – which supports her narrative – but can't remember Y at all. . .").

b. CS's Dislike of Appellant

Regarding CS's dislike of Appellant generally, the government does not dispute that (1) a witness' preexisting dislike of the accused is disclosable, (2) that CS strongly and repeatedly expressed a preexisting dislike of Appellant to the government, or (3) that the government failed to disclose this to the defense. Rather, the government states that the defense, "within their own pretrial interview of SrA CS, had ample opportunity to learn of SrA CS's 'vibes' toward Appellant." Appellee's Br. at 11.

This Court should not adopt the government's suggestion that it does not have to disclose information learned during witness interviews simply because the defense had the opportunity to interview the witness themselves. As discussed above, such a rule would relieve the government of any disclosure obligations stemming from witness interviews as long as the defense had the ability to interview the witnesses themselves and clearly does not reflect the state of military rules or jurisprudence on discovery.

Regarding the impact of CS's preexisting dislike for Appellant on the foundation for or credibility of her opinion that Appellant touched RY intentionally, the government suggests that "Appellant's physical actions towards A1C RY shaped SrA CS's perception of the incident." Appellee's Br. at 11. The government was free to make this argument before the military judge in an attempt to establish a foundation for CS's opinion, or before the members in arguing that CS's opinion was credible. What the government was not free to do was bypass the adversarial process altogether by failing to disclose CS's statement that her opinion was based, at least in part, on her dislike for Appellant and her opinion that "it seems in his character to do that on purpose." *See* Def. Ex. H at 195.

Finally, the government protests that an argument based on CS's preexisting dislike of Appellant "would have gone completely against the focal point of his attacks both at trial and on appeal surrounding SrA CS's testimony - namely that she did not know and *could not even recognize* Appellant." Appellee's Br. at 11-12 (emphasis in original). The government cites no authority for the proposition that it does not have to disclose a potential avenue of attack on its case because it might conflict with another potential avenue of defense attack. The government should disclose both and allow the defense to choose the best path to pursue at trial.[9] Additionally,

[9] The defense, of course, is also free to present alternate theories – even if they conflict in part.

the government went to great lengths in its own prior briefing to explain how unpersuasive the defense attacks on CS's identification of Appellant were. Appellee's AOE Answer Br. at 61. The government cannot simultaneously contend that the defense attacks on CS's identification of Appellant at trial were frivolous but its nondisclosure of alternative impeachment evidence was excusable because it would have contradicted the defense's purportedly frivolous theory.[10]

c. Excitedly Uttering "So Calmly"

The government's primary defense of its nondisclosure of CS's description of RY as "react[ing] so well and so calmly to the situation" that the government contends triggered crucial excited utterances is it was duplicative of CS's trial testimony. Appellee's Br. at 12 (arguing the undisclosed evidence was "exactly what SrA CS testified to at trial"). The government then quotes CS's trial testimony that "[RY] was very closed off. She didn't immediately, like, snap or confront. It was almost like a state of shock, from what I remember." R. at 1636. This is not exactly the same. "[R]eact[ing] so well and so calmly" is not the same as being in "a state of shock." To the contrary, in the undisclosed statements, CS explained that things like this happened to RY "so often" that "it was not new to her" – and guys were frequently "getting in her space and touching her." Due to this unfortunate familiarity, CS explained: "That's why she reacted so well and so calmly to the situation. It's not new to her." Def. App. Ex. H at 195. This is not – as the government represents to this Court – the same as a subdued physical reaction as a result of being in a state of shock.

[10] Indeed, as discussed at length in appellant's prior briefings, the gaps in CS's identification of appellant were largely filled by the excited utterance text message from the victim herself ("It was Sam"). *See* Assignment of Error VI. As such, at least in light of the admission of the text message, the defense tends to agree that the attacks on CS's identification had limited utility.

The government goes on to argue that CS also expressed that RY was angry, and that RY herself testified as to her emotions. Appellee's Br. at 12-13. As such, the government argues "one can easily understand" an outwardly calm reaction – and that being outwardly calm is not mutually exclusive with being "pissed." Appellee's Br. at 12-13. Again, the government was free to argue to the military judge that RY's outwardly calm reaction was understandable or compatible with its excited utterance theory. What it was not free to do was withhold the evidence and bypass the adversarial process altogether.

d. Victim-Witness Crosstalk

The government legitimately points out that there is a reference to a conversation in the ROI that seems to correspond to the five-way group phone call referenced in the post-trial disclosures. Appellee's Br. at 13. Although the ROI does not contain all the details from the notes, it does seem to be referencing the same underlying event.

The government does not address or defend the nondisclosure of the CS's discussions, in considerable detail, of how RY only reported Appellant because KB – a friend of RY's – reported Appellant and RY wanted to "stand up for her friends." Def. App. Ex. H at 195-96. Of course, as seemingly conceded by the government, the fact that one named victim reported Appellant to be supportive of another named victim with whom she was friends should have been disclosed.

Regarding the nondisclosure that CS personally "facetimed'd" with Appellant's girlfriend to tell her (the girlfriend) "about the [KB] situation," the government does not contest error but contends there was no prejudice because CS did not know Appellant's girlfriend's name. Appellee's Br. at 14; *see also* Def. App. Ex. H at 198-99. It's not clear how CS's lack of personal familiarity with Appellant's girlfriend reduces prejudice. The relevance of the nondisclosed evidence is that CS – as the only eyewitness to Specification 9 of Charge I – had an undisclosed level of personal involvement in the accusations against Appellant. If anything, the fact that CS

took it upon herself to speak to a stranger about Appellant and his alleged offenses against KB suggests an even stronger personal interest, and resulting bias, in the case than if CS and Appellant's girlfriend were otherwise acquainted.

e. Exculpatory Witnesses

SP stated he saw Appellant sitting closely but in separate chairs with a female and talking to her, but he "wasn't all over her" – "They were just talking." Def. App. Ex. H at 182. SP said he had seen the girl before but wasn't sure of her name. Def. App. Ex. H at 182. He did guess a name that was not RY. *Id.*[11] The interaction between Appellant and this individual simply "died down" – apparently uneventfully. *Id.*

The government's only defense of this nondisclosure is that there is "vast uncertainly [sic]" as to whether this was the same conversation that led to the charged offense against RY. The reason there is "uncertainly" is because the government failed to disclose it – and thereby denied the defense the opportunity to develop the facts.

That said, there is a high probability this was the same event. The charged events alleged that Appellant sat closely in separate chairs next to RY on the same side of the table. *See* R. at 1631-32. The government knew – but did not disclose – that SP witnessed Appellant sitting closely in separate chairs with a female contemporaneously with the charged events, yet SP reported that they were just talking, Appellant wasn't all over her, and it just died down uneventfully. The fact that the exculpatory witness did not know the victim's name in no way means the government did not have to disclose it.

[11] The name SP guessed was actually the same first name as RY's good friend – CS. There is no indication that such an interaction (sitting closely and talking) happened between appellant and CS on the night in question.

MV, meanwhile, told the government that he saw Appellant leaning towards RY, trying to give her drinks, and was even observing closely enough to hear Appellant ask RY out, but did not witness Appellant touch RY. Def. App. Ex. H at 286. The government does not dispute that MV told these exculpatory facts to trial counsel, or that trial counsel failed to disclose them. Appellee's Br. at 14. Instead, the government's only defense is that the ROI records that MV told OSI "he did not witness Appellant touch A1C RY's breast." Appellee's Br. at 14 (citing ROT, Vol. VII, Pretrial Advice, Attachment 2d, Report of Investigation at 11). It is true that the ROI records that MV told OSI he did not witness Appellant touch RY's breasts. However, the ROI does not include the predicate details that indicate that MV was in a perfect position to witness whether or not the touching occurred. MV's undisclosed statements to trial counsel revealed that he was close enough to see Appellant leaning towards RY and to give her drinks and to hear Appellant ask RY out, but still did not witness the charged touching. Def. App. Ex. H at 285-86. None of this information about MV's proximity to the charged events is contained in the ROI. Instead, the ROI notes only that MV was at the party and did not witness the touching. This is very different.

7. <u>Prejudice</u>

a. The Government Does Not Attempt to Satisfy the Harmless Beyond a Reasonable Doubt Burden

Except perhaps with respect to specifications for which Appellant was acquitted, Appellee's Br. at 5, the government does not attempt to argue that it has satisfied or could satisfy the burden to prove the nondisclosures harmless beyond a reasonable doubt.

If this Court finds the harmless beyond a reasonable doubt prejudice standard is applicable, it should find the government clearly has not satisfied its burden, particularly as the government does not even attempt to argue it has done so.

b. The Government *Does Not Address Whether the Nondisclosures Constituted Prosecutorial Misconduct*

While the government never directly concedes error, it does not contest error in multiple places. For example, as outlined above, the government does not dispute that KB told trial counsel Appellant attempted oral sex during a charged offense, that this statement directly contradicted her statement to OSI, and that the directly contradictory statement was withheld. Appellee's Br. at 20-21. Similarly, the government does not dispute that it possessed but failed to disclose directly inconsistent statements by KB – about this same charged assault – where she alleged telling Appellant he shouldn't be sleeping with other women when he had a girlfriend. Appellee's Br. at 22-23. These are major discovery violations, and it is hard to imagine how they would not constitute prosecutorial misconduct. To the extent the trial counsel's intention is relevant, it is difficult to see how trial counsel could have inadvertently overlooked such inconsistencies. The government has not presented any evidence that trial counsel overlooked the inconsistency or mistakenly thought it had in fact been disclosed.

It is further notable that, at trial, the government repeatedly represented to the defense that it was aware of and compliant with its discovery obligations. Def. App. Ex. G at 7 ("The Government is aware of its continuing discovery obligations . . . The Government will continue to supplement this notice as required by law."), 8 ("the Government will continue to provide supplemental notices as required."), 9 ("As stated earlier, the Government is aware of and will continue to supplement in accordance with our ongoing discovery obligations."), 11 ("As always, we are aware of our discovery obligations and will continue to update as necessary."), 13 ("As ever, the government is aware of our ongoing discovery obligations and will continue to

supplement discovery throughout this trial.").[12] Despite the government's repeated representations, it failed to disclose voluminous discoverable evidence to the defense until approximately two years after trial.

c. Under the Reasonable Probability Standard There is Still Prejudice

Even if this Court declines to apply the heightened prejudice standard, it should still find prejudice because there is a reasonable probability that, had the evidence been disclosed, the results of the proceeding would have been different.

While Appellant will not repeat all his prior arguments, there is substantial prejudice from the nondisclosures. *See* Appellant's Br. at 24-29. Prejudice must be viewed cumulatively and must account for the utility of the evidence to preparation and the potential for further development. *See Barton v. Warden, Southern Ohio Corr. Facility, 786 F.3d 450* (6th Cir. 2015) (*Brady* applies to exculpatory information, even if it is not admissible evidence, if the information might lead to the discovery of admissible evidence.); *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) (when there are multiple disclosure violations, a court must analyze whether the cumulative effect of all such evidence.).

d. Disclosure of Notes vs. Underlying Information

The government argues in its prejudice section that it was not required to disclose "all interview notes of all witness interviews by the Government . . . ." Appellee's Br. at 31-32 (emphasis added). Appellant agrees and has never argued that all notes from all interviews had to be disclosed. The question is not whether the "interview notes" had to be disclosed – but rather whether the underlying information had to be disclosed. The government could have disclosed

[12] As noted previously, the government also stated it would "comply with its discovery obligation and provide notice of any potential impeachment evidence." App. Ex. XXVII, Attachment 11, Government Response to First Defense Discovery Request, 24 August 2021 at 13.

the substance without disclosing the notes themselves. The problem here is that the government disclosed neither until two years after the trial.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 July 2024.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 10 June 2024, counsel for Appellant submitted a Motion for Leave to File Supplemental Filing, citing "voluminous additional disclosures" the Government provided to the Defense on 7 June 2024. Appellant's counsel further stated they were currently drafting a supplemental assignment of error as a result of these disclosures and suggested "an accelerated briefing schedule." The Government responded on 17 June 2024, stating it "generally does not oppose Appellant's motion . . . provided that any supplemental assignment(s) of error is based on the disclosures provided to Appellant on 7 June 2024." On 20 June 2024, this court granted the Motion for Leave to File Supplemental Filing and set an accelerated briefing schedule.

Appellant timely filed its supplemental assignment of error and a Motion to Attach on 25 June 2024. Appellant moved to attach an affidavit from one of his trial defense counsel, Major CM, as well as over 300 pages of trial counsel interview notes and other post-trial disclosures the Government had provided the Defense on 7 June 2024. As described by Appellant's motion, Major CM's affidavit "describes the disclosures she and other members of the trial defense team received from the [G]overnment before and during trial, and it includes copies of these disclosures as attachments." The Government did not oppose the Motion to Attach, and this court granted it on 3 July 2024. The Government filed a timely answer to Appellant's supplemental assignment of error on 9 July 2024. Appellant filed a reply to the Government's answer on 16 July 2024.

On 22 July 2024, Appellant moved to attach additional documents to the record. Specifically, Appellant moved to attach an affidavit from Major CM dated 20 July 2024, as well as affidavits from Appellant's two other trial defense counsel, Major CC and Major MC, both dated 19 July 2024. Appellant asserted each of the affidavits "confirms for the [c]ourt that significant portions of the information disclosed in June 2024 were not previously disclosed by the

[G]overnment," and the affidavits were "relevant and necessary" for this court to evaluate Appellant's supplemental assignment of error.

On 29 July 2024, the Government opposed Appellant's 22 July 2024 Motion to Attach, essentially contending the motion is untimely and ought to have been made when Appellant submitted his supplemental assignment of error or his reply brief.

In general, parties are not entitled to indefinitely extend their advocacy before this court by filing motions to attach after the time for filing briefs has expired, without articulating good cause for doing so. *See generally* JT. R. CRIM. APP. 18(d), 23(d); A.F. Ct. Crim. App. R. 18.5, 23.3(b). However, under the particular circumstances of this case, we find it appropriate to grant Appellant's 22 July 2024 Motion to Attach. *See* JT. R. CRIM. APP. 32.

Accordingly, it is by the court on this 8th day of August, 2024,

ORDERED:

Appellant's Motion to Attach Documents dated 22 July 2024 is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 15 December 2023, Appellant submitted to this court his original assignments of error, signed by his appellate defense counsel Mr. BS, Mr. SH, and Major MC. The Government filed its answer brief on 4 March 2024, and Appellant filed his reply brief on 27 March 2024.

On 10 June 2024, counsel for Appellant submitted a Motion for Leave to File Supplemental Filing, citing "voluminous additional disclosures" the Government provided to the Defense on 7 June 2024. The motion was signed by a new appellate defense counsel for Appellant, Major FJ. In response, the Government stated it "generally d[id] not oppose Appellant's motion . . . provided that any supplemental assignment(s) of error is based on the disclosures provided to Appellant on 7 June 2024." On 20 June 2024, this court granted the Motion for Leave to File Supplemental Filing and set an accelerated briefing schedule.

On 25 June 2024, Appellant timely filed its supplemental assignment of error. The brief bore the names of all four appellate defense counsel—Mr. BS, Mr. SH, Major MC, and Major FJ—although Major FJ signed on behalf of Major MC. The Government filed a timely answer to Appellant's supplemental assignment of error on 9 July 2024. Appellant filed a reply to the Government's answer on 16 July 2024, which was signed by Mr. BS, Mr. SH, Major FJ, and by Major FJ again on behalf of Major MC.

On 24 July 2024, Appellant submitted a Motion for Leave to File Supplemental Brief on Behalf of Appellant and Supplemental Brief on Behalf of Appellant, signed by Major FJ alone. Appellant (through Major FJ) seeks to raise an additional supplemental assignment of error, asserting that Appellant was "denied effective assistance of counsel when his counsel failed to move to compel production of a statement of a complaining witness under Rule for Courts-Martial 914 or seek remedies under the same rule." Major FJ explained his good cause for raising the supplemental issue at this time was that he "was

detailed to this case on 7 June 2024," and "[i]n the course of his review" of the record of trial he had "identified the issue briefed herein, which was not raised previously." Major FJ averred he was "raising this issue on Appellant's behalf as soon as practicable after discovering it and pursuant to his duty as detailed military counsel under Article 70, [Uniform Code of Military Justice], 10 U.S.C. § 870." Major FJ further states, "[i]f the [c]ourt does not grant this motion based on the recent detailing of military appellate defense counsel, Appellant requests the [c]ourt analyze this issue for ineffective assistance of appellate counsel" for not raising the issue in Appellant's original assignments of error.

On 31 July 2024, the Government opposed Appellant's 24 July 2024 Motion for Leave to File Supplemental Assignment of Error "due to its untimeliness and the actual conflict created by Appellant's newfound complaint against his current civilian appellate defense counsel."

In general, the addition of a new appellate defense counsel is not in itself good cause for raising supplemental assignments of error. The addition of a new counsel does not automatically "reset the clock" to an earlier stage in the appellate process, notwithstanding that the new counsel might have chosen to litigate those prior stages differently. *See generally* JT. CT. CRIM. APP. R. 18(d). However, we are cognizant of this court's "awesome, plenary, *de novo* power of review," *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)), and our "statutory mandate" to conduct a de novo review of the legal sufficiency of a conviction, *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation omitted). In addition, this court may "suspend the requirements or provisions of any of [its] rules in a particular case . . . *sua sponte*" where we find good cause to do so. JT. CT. CRIM. APP. R. 32. Under the particular circumstances of this case, we find it appropriate to grant Appellant's Motion for Leave to File Supplemental Assignment of Error dated 24 July 2024, raising the issue of whether Appellant received ineffective assistance *at trial* when his counsel failed to move to compel production of a statement of a complaining witness under R.C.M. 914 or seek remedies under that rule.

Accordingly, it is by the court on this 8th day of August, 2024,

ORDERED:

Appellant's Motion for Leave to File Supplemental Assignment of Error

dated 24 July 2024 is **GRANTED**. Appellee may file an answer within 30 days of the date of this order.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	**MOTION TO ATTACH DOCUMENTS** Before Special Panel No. ACM 40363 Date Filed: 22 July 2024

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

Pursuant to Rules 23 and 23.3(b) of this Court's Rules of Practice and Procedure, Appellant, Senior Airman (SrA) Samuel Doroteo, moves to attach the Appendix to this motion to his Record of Trial. The Appendix may be attached consistent with *United States v. Jessie* because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals 37 pages in length and consists of the following:

Affidavit of Major CC, dated 19 July 2024: Maj CD served as one of Appellant's trial defense counsel. His affidavit describes the information known and not known by the defense at the time of Appellant's court-martial. This affidavit confirms for the Court that significant portions of the information disclosed in June 2024 were not previously disclosed by the government.

Affidavit of Major MC, dated 19 July 2024: Maj MC served as one of Appellant's trial defense counsel. Her affidavit describes the information known and not known by the defense at

the time of Appellant's court-martial. This affidavit confirms for the Court that significant portions of the information disclosed in June 2024 were not previously disclosed by the government.

Affidavit of Major CM, dated 20 July 2024: Maj CM served as one of Appellant's trial defense counsel. Her affidavit describes the information known and not known by the defense at the time of Appellant's court-martial. This affidavit confirms for the Court that significant portions of the information disclosed in June 2024 were not previously disclosed by the government.

These documents are relevant and necessary to resolve this Court's consideration of Appellant's twelfth assignment of error, raised in the Supplemental Brief on Behalf of Appellant, and to determine whether the government fulfilled its discovery obligations, a question raised by, but not resolved by, the record of trial.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach Documents.

Respectfully submitted,

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Appendix

1. Affidavit of Major CC, dated 19 July 2024, 8 pages
2. Affidavit of Major MC, dated 19 July 2024, 12 pages
3. Affidavit of Major CM, dated 20 July 2024, 17 pages

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 July 2024.

Respectfully submitted,

[redacted]

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29 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF Appellant.	)))))))))	OPPOSITION TO MOTION TO ATTACH DOCUMENTS ACM 40363 Special Panel

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion to Attach Documents, dated 22 July 2024, as it is out of time.

On 10 June 2024, Appellant moved for leave to file a supplemental assignment of error brief regarding Government disclosures provided to Appellant on 7 June 2024. On 20 June 2024, this Court granted Appellant's motion and ordered that Appellant file a supplemental brief by 3 July 2024. The Order stated the Government may file an answer within 14 days of Appellant's filing and that Appellant may filed a reply brief within seven days of the Government's answer.

On 25 June 2024, Appellant filed a supplemental assignment of error brief raising one discovery issue. On the same date, Appellant moved to attach documents to the record, including an affidavit from one of Appellant's trial defense counsel. This Court granted that motion on 3 July 2024.

On 9 July 2024, 14 days after Appellant's filing, the Government timely filed its answer to Appellant's supplemental brief. On 16 July 2024, seven days later, Appellant timely filed a reply brief.

Now, one week after his reply brief was due to this Court, Appellant seeks to attach documents which Appellant claims are "relevant and necessary to resolve this Court's consideration of Appellant's twelfth assignment of error, raised in the Supplemental Brief on Behalf of Appellant . . ." (App. Mot. at 2.) However, in doing so, Appellant fails to explain his delay in filing these affidavits or why they were not filed in conjunction with either his original supplemental filing or with his reply brief. Notably, each of these affidavits describe "information known or not known by the defense at the time of Appellant's court-martial," which is information that was pertinent to Appellant's original supplemental brief and should have been provided at that time. The Government highlighted Appellant's omission of this information in his supplemental brief within its answer to the supplemental brief.

Yet, even if Appellant claims these affidavits are in reply to the Government's answer, which highlighted the omission, Appellant still should have filed these affidavits with its reply brief and within this Court's seven-day deadline to file a reply brief. Instead, Appellant did neither and waited another seven days to file his instant motion (or 14 days after the Government filed its answer) – essentially doubling this Court's seven-day reply deadline. Worse still, Appellant's motion to attach offers no explanation for why it was filed out of time or why Appellant was unable to file these affidavits with either his original supplemental brief or his reply brief. Considering Appellant's delay in filing this motion and his lack of justification for the delay, this Court should not allow Appellant to attach additional documents to the record at this point in the proceedings, especially when the United States does not have an opportunity to fully respond in a written brief.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate counsel, and the Air Force Appellate Defense Division on 29 July 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT AND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT**
v.	Before Special Panel
Senior Airman (E-4) **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	No. ACM 40363 24 July 2024

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

Additional Assignment of Error

XIII. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO MOVE TO COMPEL PRODUCTION OF A STATEMENT OF A COMPLAINING WITNESS UNDER RULE FOR COURTS-MARTIAL 914 OR SEEK REMEDIES UNDER THE SAME RULE.

Good Cause for Supplemental Filing

Undersigned counsel was detailed to this case on 7 June 2024, almost six months after the filing of Appellant's initial assignments of error on 15 December 2023. Br. on Behalf of Appellant, 15 December 2023. Since detailing, undersigned counsel has been reviewing Appellant's record of trial[1] to support the previous supplemental briefing and pursuant to his duty to "consider all issues that might affect the validity of the judgment of conviction and sentence." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard

[1] Appellant's record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, two court exhibits, and 151 appellate exhibits; the transcript is 2,149 pages.

4-8.3(b) (11 December 2018). In the course of his review, undersigned counsel identified the issue briefed herein, which was not raised previously. *See* Br. on Behalf of Appellant, 15 December 2023. Undersigned counsel is raising this issue on Appellant's behalf as soon as practicable after discovering it and pursuant to his duty as detailed military counsel under Article 70, UCMJ,[2] 10 U.S.C. § 870. This Court should grant the motion for leave to file this supplemental brief and consider the issue raised in it as part of its review of the entire record under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

If the Court does not grant this motion based on the recent detailing of additional military appellate defense counsel, Appellant requests the Court analyze this issue for ineffective assistance of appellate counsel. "Claims that appellate defense counsel have rendered ineffective assistance are measured by the same test applicable to such claims lodged against a trial defense counsel." *Untied States v. Abrams*, 59 M.J. 367, 370 (C.A.A.F. 2004) (citing *United States v. Hullum*, 15 M.J. 261, 267 (C.M.A. 1983)). Thus, an appellant must "show both deficient performance by appellate defense counsel and prejudice." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

Here, the deficient performance is the failure of appellate defense counsel to raise the issue discussed in this brief. As described *infra*, trial defense counsel provided ineffective assistance of counsel by failing to bring a motion under R.C.M. 914 after AN, a witness for the government, testified at trial. Despite making another allegation of ineffective assistance of counsel, appellate defense counsel did not raise this issue as an assignment of error. *See* Br. on Behalf of Appellant at 69–73. Although Appellant's initial brief preceded the recent decision of the United States

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

Court of Appeals for the Armed Forces (CAAF) in *United States v. Palik*, the court in that case explained that R.C.M. 914 has been in the *Manual for Courts-Martial, United States* for years and that a previous case "made it clear just how powerful R.C.M. 914 can be in circumstances very similar to the instant case." 84 M.J. 284, 291 (C.A.A.F. 2024) (citing *United States v. Muwwakkil*, 74 M.J. 187, 194 (C.A.A.F. 2015)). Since failing to raise a meritorious R.C.M. 914 motion was deficient performance constituting ineffective assistance of counsel at trial, *id.* at 294, not identifying a failure to bring this well-established motion should similarly be considered deficient performance by appellate defense counsel.

The remining question is whether this deficient performance prejudiced Appellant. The prejudice here comes from the lost opportunity to have this Court consider this meritorious issue on appeal. Although the Court might have identified this issue on its own while conducting its Article 66, UCMJ, 10 U.S.C. § 866, review, there is no guarantee it would have. Even if the Court did identify the issue, it could have decided it without the benefit of briefing. *See United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) (finding ineffective assistance of counsel where appellate counsel did nothing and the service court of criminal appeals "decided appellant's case without any defense briefs, resolving all issues against appellant and affirming the findings and sentence"). This would have deprived Appellant of his best opportunity to seek relief for this issue on appeal. For the reasons discussed *infra*, there is a reasonable probability that Appellant would have prevailed on this issue had it been raised in his initial brief, so the lack of this assignment of error prejudiced Appellant. *Palik*, 84 M.J. at 289 (stating that prejudice results when there is a reasonable probability that, absent the error, there would have been a different result). Considering the deficient performance and prejudice, the failure to raise ineffective assistance of counsel for

not binging a meritorious R.C.M. 914 motion was itself ineffective assistance of counsel during the appeal.

Statement of Facts

Appellant incorporates the statement of facts included with his initial assignments of error. Br. on Behalf of Appellant at 4–18. Appellant also offers the following additional facts, which are relevant to the issue raised in this supplemental brief.

Beginning the evening of 26 April 2020 and into the early morning hours the next day, AN, the named victim in specifications 6 and 7 of Charge I, had another Airman, OR, over to her residence for what was supposed to be a celebration of OR's recent retraining. R. at 1129–30. Unfortunately, OR's behavior changed after they had been drinking, and he began to make AN feel uncomfortable. R. at 1132. Not wanting to be with OR by herself, AN asked Appellant to come over and join them. R. at 1133. Appellant joined them, and OR seemed to calm down for a while. *Id.* However, OR soon began acting belligerently again. R. at 1133–34. AN and Appellant first tried to put OR to bed, but when that failed, they tried to get him to leave AN's home. R. at 1134. The situation escalated further, resulting in OR acting violently towards both AN and Appellant, causing them to call security forces for assistance. R. at 1134–35.

Security forces arrived at approximately 0300 or 0400 hours on 27 April 2020. R. at 1136. They removed OR from the residence and took statements from AN and Appellant. R. at 1135–36. Specifically, AN testified that she provided her statement by completing an Air Force Information Management Tool (AF IMT) 1168, *Statement of Suspect/Witness/Complainant*. R. at 1153. At this point, AN was thankful for Appellant's help with the situation. R. at 1154. Security forces ultimately left with OR, leaving AN and Appellant at AN's home. R. at 1135–37, 1153.

AN alleges the charged misconduct from Specifications 6 and 7 of Charge I occurred shortly thereafter. R. at 1137.

While preparing for trial, Appellant's trial defense counsel learned about the AF IMT 1168s completed by AN and Appellant in the early morning hours of 27 April 2020. App. Ex. XXVII at 3. Since they had not received these statements as part of discovery, trial defense counsel reached out to PB, one of the responding security forces members, to inquire about them. *Id.* at 3, Attachment 12. PB informed them that he had turned in those two AF IMT 1168s to his flight with the rest of the paperwork. *Id.* PB confirmed during his testimony at trial that he received these statements and submitted them with his daily paperwork. R. at 1261. Trial defense counsel contacted the security forces detachment to locate these statements but were informed they were not in the possession of the Reports and Analysis section. App. Ex. XXVII at 3, Attachment 13.

Having learned of these lost AF IMT 1168s and other evidentiary problems, trial defense counsel moved to abate the proceedings with regards to Specifications 6 and 7 of Charge I. App. Ex. XXVII. Trial defense counsel specifically argued for relief under R.C.M. 703, asserting that the totality of the lost or destroyed evidence, including the AF IMT 1168s, was of such central importance that it was essential to a fair trial. *Id.* at 6, 13. The government opposed this motion, and the military judge ultimately denied it. App. Ex. XXVIII; App. Ex. XXXVII. Regarding the AF IMT 1168s, the military judge found that the unavailability of these statements was not the defense's fault and could not have been prevented by the defense. App. Ex. XXXVII at 5. However, he also found that the defense had not shown that the statements were of such central importance to an issue as to be essential to a fair trial or that there were no adequate substitutes available. *Id.*

At trial, the government called AN as a witness, and she testified extensively during direct examination about the events of 26–27 April 2020 with OR and Appellant. R. at 1127, 1129–36. Following her testimony, the defense made no motions, and the government then called its next witness. R. at 1255–56.

Argument

XIII. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO MOVE TO COMPEL PRODUCTION OF A STATEMENT OF A COMPLAINING WITNESS UNDER RULE FOR COURTS-MARTIAL 914 OR SEEK REMEDIES UNDER THE SAME RULE.

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo. *Palik*, 84 M.J. at 288 (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

Law and Analysis

To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 288 (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). This test comes from the seminal case *Strickland v. Washington*, which also notes an appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. The CAAF uses a three-part test to determine whether this presumption of competence has been overcome:

1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)). "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . , an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *Id.* at 289 (alteration in original) (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)).

Appellant received ineffective assistance of counsel because his trial defense counsel did not move under R.C.M. 914 to compel the production of AN's statement made on an AF IMT 1168 on 27 April 2020. At the time of Appellant's court-martial, R.C.M. 914 stated:

> (a) *Motion for production*. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:
>
> (1) In the case of a witness called by trial counsel, in the possession of the United States . . . .

At trial, it was clear to all involved, including trial defense counsel, that AN had written a statement on an AF IMT 1168 on 27 April 2020, and she further confirmed this when she testified. R. at 1135–36, 1153; App. Ex. XXVII at 3. It was equally clear that PB, one of the responding security forces members, took these statements and submitted them to his flight with his regular paperwork. R. at 1261; App. Ex. XXVII at Attachment 12. However, the defense never received this statement, and when trial defense counsel inquired about it with security forces, they found out it was no longer in their possession, meaning it had been lost. App. Ex. XXVII at 3, Attachment 13. Despite this knowledge and having previously moved for an abatement based in part on the loss

of this statement, trial defense counsel did not move to compel production of this statement under R.C.M. 914. R. at 1255–56; App. Ex. XXVII.

Had the defense moved to compel production of the statement under R.C.M. 914, it would have likely prevailed. The record clearly establishes that AN's statement on an AF IMT 1168 from 27 April 2020 existed, and the fact that PB, a member of law enforcement, took it and submitted it to his flight means it was in the possession of the United States. R. at 1135–36, 1153, 1261; App. Ex. XXVII at Attachment 12. R.C.M. 914(a) requires the military judge to order production of "any statement of the witness that relates to the subject matter concerning which the witness has testified." AN's statement on the AF IMT 1168 was about the incident that occurred between her, Appellant, and OR, and she testified extensively about this incident during direct examination by the government. R. at 1129–36. Thus, this statement concerned a subject matter about which the witness testified, and the rule would have required the military judge to compel its production upon the defense's motion.

If the defense had brought a successful motion to compel AN's statement, the government would have been unable to produce the statement because it had been lost by that time. App. Ex. XXVII at 3, Attachment 13. When a trial counsel does not comply with a military judge's order to produce a statement to a moving party, R.C.M. 914 gave the military judge, at the time of Appellant's court-martial, two options for remedies: "order that the testimony of the witness be disregarded by the trier of fact" or declare a mistrial. R.C.M. 914(e); *see also Palik*, 84 M.J. at 289, 291. Following a successful defense R.C.M. 914 motion and the failure of the government to produce the statement, the military judge would have been required to either strike AN's testimony or declare a mistrial. AN was the only witness to the alleged misconduct in Specifications 6 and 7 of Charge I, so without AN's testimony, the government's case would have

been much weaker. Thus, either striking her testimony or declaring a mistrial would have likely created a markedly different result at trial, especially as to the specifications concerning AN.

Under these circumstances, trial defense counsel should have brought an R.C.M. 914 motion to compel the production of AN's AF IMT 1168 after she testified. The CAAF recently found such a failure to bring an R.C.M. 914 motion to be ineffective assistance of counsel. *Palik*, 84 M.J. at 295. In *Palik*, evidence adduced before trial indicated that recordings of interviews with the victim had been deleted from the storage system, and by the time of trial, it was clear the recordings were lost and could not be produced by the government. *Id.* at 286, 291. The victim testified as a government witness at trial, but the defense did not bring a motion under R.C.M. 914. *Id.* at 285. The CAAF held trial defense counsel provided ineffective assistance of counsel because their performance on this discreet issue was deficient. *Id.* at 293–94. Noting that the law on R.C.M. 914 is well settled, the court found that failing to file an R.C.M. 914 motion "fell 'measurably below the performance ordinarily expected of fallible lawyers'" where a witness testified, the government recorded the witness's prior statement, and "the Government cannot produce that recording because of its own negligence." *Id.* at 293 (cleaned up) (quoting *Gooch*, 69 M.J. at 362) (citing *Muwwakkil*, 74 M.J. at 190–94). Finding that "there was tremendous upside and virtually no downside for the defense to file that R.C.M. 914 motion," the CAAF set aside the findings and the sentence for ineffective assistance of counsel. *Id.* at 291, 294.

The circumstances here are remarkably similar to *Palik*. There is no doubt that AN provided a written statement to the government on 27 April 2020 using an AF IMT 1168. R. at 1135–36, 1153, 1261. The trial defense counsel knew of this statement, as evidenced by the pretrial motion which sought an abatement based, *inter alia*, on the loss of this statement. App. Ex. XXVII. As in *Palik*, it was clear by the time of trial that this statement was lost and could not

be produced by the government. 84 M.J. at 286, 291; App. Ex. XXVII at 3, Attachment 13. Even if it could be, it was unlikely to be harmful for Appellant, as AN was thankful for his help at the time she wrote the statement. R. at 1154. Nevertheless, after the witness testified about the subject matter of the statement during direct examination, the trial defense counsel, like those in *Palik*, did not bring a motion under R.C.M. 914. 84 M.J. at 285; R. at 1129–36, 1255–56. Consequently, this Court should reach the same conclusion as the CAAF in *Palik*: that on this discreet issue, trial defense counsel's performance was deficient and constituted ineffective assistance of counsel.

Trial defense counsel's pretrial motion was no substitute for a motion under R.C.M. 914. That motion sought an abatement of proceedings on specifications concerning AN based on the loss of AN's AF IMT 1168 as well as other evidentiary issues. App. Ex. XXVII at 18. Trial defense counsel argued for this remedy under R.C.M. 703, asserting that this evidence was of such central importance that it was essential to a fair trial. App. Ex. XXVII at 6, 13. Likewise, the military judge applied this standard, denying the motion after finding the defense had not shown that this evidence was of such central importance. App. Ex. XXXVII at 5. This was a completely different standard from R.C.M. 914, which did not require that a statement be of such central importance as to be essential to a fair trial. To compel production of a statement, R.C.M. 914(a) only required that it be a "statement of the witness that relates to the subject matter concerning which the witness has testified." An R.C.M. 914 motion would not have been ripe at the time the trial defense counsel filed the pretrial motion for abatement because AN had not yet testified, but they did not utilize this rule once she testified. Finally, the available remedies are also different, as R.C.M. 914(e) would have required the military judge to instruct the factfinder to disregard AN's testimony or declare a mistrial, not abate the proceedings. R.C.M. 914 provided different standards and remedies for the loss of this statement. Under the circumstances, an R.C.M. 914

motion would have been more likely to succeed, and trial defense counsel should have brought a motion under this rule in addition to their pretrial motion.

Since trial defense counsel failed to bring a motion under R.C.M. 914 and this performance fell measurably below the performance ordinarily expected of fallible lawyers, the remaining question is whether there is "'a reasonable probability that, absent the errors,' there would have been a different result." *Palik*, 84 M.J. at 289 (quoting *Gooch*, 69 M.J. at 362). Phrased another way, this Court must determine whether the deficiency "resulted in prejudice." *Id.* at 288 (quoting *Captain*, 75 M.J. at 101). As in *Palik*, the answer is yes, this deficiency caused prejudice. *Id.* at 293. As discussed *supra*, the defense likely would have prevailed on a motion to compel the statement because of the strong evidence of the existence of the statement and the subject matter of AN's testimony during direct examination. R. at 1129–36, 1153; App. Ex. XXVII at 3. The government would have been unable to produce the statement because it was lost. App. Ex. XXVII at 3, Attachments 12, 13. Moreover, like the court found in *Palik*, the government could not have relied on the good faith loss doctrine because its previous possession of the AF IMT 1168, combined with the evidence that security forces no longer had the statement in its records, would have been strong evidence of government negligence. 84 M.J. at 293; R. at 1261; App. Ex. XXVII at Attachments 12, 13. The military judge would then have had only two options: instruct the trier of fact to disregard AN's testimony or declare a mistrial. R.C.M. 914(e). Since AN was the only witness to the misconduct alleged in Specifications 6 and 7 of Charge I, there is at a minimum a reasonable probability that either of the available remedies would have led to a different result at trial, as least as to those specifications. Under either option, Appellant would likely not have the convictions that he presently has for each of those offenses.

The record shows trial defense counsel "failed to identify a meritorious and extraordinarily powerful R.C.M. 914 motion readily available to them." *Palik*, 84 M.J. at 293–94. Bringing such a motion had "tremendous upside and virtually no downside," but the trial defense counsel did not raise the motion. *Id.* at 291. Under these circumstances, *Palik* is controlling precedent, and this court should hold that this was deficient performance that constituted ineffective assistance of counsel. *Id.* at 293–94. Appellant recognizes that the consequences of this ineffective assistance are limited to the specifications in which AN was the named victim and therefore requests relief tailored to those specifications.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 6 and 7 of Charge I and the sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 July 2024.

Respectfully submitted,

[redacted]

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31 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant.*	))))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR ACM 40363 Special Panel

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

Pursuant to Rules 23(c) and 23.10 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for leave to file a supplemental assignment of error due to its untimeliness and the actual conflict created by Appellant's newfound complaint against his current civilian appellate defense counsel.

Appellant filed his Assignments of Error brief with this Court on 15 December 2023. The brief was signed by Mr. BS, Mr. SH, and Maj MC. The Government filed its Answer on 4 March 2024. Appellant filed a reply brief on 27 March 2024 which was signed by the same three appellate defense counsel. On the same day, Appellant moved this Court to grant oral argument. The motion was signed by the same three appellate defense counsel.

On 18 June 2024, Mr. SH argued on Appellant's behalf before this Court during oral argument. On 25 June 2024, Appellant filed a Supplemental Assignment of Error brief which was signed by Mr. BS, Mr. SH, Maj MC, and Maj FJ. On 16 July 2024, Appellant filed a reply brief signed by the same four appellate defense counsel. Then, on 22 July 2024, Appellant moved to attach additional documents to his record of trial. The motion was signed by Mr. SH and Maj FJ.

However, just two days later, on 24 July 2024, Appellant filed this current motion along with a supplemental brief. The supplemental brief alleges an ineffective assistance of counsel (IAC) claim against his trial defense counsel for failing at trial to move to compel the production of a witness statement. (App. Mot. at 1.) However, undoubtedly recognizing how out of time his newfound IAC claim is being raised before this Court, Appellant also claims IAC against his appellate defense counsel for their "failure . . . to raise the issue discussed in this brief." (Id. at 2.)

Thus, within days of Appellant's submitting a filing signed by Mr. SH, Appellant is now alleging an IAC claim against Mr. SH and his other original appellate counsel. The Government highlights this rather peculiar set of circumstances and opposes Appellant's instant motion due to what appears to be an actual conflict of interest between Appellant and Mr. SH.

Undoubtedly, the Government opposes Appellant's newfound IAC claim against his trial defense counsel because he has failed to show good cause why his *three* original appellate defense counsel did not raise this issue in any of Appellant's previous assignments of error briefs. Indeed, Appellant took 408 days to file his original brief and, thus, had more than ample time to raise this issue. In fact, Appellant's original brief raised IAC claims against his trial defense counsel – just not this particular claim.

Unable to show good cause as to his delay in filing his newfound IAC claim against his trial defense counsel, Appellant then turns to claiming IAC against his three original appellate defense counsel for not filing the issue previously. And herein lies additional ethical concerns.

To the Government's knowledge, Appellant is still represented by Mr. BS, Mr. SH, and Maj MC before this Honorable Court. Indeed, Mr. SH signed a pleading to this Court just two days before Appellant made his IAC claim against his appellate counsel. Yet now, Appellant has alleged all three of his original counsel ineffectively represented him by failing to raise this new

IAC claim against his trial defense counsel in any of Appellant's multiple previous appellate filings. Such a conflict seems untenable.

Adding further complexity to Appellant's newfound IAC claim is the Government's well-known practice of commonly moving this Court to compel declarations from defense counsel in response to an appellant's IAC claim. Should this Court grant Appellant's motion and Appellant's IAC claim against his appellate defense counsel be properly before this Court, the Government intends to move this Court to compel a declaration from Mr. BS, Mr. SH, and Maj MC to address Appellant's IAC claim against them.

Therefore, without further clarification of Mr. BS's, Mr. SH's, and Maj MC's continued representation of Appellant before this Honorable Court or an explanation from either Appellant or his counsel regarding each of his counsel's ethical abilities to continue to represent Appellant before this Court, the Government opposes Appellant's motion to file a supplemental assignment of error.

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

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[redacted]
MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 31 July 2024 via electronic filing.

[redacted]
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40363**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Samuel A. DOROTEO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 8 August 2024, this court granted Appellant's Motion for Leave to File Supplemental Assignment of Error alleging an additional instance of ineffective assistance of counsel on the part of Appellant's trial defense counsel. Appellant asserts that he was "denied effective assistance of counsel when his counsel failed to move to compel production of a statement of a complaining witness under Rules for Courts-Martial 914 or seek remedies under the same rule."

On 16 August 2024, the Government filed a Motion to Compel Affidavits for Ineffective Assistance of Counsel in response to Appellant's supplemental claim of ineffective assistance of counsel. On the same date, the Government moved for an enlargement of time in which to file its answer brief until 14 days after this court receives trial defense counsel's declarations or affidavits in accordance with this court's anticipated grant of the Government's motion to compel affidavits. Appellant did not oppose either motion.

The Government requests this court direct trial defense counsel to provide declarations or affidavits "within 30 days of the [c]ourt's order." Under the circumstances, we find 21 days adequate and appropriate.

Accordingly, it is by the court on this 27th day of August 2024,

ORDERED:

The Government's Motion to Compel Affidavits for Ineffective Assistance of Counsel dated 8 August 2024 is **GRANTED IN PART**. Major Carlos Y. Cueto Diaz, Major Cynthia A. McGrath, and Major Mary E. Clemons are each ordered to provide an affidavit or declaration to this court that is a specific and factual response to Appellant's supplemental claim of ineffective assistance.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **17 September 2024**. The Government shall deliver a copy of the responsive affidavits or declarations upon receipt to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time dated 16 August 2024 is **GRANTED**. The Government's answer to Appellant's supplemental assignment of error alleging ineffective assistance of counsel will be filed not later than **1 October 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

16 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant.*	))))))))	MOTION FOR ENLARGEMENT OF TIME ACM 40363 Special Panel

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time in order to adequately respond to Appellant's Supplemental Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Affidavits and asked this Court to order Appellant's trial defense counsel, Maj CCD, Maj CM, and Capt MC, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the Court's receipt of Maj CCD's, Maj CM's, and Capt MC's affidavits in order to properly and completely respond to Appellant's brief. To avoid any confusion, the United States respectfully asks this Court to set specific due dates for both the affidavits/declarations and the brief.

Maj CCD, Maj CM, and Capt MC represented Appellant at his trial. On 24 July 2024, Appellant filed a Motion for Leave to File a Supplemental Assignment of Error brief and a Supplemental Assignment of Error brief. On 8 August 2024, this Court granted Appellant's motion and stated the Government may file an answer within 30 days of this Court's order.

The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. All have responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

The United States requires an affidavit from Maj CCD, Maj CM, and Capt MC to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States, in a separate motion, has requested this Court order Maj CCD, Maj CM, and Capt MC to provide an affidavit with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

Additionally, the government's answer to Appellant's brief is currently due to the Court on 9 September 2024. Undersigned counsel will require a short amount of time after the submission of affidavits in order to properly address Appellant's ineffective assistance of counsel claim. Good cause exists to grant this request. Undersigned counsel needs this additional time in order to properly address Appellant's ineffective assistance of counsel claim, which cannot be analyzed until Maj CCD's, Maj CM's, and Capt MC's affidavits are received. Barring unforeseen circumstances, the United States believes fourteen days is sufficient to prepare a proper a responsive brief for this Honorable Court on this issue once the ordered affidavits are filed with the Court.

This case was docketed with the Court on 2 November 2022. Appellant filed his Supplemental Assignment of Error brief with this Honorable Court on 24 July 2024, 630 days

after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 653 days have elapsed since docketing.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 16 August 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
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16 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO COMPEL AFFIDAVITS FOR INEFFECTIVE ASSISTANCE OF COUNSEL
v.	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Special Panel

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Maj CCD, Maj CM, and Capt MC, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claim.[1]

Maj CCD, Maj CM, and Capt MC represented Appellant at his trial. On 24 July 2024, Appellant filed a Motion for Leave to File a Supplemental Assignment of Error brief and a Supplemental Assignment of Error brief. On 8 August 2024, this Court granted Appellant's motion and stated the Government may file an answer within 30 days of this Court's order.

The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. All have responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

[1] Filed in conjunction with this motion, the United States has also moved this Court for an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. The United States seeks an enlargement of time following the submission of the affidavits or declarations in order to properly and completely respond to Appellant's brief.

The United States requires an affidavit from Maj CCD, Maj CM, and Capt MC to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Affidavits or declarations are necessary in this case because the allegations of ineffective assistance of counsel involve strategic decisions that only Appellant's trial defense counsel can explain.

Accordingly, the United States respectfully requests this Court order Maj CCD, Maj CM, and Capt MC to provide a declaration or affidavit with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Affidavits.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 16 August 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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17 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	))))))))	MOTION TO ATTACH DOCUMENTS ACM 40363 Special Panel

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following documents previously ordered by this Honorable Court on 27 August 2024:

- Affidavit of Maj CCD, dated 17 September 2024, 6 pages;
- Affidavit of Maj CM, dated 17 September 2024, 3 pages; and
- Affidavit of Maj MC, dated 17 September 2024, 3 pages.

On 16 August 2024, the United States requested this Honorable Court compel Maj CCD, Maj CM, and Maj MC to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 27 August 2024, this Honorable Court granted that motion and ordered Maj CCD, Maj CM, and Maj MC to "provide an affidavit or declaration to this court that is a specific and factual response to Appellant's supplemental claim of ineffective assistance." The Order stated that the affidavits or declarations "will be provided to the court not later than 17 September 2024" and that the United States' "answer to Appellant's supplemental assignment of error alleging ineffective assistance of counsel will be filed not later than 1 October 2024."

Maj CCD, Maj CM, and Maj MC provided their affidavits to undersigned counsel on 17 September 2024.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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FOR

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

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 17 September 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
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1 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	
	)	ACM 40363
Senior Airman (E-4) SAMUEL A. DOROTEO, USAF *Appellant*.	)	Special Panel

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

ISSUE PRESENTED

XIII.

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO MOVE TO COMPEL PRODUCTION OF A STATEMENT OF A COMPLAINING WITNESS UNDER RULE FOR COURTS-MARTIAL 914 OR SEEK REMEDIES UNDER THE SAME RULE.

STATEMENT OF THE CASE

The United States' statement of the case is contained in its original brief.

STATEMENT OF FACTS

Facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

XIII.

APPELLANT'S TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.

Standard of Review

Ineffective assistance of counsel claims involve mixed questions of law and fact: "[t]his Court reviews factual findings under a clearly erroneous standard, but looks at the questions of

deficient performance and prejudice *de novo*." United States v. Gutierrez, 66 M.J. 329, 330-331 (C.A.A.F. 2008).

Law

To show ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

With regard to the first prong of Strickland's two-pronged test, courts give deference to counsel and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To establish deficient performance, an appellant must establish his counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (quoting Strickland, 466 U.S. at 690). Because an ineffective-assistance claim may be used "as a way to escape the rules of waiver and forfeiture and raise issues not presented at trial...the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." Id.

When addressing the second prong, an appellant must demonstrate a "reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." Strickland, 466 U.S. at 694. That is to say, an appellant has the burden of showing the results of the trial would have been different but for the deficiency. *See* Id., at 694; *see also* Harrington, 131 S. Ct. at 787-88 (noting the error or deficiency must be so serious that a defendant was deprived of a fair trial with reliable results).

In addressing claims of ineffective assistance of counsel, the Court of Appeals for the Armed Forces applies the following three-part test to determine whether or not the presumption of counsel's competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance...[ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (*citing* United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

In reviewing the decisions and actions of trial defense counsel, a reviewing Court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See* United States v. Davis, 60 M.J. 469, 474 (C.A.A.F. 2005).

In other words, "disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some reasoned basis." United States v. Mansfield, 24 M.J. 611, 617 (A.F.C.M.R. 1987). *See also* United States v. McIntosh, 74 M.J. 294, 296 (C.A.A.F. 2015). In assessing claims of ineffective assistance of counsel, appellate courts do not look at the success of a defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J.

131, 136 (C.A.A.F. 2001)(*citing* United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998).

Additional Facts

Specifications 6 and 7 of Charge I involved SrA AN and stemmed from events occurring on or about 26 April 2020, at or near Kaiserslautern, Germany. (ROT, Vol. I, Charge Sheet). In Specification 6, Appellant was charged with abusive sexual contact by touching SrA AN's breast. In Specification 7, Appellant was charged with sexually assaulting SrA AN by penetrating her vulva with his penis. (Id.) The panel convicted Appellant of both specifications. (R. at 2039-40.)

- *Events on the Night in Question Prior to Appellant's Misconduct Against SrA AN*

SrA AN met Appellant in technical school soon after she joined the Air Force in 2016. (R. at 1128.) SrA AN said the two were friends who "would hang out from time to time when we were not working and not doing tech school stuff." (Id.) When she moved to Edwards AFB, the two did not keep in contact.

When SrA AN PCS'd to Vogelweh AB, Germany she met Amn OR. (R. at 1129.) The two were friends who were in training together and arrived to Vogelweh around the same time. Later, Appellant also PCS'd to Vogelweh. SrA AN said when Appellant first arrived to Vogelweh, she, Amn OR, and Appellant hung out. (Id.)

On 27 April 2020, Amn OR received word that he was going to retrain as a paralegal and wanted to celebrate. (R. at 1130.) He asked SrA AN if he could come to her Kaiserslautern apartment that night. Amn OR arrived around 2130 or 2200 hours and the two drank and played trivia in SrA AN's living room. (R. at 1131-32.) Though the two were initially laughing and

having a good time, Amn OR soon began calling SrA AN names and was "just being like hateful towards me." (R. at 1132.)

SrA AN began feeling uncomfortable and, at some point, sent Appellant a Snapchat message to come over. (R. at 1133.) When asked why she asked Appellant to come over, SrA AN stated, "I just didn't feel comfortable by myself. [Amn OR] was a bigger man than me. I just didn't want to be there alone." (Id.) She said she called Appellant because he and Amn OR "know each other and they have a good relationship." (Id.)

Once Appellant arrived, the three continued to play trivia and drink. However, Amn OR kept calling SrA AN names, which frustrated SrA AN. SrA AN noticed Amn OR was stumbling into the bathroom and at one point broke one of her candles and was trying to use the bathroom in parts of the house there were not bathrooms. (R. at 1134.) SrA AN knew Amn OR had drank enough, and she asked Appellant "if we can please try to get him out of here." (Id.)

As SrA AN and Appellant attempt to get Amn OR out of the apartment, Amn OR slapped SrA AN and called her a bitch. (R. at 1135.) SrA AN then asked Appellant to give her his phone so she could call Security Forces. At this point, SrA AN said she was crying and upset. Eventually, Security Forces came, and both Appellant and SrA AN provided statements. (Id.)

On cross-examination, SrA AN stated that she first gave an oral statement to MSgt PB, a member of Security Forces, while Appellant stood beside her. (R. at 1151-52.) SrA AN then provided a written statement on an AF Form 1168. (R. at 1153.)

The events which gave rise to the offenses charged in Specifications 6 and 7 of Charge I occurred after Security Forces left that evening. The Government's original Answer to Assignments of Error brief provides an in-depth statement of facts and discussion related to those offenses. (*See* Government Answer, Issue VIII, at 65-70.)

- *Pretrial Abatement Motion*

Prior to trial, Appellant's trial defense counsel contacted MSgt PB about the AF Form 1168's completed by SrA AN and Appellant. (App. Ex. XXVIII at 3.) MSgt PB stated the AF Form 1168s were turned in with the rest of the paperwork to his flight. However, the Security Forces detachment later confirmed the two AF 1168s were not in the possession of the records department. (Id.)

At trial, Appellant's counsel moved to abate the proceedings with regard to the offenses involving SrA AN, namely Specifications 6 and 7 of Charge I, for a variety of reasons, including the loss of the AF Form 1168s. During the motion hearing, Appellant's counsel argued SrA AN's AF Form 1168 would show she "failed to recall that she had been hit as part of the mutual assault, which is kind of a big part of being questioned," and that SrA AN had a "motive to fabricate." (R. at 599.) Appellant's counsel also argued that the AF Form 1168 would also show SrA AN's level of intoxication. Appellant's counsel argued, "So to be able to challenge her intoxication level and what actually occurred before she had time to think and to regroup and to formulate her statement is a key area for our impeachment. We are not afforded because they destroyed the evidence." (Id.)

The military judge denied Appellant's motion. In relation to the AF Form 1168s, the military judge held, "While the potential for the statements to provide additional information is possible, that the additional information would be of central importance to an issue such that it would be essential to a fair trial is entirely speculative – *especially given the alleged crime had not yet occurred*." (App. Ex. XXXVII at 5.) (emphasis added). The military judge continued, "the defense has failed to meet its burden in showing that such evidence is of such central importance to an issue that is essential to a fair trial." (App. Ex. XXXVII at 5.) The military

judge added, "In addition, this Court finds the defense has failed to demonstrate the absence of an adequate substitute. Here the defense has the ability to interview [SrA AN] about what was said, and her level of intoxication. Furthermore, the defense will also be able to interview MSgt PB."[1]

- *MSgt PB's Statements and Testimony Regarding the AF 1168s*

During the hearing for Appellant's abatement motion, Appellant's counsel introduced text messages sent by MSgt PB on the night of the incident. (App. Ex. XXIX.) In those messages, MSgt PB stated that the written statements made by both Appellant and SrA AN "read[] way off." (Id. at 3.) MSgt PB continued, "I think [SrA AN] is way too intoxicated. And I don't like [Appellant] doing a statement either." (Id.) MSgt PB continued, "[Appellant] is all over the place. [SrA AN] writes half a page and doesn't talk about running in the bathroom or getting hit. I think [Appellant] is hiding it well, [b]ut [SrA AN] is clearly intoxicated." (Id.)

MSgt PB also testified during Appellant's trial during the Government's case-in-chief. MSgt PB's testimony occurred after SrA AN had testified. MSgt PB testified that he verbally questioned both SrA AN and Appellant. (R. at 1259.) MSgt PB observed SrA AN's injuries, which included bruising on her cheek, cuts on her right wrist and hand, and glass in her left leg. (R. at 1260.)

[1] While Appellant has now raised 13 issues before this Court, Appellant has never raised an issue related to the military judge's ruling on Appellant's abatement motion or ruling. Further, while Appellant did raise a factual and legal sufficiency issue related to Specification 6, Appellant's argument in that issue did not involve anything related to SrA AN's intoxication on the night in question or her testimony related to any events involving Amn OR. Instead, Appellant's sole argument was that SrA AN's testimony showed that Appellant did not "touch her breast again after she removed his hand the first time." (*See* App. Original Br. at 69.) Appellant has raised no factual or legal sufficiency issue involving Specification 7, the penetrative offense against SrA AN.

MSgt PB then asked both Appellant and SrA AN to provide a written statement. MSgt PB testified as follows:

> [SrA AN's] statement was way off to me. It was way off to me because she missed the key details that she knows -- I get it that she's an airman -- that she knows to put into a statement. For example, I talked about, you know, her injuries, her physical injuries, right? Glass stuck in the leg -- and she didn't talk about that in her statement. She's a victim of assault, right? So I opted not to accept that statement. And then when I looked at [Appellant's], the writing just gets, like it's normal and then all of the sudden it gets bigger and bigger, and it starts slanting. So at that point I suspected that they were both heavily intoxicated. At least one, for coherency and then, two, just because the writing was so wrong.

(R. at 1261.)

MSgt PB was then asked, "And so you said you that you didn't take [SrA AN's] statement, that you discarded it. What did you do with [Appellant's]?" (R. at 1261.) MSgt PB responded as follows:

> Sure. Same thing. It just goes -- both of them -- understand, when I say that ma'am, it goes in with my daily paperwork, right? But for my casework, you know, I just wrote it in my statement, saying hey, I did this. I did what I'm supposed to do as a flight chief, right? But I can't accept this as part of my overall casework. Because I deemed them too intoxicated to make coherent statements.

(Id.)

On cross-examination, Appellant's counsel questioned MSgt PB about SrA AN's written statement not mentioning an assault taking place and missing key details. (R. at 1275-76.) Appellant's counsel also questioned MSgt PB about his determination that SrA AN and Appellant were too intoxicated to write a statement. (R. at 1276.)

Analysis

In his brief, Appellant claims he "received ineffective assistance of counsel because his trial defense counsel did not move under R.C.M. 914 to compel the production of [SrA] AN's statement made on an AF IMT 1168 on 27 April 2020." (App. Supp. Br. at 7.) Appellant argues that if the defense had moved to compel the statement under R.C.M. 914, "it would have likely prevailed." (Id. at 8.) Appellant argues that the military judge's remedies at that point would have been to either "'order that the testimony of the witness be disregarded by the trier of fact' or declare a mistrial." (Id., *citing* R.C.M. 914(e) and United States v. Palik, 84 M.J. 289, 291 (C.A.A.F. 2024).) Appellant then contends that since SrA AN was the only witness to the misconduct in Specifications 6 and 7 of Charge I, "the government's case would have been much weaker," adding that "either striking [SrA AN's] testimony or declaring a mistrial would have likely created a markedly different result at trial, especially as to the specifications concerning [SrA] AN." (Id. at 9.)

In a response to an Order by this Court, each of Appellant's trial defense counsel provided an affidavit regarding this allegation. (*See* Aff. of Maj CCD, Aff. of Maj CM, and Aff. of Maj MC.)[2]

Maj CCD, the lead trial defense counsel, stated that prior to trial, the defense became aware that SrA AN "had made statements to Security Forces *unrelated to the charged misconduct*." (Aff. of Maj CCD.) (emphasis added). Maj CCD also stated that MSgt PB "recalled the statement being so incoherent—likely due to [SrA] AN being drunk—that he wondered if he should have waited until the next morning to ask her to provide a written

[2] The Government moved to attach these affidavits and declaration on 17 September 2024. This Honorable Court granted that motion on 26 September 2024.

statement." (Id.) Maj CCD also acknowledged that what became of SrA AN's AF Form 1168 is unclear because "no one in [the Records and Analysis] office remembered receiving" SrA AN's written statement from MSgt PB. (Id.)

Maj CCD then highlighted that SrA AN "briefly testified about the drunk-and-disorderly incident and the Security Forces response" on direct examination, but that the defense on cross-examination "deliberately focused on the drunk-and-disorderly incident and the Security Forces response much more than trial counsel did" for various reasons, including MSgt PB witnessing SrA AN being affectionate towards Appellant. Maj CCD called this testimony "critically important for our defense" because the defense knew SrA AN would deny these actions and MSgt PB would "contradict her and support our claim that [SrA] AN was or appeared to be attracted to [Appellant]." Per Maj CCD, this line of inquiry would "bolster our argument in support of our theories of consent or mistake of fact as to consent." (Id.)

Maj CCD then directly addressed the R.C.M. 914 issue. Maj CCD stated, "After [SrA] AN testified on direct examination, as lead trial defense counsel, I had a decision to make concerning Rule for Courts-Martial (R.C.M.) 914," adding that he was "aware of the opinion by the Court of Appeals for the Armed Forces in United States v. Muwwakkil, 74 M.J. 187 (2015), which established that the then-existing version of R.C.M. 914 applied to lost or destroyed statements," and that he knew the statement provided by SrA AN to MSgt PB could have been subject to a valid request under R.C.M. 914(a)(1). (Id.) Maj CCD stated he also knew the two potential remedies available to the military judge.

Maj CCD explained his thought process with regard to these two potential remedies as follows:

> Regarding the first potential remedy, I did not believe the military judge would instruct the panel to disregard [SrA] AN's testimony in

> its entirety. The missing statement pertained solely to the initial portion of [SrA] AN's direct examination, related to events that occurred several hours before the alleged sexual assaults, and concerned the behavior of a third party. Therefore, it seemed unreasonable to expect the military judge to exclude [SrA] AN's entire testimony due to the absence of this statement.
>
> At most, I believed the likely remedy would be for the military judge to order the panel to disregard only the portion of [SrA] AN's testimony concerning the drunk-and-disorderly incident and the subsequent response by Security Forces, as this was the only part of her testimony that related to the missing statement. While R.C.M. 914(e) does not explicitly limit the disregarded testimony to that which relates to the missing statement, R.C.M. 914(a) contains limiting language, referring to "any statement of the witness that relates to the subject matter concerning which the witness has testified."
>
> In my view, it was logical to read R.C.M. 914(e) in the context of R.C.M. 914(a). If a witness's prior statement addresses a specific matter later testified to in court, the opposing party should have access to that information. If the actions or inactions of the party that called the witness to testify preclude access to such information, it follows that the related portion of the testimony should be excluded or a mistrial be declared. This is a necessary remedy because the opposing party's ability to cross-examine the witness on the related matter using the prior statement has been curtailed. However, no public policy interest would be served by interpreting R.C.M. 914 to bar a witness from testifying altogether simply because a prior statement on a collateral or relatively insignificant matter had not been produced. I was not aware of any case law providing for such an expansive interpretation of R.C.M. 914.

(Id.) Based on this reasoning, Maj CCD surmised the "only appropriate remedy seemed to be the exclusion of the initial portion of AN's testimony concerning the drunk-and-disorderly incident and the Security Forces response." (Id.)

As to the possibility of the military judge declaring a mistrial, Maj CCD "believed it was highly unlikely the military judge would declare one," because the "same military judge had previously determined that the missing statement was not of such central importance to warrant abatement or dismissal." (Id.) While Maj CCD acknowledged that the abatement motion was

filed under R.C.M. 703, Maj CCD stated, "the judge's assessment of the statement's importance remained relevant," adding, "If the missing statement was not deemed significant enough to merit a remedy in that instance, it was reasonable to conclude it would not result in a mistrial either." Maj CCD stated, "It seemed improbable that the judge would declare a mistrial over a missing statement that pertained only to a minor part of [SrA] AN's testimony, particularly since it did not relate to the alleged offenses (i.e., the crux of her testimony) and pertained to just one of several alleged victims." (Id.)

Having concluded the only likely remedy by the military judge would be excluding the portion of SrA AN's testimony concerning the drunk-and-disorderly behavior and the Security Forces response, Maj CCD recognized the downside this result would cause to his client's case and "chose not to request it because that remedy would not have served our client's best interests." (Id.) Maj CCD explained that "[e]xcluding that portion of [SrA AN's] testimony would have undermined our strategy," which involved "delving into this part of the evening with [SrA] AN" to "establish grounds for our argument that she was either lying about the events of that night or, at the very least, forgetting critical aspects of it." (Id.) Maj CCD continued, "For instance, on cross-examination, we explored the possibility that [SrA] AN had violated a COVID-related order, assaulted the drunk airman, and acted flirtatiously and romantically toward our client in the crucial hour leading up to the alleged sexual assaults." Maj CCD stated, "This part of her testimony was vital to our case, as it provided our best opportunity to challenge the credibility of an otherwise credible witness. I did not want to lose the ability to cover these points with [SrA] AN on cross-examination, which I believed would have been the outcome if I had sought a remedy under R.C.M. 914."

Maj CCD concluded as follows:

> In summary, I made a strategic decision following a thorough analysis of what I understood the state of the law to be at the time, the military judge's assessment of the relative importance of the missing statement, the facts of the case, and the overall strength of our position with respect to [SrA] AN. The loss or destruction of her statement to MSgt PB may have limited our ability to confront her to some extent with her prior account related to the drunk-and-disorderly behavior of a third party. However, that was not our concern with this witness. What was relevant to us were the circumstances surrounding the giving of the statement, rather than the content of the statement itself. Therefore, I chose not to pursue a remedy that would have closed off this important line of inquiry. Equally important, our ability to cross-examine [SrA] AN regarding the charged misconduct was in no way impacted by the absence of a statement made prior to the alleged assaults.

(Id.) Maj CM's and Maj MC's affidavits provide similar reasoning.

Here, each of Appellant's trial defense counsel provide reasonable explanations for why Appellant's defense team did not move to compel SrA AN's AF Form 1168 pursuant to R.C.M. 914. The team recognized the likely outcome of such a motion would not result in the military judge declaring a mistrial because the missing statement pertained to only a minor part of SrA AN's testimony, did not relate to the alleged offenses (which occurred *after* the statement had been made) and involved only one of several alleged victims.

Further, the defense team recognized the likelihood that the military judge would not strike SrA AN's entire testimony, but instead only strike the portion of SrA AN's testimony that related to the AF Form 1168. Maj CCD recognized that R.C.M. 914(a) states that a military judge, on a motion by the party who did not call the witness, "shall order the party who called a witness to produce . . . any statement of the witness that *relates to the subject matter concerning which the witness has testified*." *See* R.C.M. 914(a). (emphasis added.) As our superior Court recently noted in Palik,

> The language of R.C.M. 914, "tracks the language of the Jencks Act." United States v. Muwwakkil, 74 M.J. 187, 190 (C.A.A.F. 2015) (internal quotation marks omitted) (citation omitted). Specifically, the Jencks Act requires a district court judge, upon motion by the defendant, to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d] to the subject matter" of their testimony after each witness testifies on direct examination. 18 U.S.C. § 3500(b) (2018).

Palik, 84 M.J. at 289.

Here, the statement in question related to the incident involving Amn OR that, as Maj CCD knew, occurred "several hours before the alleged sexual assaults, and concerned the behavior of a third party." (Aff. of Maj CCD.) The AF Form 1168 did not "relate to the subject matter" of Appellant's sexual assault on SrA AN that occurred well after MSgt PB and the rest of the Security Forces personnel left that night. In fact, Maj CCD stated in his affidavit that "our ability to cross-examine [SrA] AN regarding the charged misconduct was in no way impacted by the absence of a statement made prior to the alleged assaults." (Aff. of Maj CCD.)

Thus, Appellant's defense team was perfectly reasonable in believing the likely outcome of a motion raised under R.C.M. 914 would only result in that portion of SrA AN's testimony that "related to the subject matter" of the AF Form 1168, which dealt solely with the events involving Amn OR. Moreover, as addressed by Maj CCD in his affidavit, Appellant's defense team recognized the pitfalls that this limitation would create for their strategy and overall defense theory.

Still, Appellant claims error by relying solely on our superior Court's recent decision in Palik. (*See* App. Supp. Br. at 9-12.) Appellant believes his case is "remarkably similar to Palik." (Id. at 9.) Appellant is wrong.

To start, Palik involved two deleted video recordings made during two separate Air Force Office of Special Investigations (AFOSI) interviews of the victim in that case. Palik, 84 M.J. at

285. The subject matter of those interviews was about that appellant assaulting the victim, which ultimately gave rise to the actual charges in that case.

SrA AN's AF Form 1168 is a stark contrast from the deleted video recordings in Palik. To start, it is questionable as to whether SrA AN's AF Form 1168 was a statement at all. R.C.M. 914(f)(1) defines a "statement" as a "written statement made by the witness that is signed or otherwise adopted or approved by the witness." Here, MSgt PB's testified that SrA AN was "clearly intoxicated" and that he deemed both SrA AN and Appellant "too intoxicated to make coherent statements." (R. at 1261.) Considering these factors, there is a question of whether or not SrA AN signed, adopted, or approved what she wrote or, even if she did, whether SrA AN had the mental capacity (due to her intoxication) to sign, adopt, or approve the statement. Considering MSgt PB's determination that she was too intoxicated to make a statement at all, it follows that she would then also be too intoxicated to either sign, adopt, or approve anything that was written.

Yet, even if this Court determines SrA AN's AF Form 1168 was a "statement" under R.C.M. 914, the statement is still vastly different than the recordings at issue in Palik because the AF Form 1168 at issue in this case did not involve the charges for which Appellant was accused, tried and convicted. In fact, as Maj CCD noted in his affidavit, the AF Form 1168 at issue was written by SrA AN well before the sexual assault even took place, was wholly unrelated to anything the Government charged Appellant, and involved the actions of a third party – not Appellant.

Next, a central and ultimately fatal concern for our superior Court in Palik was the fact that the trial defense counsel in that case "did not provide a reasonable explanation for their failure to raise a motion pursuant to R.C.M. 914 after [the victim] testified on direct examination

at the court-martial proceedings." Id. at 290-91. More specifically, the Court highlighted that the trial defense counsel did not directly address R.C.M. 914 in their declarations to this Court or "provide a reasonable explanation for why they did not file the R.C.M. 914 motion." Id. at 291. As noted by our superior Court, the lead trial defense counsel in that case did "not even directly mention R.C.M. 914 despite the fact that the CCA specifically asked the defense counsel to address that point." Palik, 84 M.J. at 286-87, 291. Further, while the assistant defense counsel's affidavit did mention R.C.M. 914, our superior Court noted that the counsel's affidavit focused on attacking the competency of the investigators, which the Court found at odds with the "crux of this case." Id. ("the crux of this case was the credibility of the testimony of [the victim] and not the competence of the OSI agents.")

Again, in stark contrast to Palik, counsel in this case directly addressed R.C.M. 914 and explain in detail their analysis as to why they did not file an R.C.M. 914 motion. As noted above, Maj CCD was well-versed and researched on the R.C.M. 914 issue, including being aware of Muwwakkil, the particular language of each section of R.C.M. 914, and the potential remedies available to the military judge. Taking all of this into account, Maj CCD recognized the likely outcome of a R.C.M. 914 motion and further recognized the pitfalls a potential ruling by the military judge could have on the defense team's theory and their overall defense of Appellant. Thus, in contrast to Palik, Appellant's trial defense counsel here directly addressed R.C.M. 914 and provided a reasonable explanation for their decision to not file an R.C.M. 914 motion in this case.

Next, in Palik, our superior Court found that "there was tremendous upside and virtually no downside for the defense to file" an R.C.M. 914 motion in that case. Again, however, the landscape in this case is much different. Where, in Palik, the lost recordings were of two victim

interviews where the victim discussed the sexual assault that led to the actual charges in that case, the AF Form 1168 in this case addressed nothing related to the charges against Appellant as the statement was taken well before the sexual assault took place and was about an unrelated incident involving a third party.

Here, SrA AN's AF Form 1168 only "related to the subject matter" of an unrelated incident that occurred well before Appellant's assault on SrA AN, therein creating the high probability that the military judge would only disregard the portion of SrA AN's testimony about the unrelated events earlier in the night. However, as detailed by Maj CCD, those events earlier in the night, while unrelated to the charged misconduct, were a key part in the trial defense team's strategy to undercut SrA AN's overall credibility. Thus, raising an R.C.M. 914 motion presented a major "downside" for the defense which Appellant's defense team recognized and sought to avoid. Appellant notably fails to recognize any of these pitfalls within his brief, let alone explain why his defense team's strategy to avoid these pitfalls was unreasonable or somehow fell measurably below the performance ordinarily expected of fallible lawyers.

The statements from Appellant's trial defense counsel demonstrate a sound approach to Appellant's defense, and a reasonable, "tactical decision[] made at the trial." Mansfield, 24 M.J. at 617. Thus, Appellant's trial defense counsel did not perform deficiently, and their decision to not file an R.C.M. 914 motion does not overcome the "strong presumption" that their conduct was within the "wide range of reasonable professional performance." Strickland, 466 U.S. at 689. Additionally, because this was a tactical decision, and this Court should not second-guess strategic or tactical decisions on review, Appellant's ineffective assistance of counsel claim must fail. Strickland, 466 U.S. at 689; Morgan, 37 M.J. at 410.

Finally, Appellant has failed to show any prejudice as there is no reasonable probability that, absent any alleged errors, there would have been a different result. First, as detailed by Maj CCD, the defense team believed the likely outcome of such a motion would have been for the military judge to strike only the portion of SrA AN's testimony that "related to the subject matter" of her AF Form 1168 – that being her testimony about the events earlier in the night that well preceded Appellant's sexual assault against her. As explained by Maj CCD, this outcome would have resulted in a tremendous blow to Appellant's overall defense and theory for attacking SrA AN's credibility. Thus, with this outcome, there was no "reasonable probability" of a different result that would have favored Appellant. In fact, this outcome would have heavily disfavored Appellant's defense.

This, of course, assumes the military judge would have found in Appellant's favor at all with the R.C.M. 914 motion. Another reasonable, and also likely, probability of Appellant's motion is that it would have failed completely by virtue of the good faith loss doctrine. In Muwwakkil, our superior Court recognized the existence of a good faith loss doctrine in the military's R.C.M. 914 and Jencks Act jurisprudence, which "excuses the Government's failure to produce 'statements' if the loss or destruction of the evidence was in good faith." 74 M.J. at 193; *see also* Palik, 84 M.J. at 290. For example, in another case, our superior Court denied relief under the Jencks Act where the government lost Article 32 recordings of witness testimony. United States v. Marsh, 21 M.J. 445, 452 (C.M.A. 1986). The Court reasoned that although "some negligence may have occurred . . . there was no gross negligence amounting to an election by the prosecution to suppress these materials." Id.

Notably, in Palik, our superior Court held the good faith loss doctrine did not apply because that case had "damning evidence of negligence on the part of OSI," including setting up

a recording system that automatically deleted witness interview records after a period of time and assigning an AFOSI special agent as the *lead* agent in the case despite the agent's "marked lack of experience as an investigator." Palik, 84 M.J. at 293.

In this case, however, there is no such "damning evidence of negligence" on the part of MSgt PB. To start, MSgt PB had spent his entire 17-year Air Force career as a member of Security Forces and did not lack experience in investigations or taking witness statements. (R. at 1256-58, 1262-64.) Moreover, MSgt PB's testimony showed he used that extensive experience in determining that the one-half-page written statement provided by SrA AN that night was not suitable for acceptance because she was "way too intoxicated" to make a coherent statement. In fact, even Maj CCD acknowledged that MSgt PB wondered if he should have waited until the following morning to ask SrA AN to provide a statement. Because of this belief, which Appellant's counsel readily agreed with in order to further their theory of the case, MSgt PB appears to have made the decision to not include the statement in his report when he testified, "But I can't accept this as part of my overall casework. Because I deemed them too intoxicated to make coherent statements." (R. at 1261.)

Here, MSgt PB, in good faith, believed the written statement provided by SrA AN lacked any evidentiary value because of her level of intoxication and incoherency. MSgt PB's actions were certainly not reckless, grossly negligent, or in bad faith. In fact, Maj CCD believed MSgt PB's testimony regarding SrA AN's level of intoxication that night (the very reason MSgt PB did not accept SrA AN's written statement) *helped* Appellant's case, not hurt it. In short, aside from the fact that SrA AN's statement did not involve anything related to Appellant or the charges against him, Appellant's counsel at trial would have not been able to overcome the good faith loss doctrine, which, in turn, would have proved fatal to any R.C.M. 914 motion.

In sum, SrA AN's written statement at issue in this case was one that: (1) dealt solely with an incident that occurred hours before Appellant sexually assaulted SrA AN; (2) was provided well before Appellant sexually assaulted SrA AN; (3) dealt solely with an unrelated third party (Amn OR); (4) did not in any way relate to any charged misconduct against Appellant; and (5) according to MSgt PB, was a one-half page incoherent written statement made by a "clearly intoxicated" person. Moreover, Maj CCD acknowledged that the defense not having SrA AN's statement about the Amn OR incident had no impact on their questioning of SrA AN about the charged misconduct against Appellant by stating, "Equally important, our ability to cross-examine [SrA] AN regarding the charged misconduct was in no way impacted by the absence of a statement made prior to the alleged assaults." (Aff. of Maj CCD.)

The contrast between SrA AN's statement and the two deleted recordings at issue in Palik, which were both statements provided by that case's victim to AFOSI directly about the charged misconduct in that case, is clear.

Equally clear are the distinctions between the non-existent R.C.M. 914 analysis done by the counsel in Palik versus the abundant R.C.M. 914 analysis provided by Appellant's trial team in this case. In Palik, our superior Court determined there was no reasonable explanation about R.C.M. 914 from that appellant's counsel, going so far as to say that the lead defense counsel did not even mention R.C.M. 914 in their declaration to this Court about the issue. In complete contrast, Maj CCD's affidavit in this case provides a clear explanation as to why Appellant's defense team did not raise a R.C.M. 914 motion following SrA AN's testimony. Maj CCD's affidavit shows he understood the law (including Muwwakkil), understood the language and meaning of multiple sections of R.C.M. 914, understood the potential remedies available to the military judge, and then provided this Court a thorough and in-depth reasoning and analysis as to

why raising an R.C.M. 914 motion would be detrimental to his client's defense (which, again, is a complete opposite from the "no downside" situation at play in Palik.)

Notably, in the final paragraph of its analysis in Palik, our superior Court, in finding counsels' performance in that case ineffective as it related to the R.C.M. 914 issue, stated, "the Supreme Court has held that 'an attorney's ignorance of a point of law that is fundamental to the case combined with the failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.'" Palik, 84 M.J. at 294 (*quoting* Hinton v. Alabama, 571 U.S. 263, 274 (2014). Here, however, Maj CCD's affidavit shows (1) Appellant's defense team was not "ignoran[t] of a point of law," since they well understood R.C.M. 914; and (2) they did not "fail[] to perform basic research" on R.C.M. 914, since Maj CCD stated he understood case law surrounding R.C.M. 914 (including Muwwakkil) and thoroughly researched the issue (including an analysis of "relate[d] to the subject matter" wording of R.C.M. 914). Again, the defense team's awareness, scrutiny, and reasoning regarding R.C.M. 914 in this case is simply not comparable to the deficiencies noted by our superior Court in Palik.

In short, where the counsel in Palik provided, no "reasonable explanation for why they did not file the R.C.M. 914 motion," Appellant's counsel here provided ample reasoning that is perfectly reasonable and shows their level of advocacy did not fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers." Gooch, 69 M.J. at 362. As shown in the counsels' affidavits, the defense team was well aware of R.C.M. 914 and their ability to request that the military judge compel SrA AN's AF Form 1168, and had a very sound strategy for not pursing that option. Further, Appellant cannot show a reasonable probability that, but for his counsels' strategic choices, the result of his trial would have been different. Thus, Appellant's claim must fail.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 1 October 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), **SAMUEL A. DOROTEO,** United States Air Force, *Appellant.*	**SUPPLEMENTAL REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40363 8 October 2024

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

Appellant, Senior Airman (SrA) Samuel A. Doroteo, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer, dated 1 October 2024 (Ans.). In addition to the arguments in his supplemental brief, filed on 24 July 2024, Appellant submits the following arguments for the issue listed below.

XIII.

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL CHOSE NOT TO MOVE TO COMPEL PRODUCTION OF A STATEMENT OF A COMPLAINING WITNESS UNDER RULE FOR COURTS-MARTIAL 914 BASED ON A FLAWED UNDERSTANDING OF THE REMEDIES AVAILABLE UNDER THAT RULE.

1. Rule for Courts-Martial 914 requires the military judge to declare a mistrial or order the trier of fact to disregard the entire testimony of the witness, not part of the testimony.

When a trial counsel does not comply with a military judge's order under Rule for Courts-Martial (R.C.M.) 914 to produce a witness's statement to a moving party, one of the available remedies is to order the trier of fact to disregard the testimony of that witness. R.C.M. 914(e). The rule in effect at the time of Appellant's court-martial specifically stated:

> If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that *the testimony of the witness* be disregarded by the trier of fact and that the trial proceed, or, if it is trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

Id. (emphasis added). No reasonable reading of this rule supports trial defense counsel's, and the Government's, contention that the military judge could have ordered the trier of fact to disregard only a portion of the witness's testimony. In textual interpretation, the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *See United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015) (quoting *Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997)) (describing method for statutory interpretation). The "inquiry must cease if the . . . language is unambiguous." *Id.* Here, the plain and unambiguous meaning of the phrase "the testimony of the witness" in R.C.M. 914(e) is that the military judge shall order the trier of fact to disregard that witness's entire testimony. The text says nothing about disregarding only part of the testimony or determining which part should be disregarded. Indeed, the remedy of ordering the trier of fact to disregard *all* of a witness's testimony is what makes an R.C.M. 914 motion "extraordinarily powerful." *United States v. Palik*, 84 M.J. 284, 293–94 (C.A.A.F. 2024). The text of the rule does not contemplate a lesser remedy, and any contrary reading would contradict the United States Court of Appeals for the Armed Force's (CAAF's) understanding of the rule's severity.

If the President, when promulgating R.C.M. 914, had wanted to limit the remedy to disregarding only the portion of the witness's testimony that relates to the statement at issue, he could have done so by using language similar to what appears in an earlier paragraph within the rule:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving

> party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is . . . [i]n the case of a witness called by trial counsel, in the possession of the United States.

R.C.M. 914(a). This language constrains the scope of the rule by limiting its applicability to statements that relate "to the subject matter concerning which the witness has testified." *Id.* In contrast, there is no such limiting language when it comes to remedies in R.C.M. 914(e). That provision simply says, "[T]he military judge shall order that the testimony of the witness be disregarded by the trier of fact." R.C.M. 914(e). This subsection could have used language similar to R.C.M. 914(a) to limit the disregarded testimony to that which relates to the subject matter contained in the statement, but it does not. Rather, it refers more broadly to "the testimony of the witness." R.C.M. 914(e). The plain meaning that this includes the entirety of the witness's testimony only becomes clearer when contrasted with limiting language elsewhere in the same rule.

It is little wonder why R.C.M. 914 does not limit this remedy to disregarding only testimony that relates to matters included in the witness's statement because such a rule would be largely unworkable. When a party does not comply with an order to deliver a statement to a moving party, due either to inability or unwillingness to do so, the precise contents of the statement are not likely to be known to the opposing party or the military judge. Without this knowledge, the military judge could not determine which parts of the testimony to order the trier of fact to disregard without speculating as to which parts relate to the contents of the unavailable statement. Under such circumstances, military judges could not properly tailor this remedy. Thus, it makes sense that the rule instead provides the sure remedy of ordering the trier of fact to disregard the witness's entire testimony.

Despite the plain meaning evident in R.C.M. 914(e), Appellant's trial defense counsel proceeded under the mistaken belief that if they brought a successful R.C.M. 914 motion for AN's lost statement, and the Government failed to produce it, the military judge would only order the trier of fact to disregard the portions of AN's testimony relating to this statement. Affidavit of Maj CCD, 17 September 2024 at 3–5; Affidavit of Maj CM, 17 September 2024 at 3; Affidavit of Maj MC, 17 September 2024 at 2–3. Since trial defense counsel found this portion of the testimony helpful to their strategy of challenging AN's recollection of the evening in question, their mistaken understanding of R.C.M. 914 led to the erroneous conclusion that a successful R.C.M. 914 motion would have harmed Appellant's best interests by causing the trier of fact to disregard the helpful parts of AN's testimony while considering the inculpatory parts. *Id.* On the contrary, a correct application of R.C.M. 914 leads to the conclusion that the remedy, absent a mistrial, would have been for the trier of fact to disregard AN's entire testimony. This would have eliminated the testimony of the only witness to the misconduct alleged in Specifications 6 and 7 of Charge I, providing a significant benefit to Appellant. *See* Supplemental Brief on Behalf of Appellant, 24 July 2024 at 8–9.

The Government seemingly adopted trial defense counsel's incorrect interpretation of the remedies under R.C.M. 914 and argued that the trial defense counsel were "perfectly reasonable" in their belief about the outcome of an R.C.M. 914 motion.[1] Ans. at 14. However, neither the Government nor trial defense counsel cite any authority supporting this interpretation of the remedies under R.C.M. 914. The lead trial defense counsel, Maj CCD, noted that he was aware of the CAAF's decision in *United States v. Muwwakkil*, but *Muwwakkil* says nothing to indicate

[1] Although the Government's Answer repeatedly refers to the trial defense counsel's interpretation of R.C.M. 914 as "reasonable," it stops notably short of asserting this interpretation was correct. *See* Ans. at 13–14, 16–17, 21.

that an R.C.M. 914 remedy could include an order to disregard only the portion of a witness's testimony that relates to the contents of an unproduced statement. 74 M.J. 187 (C.A.A.F. 2015). Rather, the Court quoted the language establishing that one of the remedies was to "order that the testimony of the witness be disregarded by the trier of fact" and held that the military judge did not abuse their discretion by granting the defense motion to strike a witness's trial testimony. *Id.* at 193 (quoting R.C.M. 914(e)). Moreover, the Court in *Muwwakkil* held that no prejudice analysis was required under R.C.M. 914 because "[t]he plain text of R.C.M. 914 provides two remedies for the Government's failure to deliver a 'statement' without referencing a predicate finding of prejudice to the accused." *Id.* at 194. The holding that no prejudice analysis is required undercuts trial defense counsel's reasoning that a remedy would be limited to disregarding the portions of AN's testimony related to the unproduced statement. If no finding of prejudice is necessary to obtain a plainly available remedy under the rule, there should be no reason to think that remedy would be curtailed based on the perceived impact of not producing the statement. *Compare Muwwakkil*, 74 M.J. at 194 *with* Affidavit of Maj CCD at 4.

The reasoning advanced by both trial defense counsel and the Government regarding the remedies available under R.C.M. 914 is contrary to the plain language of the rule and unsupported by precedent or other authority. This faulty reasoning led to a conclusion that was simply wrong. Trial defense counsel should have moved to compel production of AN's statement because the Government's inevitable failure to produce it would have compelled the military judge to either order the trier of fact to disregard AN's entire testimony or declare a mistrial. An order to disregard AN's entire testimony would have undoubtedly benefited Appellant by eliminating the only inculpatory testimony as to the misconduct alleged in two specifications.

2. A strategic decision based on an incorrect understanding of the law constitutes ineffective assistance of counsel.

Trial defense counsel's decision to not bring a motion under R.C.M. 914 or seek remedies under that rule constitutes ineffective assistance of counsel (IAC) because it was based on an erroneous understanding of the applicable law. As the Supreme Court has held, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam) (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000) ("finding deficient performance where counsel 'failed to conduct an investigation that would have uncovered extensive records . . . because they incorrectly thought that state law barred access to such records'"); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) ("finding deficient performance where counsel failed to conduct pretrial discovery and that failure 'was not based on 'strategy,' but on counsel's mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense'")). Trial defense counsel's incorrect understanding of R.C.M. 914's remedies is an ignorance of a point of law that resulted in unreasonable performance. The Government relies heavily on trial defense counsel's reported knowledge and consideration of R.C.M. 914 to contrast this case from *Palik*, 84 M.J. at 294, and argue the trial defense counsel performed reasonably. Ans. at 16, 21. None of trial defense counsel's research or reasoning led them to the correct conclusion that an R.C.M. 914 motion would likely result in all of AN's testimony being struck. Simply thinking about the issue is insufficient to avoid IAC when that reasoning is based on a flawed understanding of the law. Although trial defense counsel seemingly considered R.C.M. 914 more than the counsel in *Palik*, their reasoning was fatally flawed, leading to deficient performance that still falls "measurably

below the performance ordinarily expected of fallible lawyers." 84 M.J. at 293–97 (cleaned up) (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)).

The Government advanced additional arguments to suggest this performance was not IAC. First, it claimed the statement AN wrote on an Air Force Information Management Tool (AF IMT) 1168 may not be a statement at all, arguing, "[T]here is a question of whether or not [AN] signed, adopted, or approved what she wrote or, even if she did, whether [AN] had the mental capacity (due to her intoxication) to sign, adopt, or approve the statement." Ans. at 15. This argument is a red herring. R.C.M. 914(f) defines "statement" under the rule, including: "A written statement made by the witness that is signed or otherwise adopted or approved by the witness." Since AN's AF IMT 1168 is missing, whether she signed it cannot be confirmed. But she wrote the statement herself, which is an obvious form of otherwise adopting or approving it. R. at 1153, 1274–75. Moreover, AN testified that she understood her statement on the AF IMT 1168 to be a sworn statement and that she knew she had to tell the truth when making it. R. at 1153. Contrary to the Government's argument, it would have been unreasonable for the court to view an AF IMT 1168 written by a witness who understood it to be a sworn statement as anything other than a statement under R.C.M. 914.

The Government also invoked the good faith loss doctrine to argue that AN's statement was appropriately disregarded because her intoxication caused the statement to lack evidentiary value. Ans. at 18–19. This argument mischaracterizes the evidence. PB, the responding officer who directed AN to write her statement on the AF IMT 1168 and collected it afterwards, testified that he submitted this statement with his daily paperwork. R. at 1261. Although he did not think it would be useful for his overall casework, he clarified that he did what he was supposed to do and included the statement with his paperwork. *Id.* The statement was seemingly lost after that,

and as in *Muwwakkil*, the statement "was no longer in the Government's possession solely because of the Government's own negligence in failing to preserve it." 74 M.J. at 193. The good faith loss doctrine would not have applied where the responding officer properly collected and submitted a statement that was subsequently lost.

R.C.M. 914 is an "extraordinarily powerful" tool that trial defense counsel could have used to significantly benefit Appellant by causing AN's testimony to be disregarded. *Palik*, 84 M.J. at 293–94. However, they failed to recognize the true potential of this rule and decided not to utilize it based on an incorrect understanding of its remedies. This decision, based on an insufficient understanding of the law, constitutes IAC.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 6 and 7 of Charge I and the sentence.

Respectfully submitted,

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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 8 October 2024.

Respectfully submitted,

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