IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

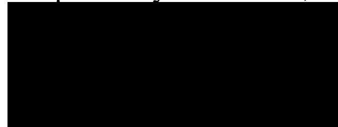
UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Captain (O-3)	)	No. ACM 40349
JORDAN S. EDWARDS,	)	
United States Air Force	)	25 November 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **31 January 2023**. The record of trial was docketed with this Court on 3 October 2022. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

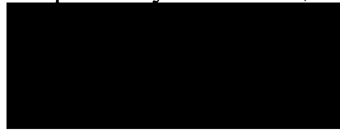


HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

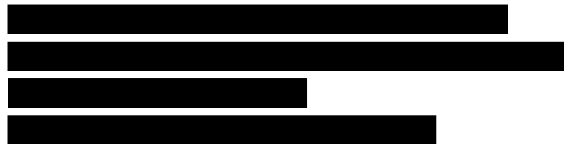
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 November 2022.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



28 November 2022

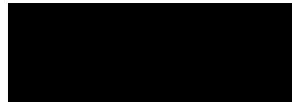
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) JORDAN S. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40349 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.

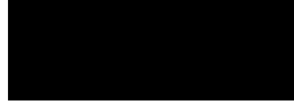
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



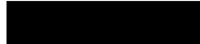
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 November 2022.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40349 23 January 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 March 2023**. The record of trial was docketed with this Court on 3 October 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 16 May 2022, at a general court-martial convened at Los Angeles Air Force Base (AFB), California, Appellant was found guilty, contrary to his pleas, of two specifications of Article 120, Uniform Code of Military Justice (UCMJ) and one specification of Article 133, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 16 May 2022. Appellant was found not guilty, consistent with his pleas, of one specification of Article 109, UCMJ; four specifications of Article 120, UCMJ; three specifications of Article 128, UCMJ; one specification of Article 131g, UCMJ—pursuant to a Rule for Court-Martial (R.C.M.) 917 motion; and one specification of Article 134, UCMJ. *Id.* The military judge sentenced Appellant to 42 months' confinement and a dishonorable discharge. *Id.* The convening

authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action,* 29 June 2022.

The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

24 January 2023

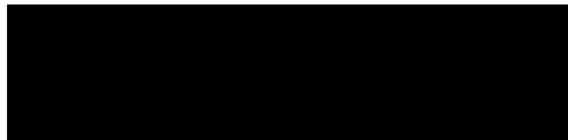
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) JORDAN S. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40349 Panel No. 1

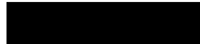
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

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.

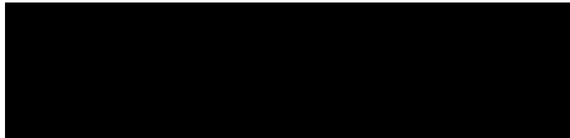


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

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



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 1 No. ACM 40349 22 February 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 April 2023**. The record of trial was docketed with this Court on 3 October 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 16 May 2022, at a general court-martial convened at Los Angeles Air Force Base (AFB), California, Appellant was found guilty, contrary to his pleas, of two specifications of Article 120, Uniform Code of Military Justice (UCMJ) and one specification of Article 133, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 16 May 2022. Appellant was found not guilty, consistent with his pleas, of one specification of Article 109, UCMJ; four specifications of Article 120, UCMJ; three specifications of Article 128, UCMJ; one specification of Article 131g, UCMJ—pursuant to a Rule for Court-Martial (R.C.M.) 917 motion; and one specification of Article 134, UCMJ. *Id.* The military judge sentenced Appellant to 42 months' confinement and a dishonorable discharge. *Id.* The convening

authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action,* 29 June 2022.

The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

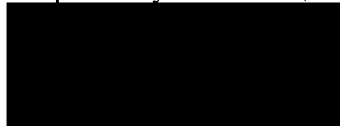
Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

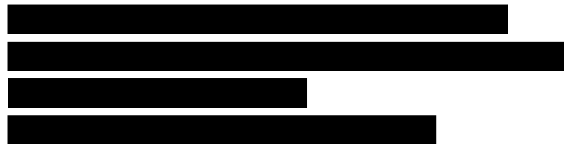
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 February 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



23 February 2023

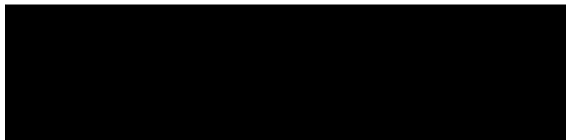
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) JORDAN S. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40349 Panel No. 1

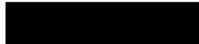
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

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.

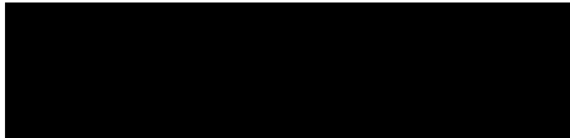


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

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



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

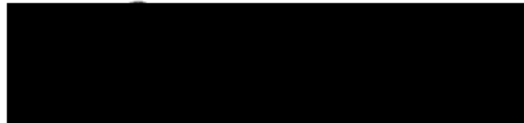
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS**, United States Air Force *Appellant*	**NOTICE OF APPEARANCE OF COUNSEL** Before Panel No. 1 No. ACM 40349 10 March 2023

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

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 13.1 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.

Respectfully submitted,

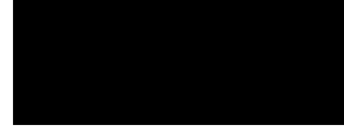


JOSHUA R. TRAEGER, Esq.
Civilian Defense Counsel

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 10 March 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS**, United States Air Force *Appellant*	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 1 No. ACM 40349 10 March 2023

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

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

1) Transcript pages 100-125 and 222-249. These transcriptions are of closed sessions litigating issues related to Mil. R. Evid. 412, were attended by trial and defense counsel, and were ordered sealed by the military judge. R. at 31, 250, 257, 1049.
2) Appellate Exhibits XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXXV, XXXVI, XXXVII, XXXVIII, XLIII, XLIV, XLV, and LIX were motions, related evidence, and rulings under Mil. R. Evid. 412. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 31, 250, 257, 1049.

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

Evid. 412, meaning the propriety of that litigation and the military judge's ultimate rulings may be subject to appellate scrutiny. In order to fully present those matters to this Court, the undersigned counsel requires access to sealed material.

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

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

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

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

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

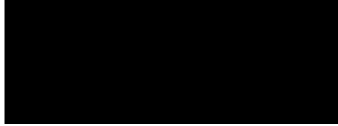
Respectfully submitted,

JOSHUA R. TRAEGER, Esq.
Civilian Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 March 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS**, United States Air Force *Appellant*	**CONSENT MOTION FOR LEAVE TO FILE MOTION TO COPY, RETAIN, AND TRANSMIT SEALED MATERIALS** Before Panel No. 1 No. ACM 40349 10 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 pages 100-125 and 222-249 of the verbatim transcript of Appellant's court-martial, as well as Appellate Exhibits (App. Ex.) XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXXV, XXXVI, XXXVII, XXXVIII, XLIII, XLIV, XLV, and LIX included in Appellant's record of trial to Appellant's non-local lead Appellate Defense Counsel. Pursuant to the same rule, the motion for leave to file the pleading and the pleading have been combined herein.

On 10 March 2023, Appellant also filed his Consent Motion to Examine Sealed Materials. Appellant is represented by undersigned counsel and Mr. Joshua Traeger. In anticipation of the Court granting Appellant's Consent Motion to Examine Sealed Materials, Appellant requests this Court's permission for undersigned counsel to create and securely retain and transmit digital copies of the transcript pages 100-125 and 222-249 of the verbatim transcript of Appellant's court-martial and App. Ex. XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXXV, XXXVI,

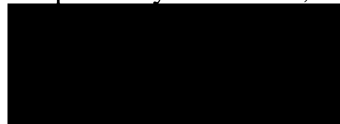
XXXVII, XXXVIII, XLIII, XLIV, XLV, and LIX to Mr. Joshua Traeger, who is located in Traverse City, Michigan, to facilitate counsel's preparation of Appellant's Assignment of Errors.

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 and create an electronic file containing the sealed material. Undersigned counsel will then electronically transmit that file to undersigned counsel's official, encrypted email account. Undersigned counsel will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Appellate Defense Division's secure electronic drive. Undersigned counsel will securely transmit a copy of the electronic file to Mr. Joshua Traeger via DoD SAFE, and they will securely store the file with clear markings to indicate it contains sealed material.

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

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

Respectfully submitted,

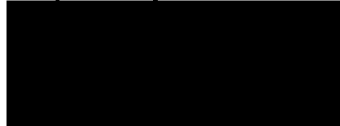


HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 March 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40349**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan S. EDWARDS	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 10 March 2023, counsel for Appellant moved this court to permit appellate defense counsel and appellate counsel for the Government, to examine the following sealed materials in Appellant's case: pages 100–125 and 222–249 of the verbatim transcript, and Appellate Exhibits XII–XX, XXXV–XXXVIII, XLIII–XLV, and LIX.

In a separate motion also filed on 10 March 2023, appellate military defense counsel requested leave to file and permission to copy, retain, and transmit those sealed materials to civilian appellate defense counsel, Mr. Joshua Traeger, who is currently located in Traverse City, Michigan. Counsel avers that they will "scan and create an electronic file containing the sealed material" then "securely transmit a copy of the electronic file to Mr. Joshua Traeger via DoD SAFE."

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 motion also states that the Government consents to appellate defense counsel viewing the sealed materials and Appellant's appellate military defense counsel transmitting the sealed material via secure means to Mr. Traeger.

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 (R.C.M.) 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court has considered Appellant's motion, the Government's consent, 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 14th day of March, 2023,

ORDERED:

Appellant's Consent Motions to Examine Sealed Materials and for Leave to File Motion to Copy, Retain, and Transmit Sealed Materials to civilian counsel, Mr. Joshua Traeger, are **GRANTED.** Appellate defense counsel and government appellate counsel are authorized to examine **pages 100–125 and 222–249 of the verbatim transcript, and Appellate Exhibits XII–XX, XXXV–XXVIII, XLIII–XLV, and LIX**. To examine these materials, counsel will coordinate with the court.

Appellant's military counsel is permitted to scan a hardcopy 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. Traeger; and transmit files containing sealed materials encrypted or password-protected to Mr. Traeger 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. Traeger via U.S. mail, Federal Express, or by similar secure means of shipment.

Except as outlined in this order, 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.

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

E, Capt, USAF
Acting Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Captain (O-3) **JORDAN S. EDWARDS,** United States Air Force *Appellant*	)	No. ACM 40349 24 March 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 May 2023**. The record of trial was docketed with this Court on 3 October 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 16 May 2022, at a general court-martial convened at Los Angeles Air Force Base (AFB), California, Appellant was found guilty, contrary to his pleas, of two specifications of Article 120, Uniform Code of Military Justice (UCMJ) and one specification of Article 133, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 16 May 2022. Appellant was found not guilty, consistent with his pleas, of one specification of Article 109, UCMJ; four specifications of Article 120, UCMJ; three specifications of Article 128, UCMJ; one specification of Article 131g, UCMJ—pursuant to a Rule for Court-Martial (R.C.M.) 917 motion; and one specification of Article 134, UCMJ. *Id.* The military judge sentenced Appellant to 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action,* 29 June 2022.

The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 15 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Two cases have priority over the present case:

1. *United States v. Arroyo,* ACM 40321: The Answer is due in this case on Monday, 27 March 2023, and the Reply will be due NLT Monday, 3 April 2023.
2. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel has started review of the Record of Trial in this case and will begin writing the Assignment(s) of Error after the review is complete.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

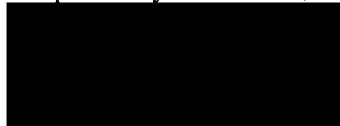
Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 24 March 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

24 March 2023

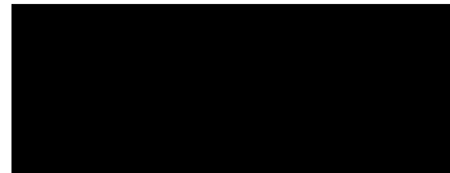
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) JORDAN S. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40349 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.

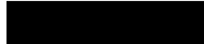


THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

<u>**CERTIFICATE OF FILING AND SERVICE**</u>

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

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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIFTH)**
	)	
v.	)	Before Panel No. 1
	)	
Captain (O-3)	)	No. ACM 40349
JORDAN S. EDWARDS,	)	
United States Air Force	)	24 April 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 May 2023**. The record of trial was docketed with this Court on 3 October 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 16 May 2022, at a general court-martial convened at Los Angeles Air Force Base (AFB), California, Appellant was found guilty, contrary to his pleas, of two specifications of Article 120, Uniform Code of Military Justice (UCMJ) and one specification of Article 133, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 16 May 2022. Appellant was found not guilty, consistent with his pleas, of one specification of Article 109, UCMJ; four specifications of Article 120, UCMJ; three specifications of Article 128, UCMJ; one specification of Article 131g, UCMJ—pursuant to a Rule for Court-Martial (R.C.M.) 917 motion; and one specification of Article 134, UCMJ. *Id.* The military judge sentenced Appellant to 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action,* 29 June 2022.

The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 16 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Zero cases have priority over the present case. Counsel is currently reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 24 April 2023.

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[redacted]

25 April 2023

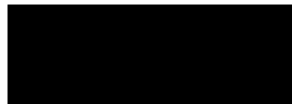
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) JORDAN S. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40349 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.

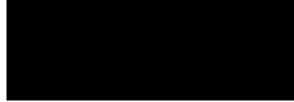
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.



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

CERTIFICATE OF FILING AND SERVICE

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



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40349**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan S. EDWARDS	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 April 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 26th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **31 May 2023**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

JORDAN S. EDWARDS
Captain (O-3), USAF
Appellant

Docket No. 40349

BRIEF ON BEHALF OF APPELLANT

JOSHUA R. TRAEGER, Esq.
Lead Civilian Defense Counsel
Golden Law, Inc.

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS** United States Air Force *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40349 24 May 2023

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED EVIDENCE OF CAPT EDWARDS' UNCHARGED ACTS OF ALLEGED "COERCIVE CONTROL" TO SHOW AN INTENT TO DOMINATE OR CONTROL S.L., AS SUCH INTENT IS UNRELATED TO S.L.'S CHARGED INABILITY TO CONSENT.

II.

WHETHER SPECIFICATIONS 2 AND 4 OF CHARGE II ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THERE LACKS EVIDENCE THAT S.L. WAS ACTUALLY ASLEEP AT THE TIME OF THE ALLEGED OFFENSES.

III.

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

---

[1] Issue IV is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

IV.

WHETHER CAPT EDWARDS' SENTENCE TO FORTY-TWO MONTHS OF CONFINEMENT AND A DISMISSAL IS INAPPROPRIATELY SEVERE.

Statement of the Case[2]

On 6 May 2022 and from 9 to 16 May 2022, Appellant (herein after Captain (Capt) Edwards) was tried by officer members at Los Angeles AFB, California. Capt Edwards was charged, arraigned, and eventually tried on one specification of damaging non-military property, in violation of Article 109, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §909 (Charge I), six specifications of sexual assault against S.L, in violation of Article 120, UCMJ, 10 U.S.C. §920 (Charge II), three specifications alleging various acts of assault against K.E., in violation of Article 128, UCMJ, 10 U.S.C. §928 (Charge III), one specification of stalking S.L., in violation of Article 130, UCMJ, 10 U.S.C. §930 (Charge IV), one specification of wrongful interference with an adverse administrative proceeding, in violation of Article 131g, UCMJ, 10 U.S.C. §931g (Charge V), one specification of conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ, 10 U.S.C. §933 (Charge VI), and one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. §934 (Charge VII). Record of Trial (ROT), Vol. 1, Charge Sheet [Charge Sheet]. Contrary to his pleas, the members found Capt Edwards guilty of Specification 2 of Charge II, Specification 4 of Charge II, Charge II (sexual assault of S.L.), and Charge VI and its

[2] Unless otherwise noted all references to the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.) (*2019 MCM*).

Specification (conduct unbecoming an officer and gentleman). R. 1451. At Capt Edwards' election, the military judge sitting alone sentenced him to a reprimand, to be dismissed from the service, and to be confined as follows: for Specification 2 of Charge II, for eighteen (18) months; for Specification 4 of Charge II, for eighteen (18) months; and for the Specification of Charge VI, for six (6) months. R. 1505. The military judge directed that all sentences to confinement would run consecutively for a total term of adjudged confinement of forty-two (42) months. *Id.* The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, 29 June 2022.

Statement of Facts

General Background

Capt Edwards enlisted in the United States Air Force (USAF) on 24 March 2009. Prosecution Exhibit (Pros. Ex.) 36. At the time of his enlistment, Capt Edwards was twenty-one years old and married to K.E., and the two shared a young daughter. Defense Exhibit (Def. Ex.) AL at 1. Capt Edwards wanted to provide stability for his young family and begin a career that was professionally challenging, prompting him to enlisted in the USAF. *Id.* Capt Edwards served as an enlisted member of the USAF until 2015. Pros. Ex. 37 at 6-8. During his enlisted time, Capt Edwards was selected for Senior Airman "Below the Zone," made Staff Sergeant within three years of his initial enlistment, and deployed in support of a Joint Expeditionary Task Force for US Forces-Afghanistan, all while achieving his Bachelor's degree in finance and graduating *magna cum laude* from Park University.

Def. Ex. AL at 1; Def. Ex. N; Pros. Ex. 36. In 2015, Capt Edwards commissioned as an officer in the USAF. Pros. Ex. 37 at 6. He became a finance officer, first assigned to Joint Base Pearl Harbor-Hickam, Hawaii, then to Wright-Patterson AFB, Ohio, and finally to Los Angeles AFB, California. Pros. Ex. 37. During his time as an officer, Capt Edwards received his Master's degree and published an article that standardized production cost measures for major defense acquisition platforms. Def. Ex. AL at 2; Def. Ex. AD. Capt Edwards is now a father to two children. Def. Ex. AK.

Capt Edwards' Marriage to S.L. and Allegations at Issue

In June 2007, Capt Edwards met K.E. R. at 583. The two of them eventually married and then subsequently divorced in late 2017. R. at 583. Although K.E. was a witness at the court-martial, the members acquitted Capt Edwards of all charges and specifications in which K.E. was an alleged victim. R. at 1451; ROT, Vol. 1, Entry of Judgment [Entry of Judgment], 12 July 2022.

While going through the process of divorcing K.E., Capt Edwards met S.L. R. at 703. At the time, S.L. was also ending her marital relationship with another person. R. at 703. Capt Edwards and S.L. began an "intimate friendship" in the summer of 2017, dating and engaging in consensual intimacy while both lived in Hawaii. R. at 703-05, 708. Capt Edwards eventually divorced K.E. in early 2018, and S.L.'s divorce finalized in October 2018. R. at 583, 706.

In May 2018, S.L. moved to Folsom, California, near her childhood home. R. at 705. Despite the move, S.L. and Capt Edwards remained in contact,

communicating regularly. R. at 706. Capt Edwards also visited S.L. in California in July 2018. R. at 708. During this visit, Capt Edwards and S.L. engaged in regular, consensual sexual activity, with S.L. describing the frequency of their sexual acts as "two or three times a day." R. at 710, 743. During this week-long visit, Capt Edwards met S.L.'s family and friends. R. at 713. S.L. alleged that, during one evening following time spent with friends, Capt Edwards sexually assaulted her on her bedroom floor. R. at 714-24. The members acquitted Capt Edwards of this allegation. R. at 1451. Following this alleged act of sexual assault, S.L continued to engage in consensual sex with Capt Edwards for the remainder of his week-long stay. R. at 724.

Capt Edwards left S.L.'s home in July 2018 and moved to Ohio as part of a permanent change of station (PCS) to Wright-Patterson AFB. R. at 724. S.L. eventually visited Capt Edwards at his new home in Ohio in August 2018. R. at 724. S.L. testified that, during the period of time between Capt Edwards leaving S.L.'s California home and S.L. visiting Capt Edwards at his Ohio home, Capt Edwards required certain settings on her cellular phone. R. at 724-28. More specifically, S.L. testified that Capt Edwards required her to send "read receipts" in text message conversations and to allow Capt Edwards to see her location via cellular phone tracking software. R. at 724-28. S.L. testified that, when those settings were disabled, Capt Edwards would start arguments. R. at 726. S.L. further testified that Capt Edwards would accuse her of "cheating." R. at 726. S.L. admitted to independently deleting text messages with Capt Edwards, changing the settings of

her phone, and occasionally disabling the tracking software, which would "cause an argument." R. at 727.

In August 2018 and October 2018, S.L. visited Capt Edwards in Ohio. R. at 728-29. By her visit in October 2018, according to the testimony of S.L., Capt Edwards began requesting that she send him pictures of her whereabouts. R. at 729. S.L. testified that Capt Edwards explained that he had trust issues from prior relationships, and these photographs would help him trust her. R. at 729-30. S.L. also testified that Capt Edwards wanted to engage in sexual activity with her during times she was disinterested. R. at 731-32. According to S.L., when she returned home from her October 2018 visit to Ohio, Capt Edwards ended their relationship. R. at 733.

Soon thereafter, however, S.L. and Capt Edwards rekindled their romance. R. at 734. S.L. testified that she "missed him" and "loved him." R. at 734. Thus, in December 2018, Capt Edwards visited S.L. in California, and then the two of them traveled to Capt Edwards' family home in Missouri. R. at 739. By all accounts, it was a good trip. R. at 739. However, S.L. testified that, after the trip, Capt Edwards revealed that he had been unfaithful in their relationship by having sexual relations with multiple women. R. at 740. After Capt Edwards apologized, though, S.L. moved in with him in Beavercreek, Ohio in February 2019. R. at 740-41. The two began a romantic life together, including regular sexual activity. R. at 742-43. Again, S.L. testified that she expressed disinterest in sex from time to time, but she nonetheless

engaged in consensual sexual activity with Capt Edwards on a regular basis. R. at 742-43.

The timeframe of the next charged event is unknown. Trial counsel referenced "during this timeframe" during direct examination, and the context of the questions and answers were the time period following S.L. and Capt Edwards beginning to live together in Beavercreek, Ohio. R. at 744. Nonetheless, S.L. described an event that, in Specification 2 of Charge II, the Government alleged to have involved a sexual act by Capt Edwards upon S.L. when she was asleep. Charge Sheet. S.L. further described being sexually assaulted as "happening regularly" in Beavercreek. R. at 750. S.L. also described engaging in consensual sex with Capt Edwards during this time. R. at 752. Finally, S.L. testified that, after moving in together, Capt Edwards continued to request that she share her location. R. at 748; Pros. Ex. 3.

In April 2019, S.L. moved out of her shared home with Capt Edwards and returned to California. R. at 753-54. Then, in August 2019, Capt Edwards visited S.L. in California. R. at 754. By this point, S.L. described their relationship as a "circle," with a consistent cycle of disagreements, breakups, and reconciliations. R. at 755. When S.L. described these "circles," trial counsel specifically asked her to describe disagreements the two had about folding laundry and cleaning the dishes, and S.L. did. R. at 755. Despite the negative cycles of their relationship, S.L. and Capt Edwards consistently visited one another between April and November 2019. R. at 756. The two also talked regularly. R. at 757. S.L. testified that she "loved [Capt Edwards] very much," that she "wanted to help him," and that she "wanted to

be with him." R. at 757. During this same period of time, which trial counsel described as "these trips together," S.L. testified that Capt Edwards sexually assaulted her. R. at 757-58. S.L. failed to provide any dates, times, locations, or details about those occurrences. R. at 757-58.

In November 2019, S.L. moved back into a shared home with Capt Edwards, and the two were married on 9 December 2019. R. at 758. Following their marriage, S.L. testified that Capt Edwards had a poor relationship with her children and that he would get angry, to include acts that were charged in the Specification of Charge VI. R. at 760-61; Charge Sheet. S.L. testified that Capt Edwards' anger caused her to be fearful of him in late 2019 and early 2020. R. at 764.

After an incident with S.L.'s child in February 2020, Capt Edwards and S.L. discontinued their communications with one another, and S.L. moved back to California. R. at 817-18; R. at 823. At trial, S.L. described her feelings towards Capt Edwards during this timeframe – April 2020 – as follows:

> And a lot of the times it felt like Jordan was two people. He was the person I had all of these -- I have all of these happy memories with and I loved very much, and he was also the person who wrote this letter and hurt my son and hurt me, and it was hard for me to understand it was the same person.

R. at 819. S.L. described feeling "stupid" for continuing her relationship with Capt Edwards despite their interpersonal conflicts. R. at 820.

In May 2020, S.L. visited Capt Edwards in Ohio and remained in Ohio, off and on, through August 2020. R. at 823-24. S.L. testified that, during this time, Capt Edwards reinstituted the requirements of location tracking and read receipts.

R. at 824. She also testified that Capt Edwards routinely examined her phone due to his suspicion that she was unfaithful in their relationship. R. at 834.

In September 2020, S.L. and Capt Edwards returned to California, as Capt Edwards was reassigned to Los Angeles AFB. R. at 834; R. at 836. During the move, S.L. and Capt Edwards stayed at the home of Capt Edwards' aunt in Rancho Santa Margarita, California. R. at 836. S.L testified that, during this time, her relationship with Capt Edwards "wasn't very good." R. at 838. S.L. described that the two fought a lot, and that Capt Edwards "was mad at [S.L.] for just existing…." R. at 838. S.L. testified that Capt Edwards went through her phone, tracked her location, and required read receipts for text messages. R. at 838. S.L. stated that, during this time, Capt Edwards wanted to engage in sexual activity with her during times she was disinterested. R. at 839-40.

S.L. explained that, while in Rancho Santa Margarita, Capt Edwards sexually assaulted her multiple times, as alleged in Specification 4 of Charge II. R. at 840-48. S.L. also described having consensual sex with Capt Edwards in Rancho Santa Margarita, although it was not "enjoyable" for her according to her testimony. R. at 845.

In November 2020, S.L. and Capt Edwards traveled to Solvang, California. R. at 851. S.L. testified that, during this trip, Capt Edwards sexually assaulted her by penetrating her anus with his penis without her consent, as alleged in Specification 5 of Charge II. R. at 856; Charge Sheet. Notably, the members acquitted Capt Edwards of this offense. R. at 1451.

After the trip to Solvang, S.L. and Capt Edwards lived apart from one another. R. at 859. Their relationship was still negative, and according to S.L., Capt Edwards continued to demand her location, read receipts, and pictures of her activities. R. at 859. By early 2021, the relationship had devolved to a point where the two were discussing divorce. R. at 871. In February 2021, Capt Edwards and S.L. traveled to Tulare, California. R. at 873. During this trip. S.L. testified that Capt Edwards sexually assaulted her by penetrating her mouth with his penis without her consent, as alleged in Specification 6 of Charge II. R. at 875-76; Charge Sheet. S.L. testified that she performed this act of oral sex upon Capt Edwards because she was "scared of him." R. at 876. The members acquitted Capt Edwards of this offense. R. at 1451.

S.L. testified that this event was the last time she saw Capt Edwards. R. at 879. Nonetheless, the two continued to talk via phone and text message, with multiple disagreements about the nature of their relationship and the inevitability of their divorce. R. at 881-88. Capt Edwards then filed for divorce on 4 March 2021. R. at 1052. S.L. sought and received a restraining order against Capt Edwards on 5 March 2021. R. at 1052. And shortly thereafter, S.L. reported her allegations to law enforcement and Capt Edwards' chain of command. R. at 904-05.

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Argument

I.

THE MILITARY JUDGE ERRED WHEN HE ADMITTED EVIDENCE OF CAPT EDWARDS' UNCHARGED ACTS OF ALLEGED "COERCIVE CONTROL" TO SHOW AN INTENT TO DOMINATE OR CONTROL S.L., AS SUCH INTENT IS UNRELATED TO S.L.'S CHARGED INABILITY TO CONSENT.

Additional Facts

On 23 March 2022, the Government notified the Defense of its intent to offer certain evidence under Military Rule of Evidence (M.R.E.) 404(b)(2). Appellate Exhibit (App. Ex.) X at 16-17. In relevant part, the Government informed the Defense that it would offer "other acts…which establish the accused's pattern of coercive control," such as evidence that "the accused would track [S.L.]'s movement through mobile phone applications; login to [her] phones…and require [her] to check in with him." *Id.* In pretrial motions practice, and over Defense objection, the military judge admitted the evidence. App. Ex. XL. The military judge reasoned that "the accused's intent and motivation is relevant to potential arguments that he disregarded the wishes of S.L. in regard to the offenses alleged in the specifications of Charge II." *Id.* at ¶ 25. The military judge later instructed the panel on this issue as follows:

> You may consider evidence that the accused may have requested that both [K.E.] and [S.L.] provide him with phone location data, that he may have been verbally abusive towards both [K.E.] and [S.L.], that he may have requested that [S.L.] provide him with text message read receipts, and that he may have expected [S.L.] to engage in sexual intercourse with him on a frequent basis and may have pressured her to do so, for the limited purpose of its tendency, if any, to prove that the accused was motivated to and intended to *control the actions and behaviors of [K.E.] and [S.L.].*

R. at 1385 (emphasis added). The military judge did not limit the admissibility or application of the uncharged acts evidence to any particular specification or charge. *Id.*

At trial, the Government called S.L. to testify to these acts of so-called coercive control, as cited above. R. at 703-905. The Government also called Dr. T.C. as a witness. R. at 1150. Over Defense objection, the court recognized Dr. T.C. as an expert in the field of forensic psychology. R. at 1161. Dr. T.C. testified at length about "intimate partner violence" and its impact on relationships. R. at 1166-69. In an exchange with trial counsel, Dr. T.C. testified as follows:

> Q. …And then when that power and control that you're talking about is present, you call that intimate terrorism?
>
> A. Yeah. So intimate terrorism is generally defined as -- those relationships are characterized by pervasive patterns of control and intimidation and manipulation of a partner. It oftentimes involves monopolizing vital resources, you know, controlling one's partner, the partner's ability to, you know, make personal decisions for themselves, and kind of creating this overall context of -- on freedoms for the individual. And then sometimes you'll have something called coercive control in those intimate terrorism types of relationships.

R. at 1169. This line of testimony continued:

> Q. Okay. And I think that's -- we have a sort of a diagram from -- that a major research literature uses to describe the coercive control?
>
> A. Yeah. It's super overwhelming. I appreciate that. So, I'm not going to talk in specifics about this diagram at all. But really what coercive control is, it's typically defined as sort of a dynamic process whereby you have a demand that is placed and there's a credible threat of a negative consequence if they don't comply. And so, what can happen in situations of coercive control is this very dynamic process whereby we're seeing this sort of unfreedoms being manifested in a variety of different ways. And so, this particular model is from some research that was done in 2005 and 2006, and it sort of outlines some of those processes by which

> coercive control can -- it's a theoretical model that helps us understand how coercive control can be that pervasive pattern.

R. at 1171. Critically, Dr. T.C. defined the impact of coercive control on "intent" as follows:

> Q. So, you have some level of motivation or intentionality from a perpetrator of this control?
>
> A. There can be -- there can be intentionality with regard to the perpetrator. I mean, sort of the first piece is setting the -- setting the stage, you know, seeking to create a context in which that credible threat is actually a credible threat, right? Because if I just demand that my partner pick up their socks and there's no credible threat, that doesn't look so much like coercive control. But there has to be some establishment of that credible threat *that if the person doesn't comply that something unpleasant would happen to them*.

R. at 1171 (emphasis added).

During this line of questioning, trial counsel and Dr. T.C. referred to a PowerPoint presentation prepared by Dr. T.C. R. at 1171; App. Ex. LXIII. Not coincidentally, the "Model of Intimate Partner Coercive Control" presented by Dr. T.C. was drawn in the shape of circle, mirroring critical moments of trial counsel's direct examination of S.L., as cited above. App. Ex. LXIII at 5. Trial counsel reiterated this point during Dr. T.C.'s direct examination, stating "so, it's a constantly circling dynamic," repeating a point about a relationship "circle" that the Government made on the direct examination of S.L. R. at 1173.

Standard of Review

A military judge's decision to admit evidence pursuant to M.R.E. 404(b) is reviewed for an abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (citation omitted). "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) (citation 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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Law

M.R.E. 404(a)(1) states: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The Court of Appeals for the Armed Forces (CAAF) has "consistently stated that evidence of uncharged bad acts may not be introduced solely to show that an accused has a propensity to commit crimes of the type charged." *Morrison*, 52 M.J. at 121 (citations omitted). Under M.R.E. 404(b)(1), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." M.R.E. 404(b)(1). A court may admit such evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." M.R.E. 404(b)(2).

Courts apply the three-part *Reynolds* test to review admissibility under M.R.E. 404(b): (1) "Does the evidence reasonably support a finding by the court members that appellant committed other 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 substantially outweighed by the danger of unfair prejudice?" *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

Analysis

The military judge abused his discretion by admitting, without limitation, evidence of Capt Edwards' acts of "coercive control," as such evidence is unrelated to S.L.'s inability to consent as alleged in Specifications 2 and 4 of Charge II. Thus, the military judge utilized incorrect legal principles and applied them in Capt Edwards' case in an unreasonable manner. *See, e.g., Ellis*, 68 M.J. at 344.

A. "Coercive control" is unrelated to the legal inability to consent.

This analysis begins with a simple premise – the legal inability of someone to consent while sleeping is absolute; it requires no showing of a lack of consent or evidence of submission in circumstances where resistance would be futile. A sleeping, unconscious, or incompetent person cannot consent as a matter of law. Article 120(g)(8)(B), UCMJ. Thus, the submission of a person to an act of sexual intercourse due to the "coercive control" of another is irrelevant when the person is incapable of consenting. It is the legal condition of the person that matters, as a conclusion of law.

Put another way, if a woman in a relationship routinely resisted her male partner's acts of coercive control, the fact that the woman might have been able to "stand up" to the man's control in the past would be an unviable defense if the woman was asleep, and thus legally incapable of consenting, in the present. Even the strongest willed person cannot consent while asleep. It is the legal condition of the person that matters.

This Court has analyzed this issue in a different context – that of a victim being "substantially incapable of declining participation" due to alcohol intoxication. In *United States v. Jones*, this Court tackled the question of factual and legal sufficiency of an aggravated sexual assault conviction where the government charged the appellant under a statutory provision accounting for a victim's lack of ability to consent rather than whether the victim actually consented. *United States v. Jones*, No. ACM 38434, 2015 CCA LEXIS 86 (A.F. Ct. Crim. App. 13 March 2015) (unpub. op.). Although this Court's *Jones* opinion is unpublished and largely deals with separate issues, its language is instructive on the question now before this Court. *Id.* The Court wrote:

> …we must determine whether the lack of permission is included in, but not completely encompassed by proof of substantial incapability to decline participation….The question is whether lack of permission is necessarily established by proof of incapability. *Looking only at the facts needed to prove each assertion, they appear to be completely independent.* Proof of incapability need not show any speech, gesture or other manifestation of assent. In fact, it is commonly proved by the absence of such things when they would normally be expected. Similarly, proof that the alleged victim affirmatively withheld permission – as in this case – usually negates the lack of capability.

Id. at *32-33 (emphasis added). Although explored in the context of a different theory of criminal liability, this analysis is exactly Capt Edwards' point herein – proof of incapability (i.e. asleep) is completely independent of proof (or evidence) of a lack of consent or acquiescence due to "coercive control." Because proof of incapability "need not show any speech, gesture or other manifestation of assent," evidence of power or control over the actions or behaviors of the alleged victim is irrelevant to the question of whether she was, in fact, incapable of consenting at the time of the offense. That the military judge conflated these two theories of liability permitted acts of uncharged misconduct to be used as evidence regarding allegations in which the only question was one of capability, not control.

B. S.L.'s allegations were uncorroborated at trial.

This issue is especially concerning in light of the Government's thin case against Capt Edwards with regard to Specifications 2 and 4 of Charge II. As described below, as a witness, S.L. was significantly discredited at trial. More important on this issue, however, is the fact that her allegations were uncorroborated by objective evidence. The Government's case against Capt Edwards for the allegations made by S.L. consisted of just five witnesses: S.L., Ms. J.G., Maj N.S., Ms. A.M., and Dr. T.C. Ms. J.G., the Family Advocacy Treatment Manager at Wright-Patterson AFB, testified to Family Advocacy's multiple attempts to contact S.L. after a February 2020 report from the Air Force Office of Special Investigations (OSI). R. at 1084, 1090-92. This evidence was offered to prove Charge V and its Specification, of which the military judge found Capt Edwards not guilty as permitted

by Rule for Court-Martial (R.C.M.) 917. R at 1213. Major N.S., for his part, refused to testify to the content of patient-psychotherapist records involving S.L., prompting the military judge to instruct the members to disregard his testimony entirely. R. at 1119. Ms. A.M., S.L.'s mother, testified to just three events: (1) seeing S.L. intoxicated with Capt Edwards in the summer of 2018, which related to Specification 1 of Charge II, of which the members found Capt Edwards not guilty (R. at 1451); (2) S.L. complaining to Ms. A.M. in April 2019 that Capt Edwards threw items at her; and (3) S.L. needing a new cellular phone plan in December 2020 due to Capt Edwards' monitoring her cellular phone activity. R at 1121-26. None of these events related to Specifications 2 and 4 of Charge II, and the third (the cellular phone) related only to the Government's M.R.E. 404(b) evidence. And finally, as described above, Dr. T.C. testified exclusively to the application of "coercive control" to the relationship between Capt Edwards and S.L. R. at 1169-71.

Thus, it is clear that the Government's case with regard to Specifications 2 and 4 of Charge II involved no corroborating evidence whatsoever. There were no eye witnesses to the events in question, no outcry witnesses, no statements or confessions of Capt Edwards, and no forensic evidence upon which the fact finder could rely in reaching its conclusions. The only "other" evidence the Government had to support the allegations of S.L. with regard to Specifications 2 and 4 of Charge II was the evidence offered under M.R.E. 404(b).

C. The military judge permitted improper character evidence to buttress unsupported allegations of sexual assault.

In that sense, the true error of the military judge in this case was admitting, without limitation, Capt Edwards' acts of coercive control as evidence supporting Specifications 2 and 4 of Charge II. In other words, by failing to limit the application of the M.R.E. 404(b) evidence, the military judge permitted the members to use that evidence in their analysis of Specifications 2 and 4 of Charge II. The military judge specifically instructed the members that the "coercive control" evidence could be used to establish that Capt Edwards "intended to control the actions and behaviors of" S.L., without explaining what "control the actions and behaviors" meant in the context of each specification or limiting the evidence to only those situations in which S.L. was able to act. R. at 1385.[3] At trial, the Government went to great lengths to make the same point. Over Defense objection, they invited Dr. T.C. to testify about "control and intimidation and manipulation of a partner," "intimate terrorism," and, importantly, the scientific belief that "if the person doesn't comply that something unpleasant would happen to them." R. at 1169, 1171. And, clearly not as a coincidence, trial counsel introduced a circular diagram through Dr. T.C. demonstrating a studied pattern of "coercive control" in relationships, mirroring the

[3] Of note, the military judge also instructed the members that they "may consider evidence regarding an alleged incident during which the accused may have struck his stepson for its limited tendency, if any, to prove that the accused was motivated to and intended to control the actions and behaviors of [S.L.]" R. at 1385, 1389. Although this evidence was not originally contemplated in the M.R.E. 404(b) filings at trial, the final instruction by the judge calls into question its proper application vis-à-vis Specifications 2 and 4 of Charge II. This evidence was originally offered under Charge V and its Specification (R. at 804), yet the military judge ultimately permitted the members to use the evidence in further support of this "coercive control" theory. This evidence is far afield from the allegations in Specifications 2 and 4 of Charge II, adding more error to the military judge's determinations.

testimony of S.L. that her relationship with Capt Edwards was a "circle" – a period of romance, followed by controlling actions, followed by romance, followed by controlling actions, and so on. R. at 1171; App. Ex. LXIII at 5.

The military judge's abuse of discretion was in allowing this M.R.E. 404(b) evidence to apply equally to Specifications 2 and 4 of Charge II as it did to the remaining specifications involving S.L. The Government originally charged Capt Edwards with multiple acts of sexual assault against S.L. These specifications alleged a sexual act done "without consent," and the military judge did not err in permitting the M.R.E. 404(b) evidence as it related to these specifications. In fact, a pattern of "coercive control" would be relevant to a lack of consent. As Dr. T.C. testified, the establishment of a "credible threat" over time, through various controlling acts in a relationship, could explain a partner's perceived submission to sexual intercourse under the belief "that if the person doesn't comply that something unpleasant would happen to them." R. at 1171. However, the members apparently disbelieved the Government's arguments that S.L. did not consent, because they acquitted Capt Edwards of those allegations. R. at 1451.

That said, whether a person felt "controlled" or compelled to comply under fear that "something unpleasant would happen to them" is irrelevant as it relates to their legal condition. Thus, the military judge should have limited the admissibility of the M.R.E. 404(b) evidence to only those specifications in which a lack of consent was alleged. Otherwise, the military judge invited the members to apply Capt Edwards' previous controlling behaviors – requiring read receipts, requiring location tracking,

etc. – to a set of circumstances in which his previous behaviors are irrelevant, i.e. S.L.'s legal incapacity.

In his ruling on this issue at trial, the military judge cited *United States v. Moore*[4] for the proposition that controlling behaviors are admissible under M.R.E. 404(b) to establish a "motive and intent to dominate and control." App. Ex. XL at 6. However, *Moore* dealt strictly with the admissibility of controlling actions by a boyfriend in a case in which the girlfriend claimed a lack of consent. *Moore*, 78 M.J. at 875. In *Moore,* this Court clearly stated that evidence of that Appellant's "acts of controlling behavior [were] probative of these facts of consequence – lack of consent and mistake of fact as to consent." *Id.* The Court concluded that controlling acts offered under M.R.E. 404(b) "made the fact that Appellant intended to penetrate [the victim] when she did not consent more probable and Appellant's ignorance or mistake that [the victim] did consent less probable." *Id.* Thus, the *Moore* case does not stand for the proposition that prior acts of control are probative, in any way, of an alleged victim's legal incapacity to consent. To the contrary, controlling behavior does not relate in any relevant way to the legal status of a victim, i.e. whether she was asleep, or the relevant mistake of fact of an accused, i.e. whether he honestly and reasonably believed she was awake.

Here, the *Kohlbek* factors also weigh in favor of Capt Edwards. As described above and below, the strength of the Government's case was weak. Not only did the members acquit Capt Edwards of every other allegation involving S.L., the facts

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[4] 78 M.J. 868, 875 (A.F. Ct. Crim. App. 2019).

underlying the current convictions are insufficient to establish Capt Edwards' guilt (*see* Issue II *infra*). It is for this reason that Capt Edwards raises this issue, believing that the members were improperly permitted to use his prior bad acts to draw conclusions about his behavior as alleged in Specifications 2 and 4 of Charge II. Further, the Defense's case was strong. Not only did the Defense establish S.L.'s clear motive to fabricate, they brought into question her credibility through prior inconsistent statements, material omissions, and ongoing interests in the outcome of the case. This included S.L.'s apparent jealousy and anger towards Capt Edwards for previous acts of infidelity. R. at 740. In fact, the Defense's evidence as to S.L.'s credibility was strong enough to lead the members to acquit Capt Edwards of the majority of allegations involving her, lending to the belief that this M.R.E. 404(b) evidence must have been what tipped the scales with regards to Specifications 2 and 4 of Charge II. Third, the M.R.E. 404(b) evidence, although immaterial to Specifications 2 and 4 of Charge II as a matter of law, was an important matter for consideration by the members. As stated above, the trial counsel went to great lengths to get this evidence of "coercive control" admitted before the members, including calling a witness who was recognized as an expert over the Defense's objection. R. at 1160-62. The trial counsel also apparently structured his direct examination of S.L. to mirror the anticipated testimony of their expert, ensuring that S.L. testified to a "circle" in her relationship with Capt Edwards that would mirror Dr. T.C.'s eventual testimony. R. at 1171. Thus, the evidence was critical, especially to the findings of guilt with regard to Specifications 2 and 4 of Charge II. Finally, the

evidence was of sufficient quality to prejudice Capt Edwards. Although S.L.'s credibility was attacked, her account was speciously supported by the expert testimony of Dr. T.C. in a way that ultimately led to Capt Edwards' conviction. Thus, evidence of "coercive control" was strategically admitted by the Government to secure the convictions it must now defend on appeal.

Ultimately, assuming *arguendo* that Capt Edwards consistently acted in a controlling manner towards S.L., his prior behavior is irrelevant to her legal condition at the time of Specifications 2 and 4 of Charge II. For those allegations, there was no degree of "control" that Capt Edwards exercised. S.L. was either asleep or not, and admitting M.R.E. 404(b) evidence without limiting its application to Specifications 2 and 4 of Charge II represented an abuse of discretion by the military judge.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings as to Specifications 2 and 4 of Charge II, and set aside the sentence for each.

II.

SPECIFICATIONS 2 AND 4 OF CHARGE II ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THERE LACKS EVIDENCE THAT S.L. WAS ACTUALLY ASLEEP AT THE TIME OF THE ALLEGED OFFENSES.

Additional Facts

Specification 2 of Charge II alleges that Capt Edwards sexually assaulted S.L. "on divers occasions, at or near Beavercreek, Ohio, between on or about 1 January 2019 and on or about 31 August 2020…when [Capt Edwards] knew or reasonably should have known she was asleep." Charge Sheet. The only witness to this incident

was S.L. During trial, S.L. described this allegation during direct examination as follows:

> Q. So, I want to walk through some events that happened during this timeframe. When you were asleep, when, if ever, did you wake up to Captain – what I want to talk about is some times during this time period when you are asleep and some things happened between Captain Edwards and you. Can you tell the members the first time you remember that happening during this time frame?
>
> A. Yeah. I was pretty tired just having a difficult time with the transition, and he had wanted to have sex before bed and I didn't want to because I was tired and he was frustrated. We went to bed, and then he had started having sex with me during the night. And I had told him again, you know, I'm just so tired and he continued to have sex with me anyways. And then afterwards he got angry at me for pretending – for pretending like I didn't like it.
>
> …
>
> Q. So, I want to break it down. You wake up. Do you know how late into the night this is?
>
> A. I -- no. I don't have a time. I just know it was during the night because it was still dark.
>
> Q. When you first wake up, there's a moment there, you know, you go from asleep to kind of understanding what's going on. Do you know what's happening right away?
>
> A. No. I mean, it's confusing when you first wake up, but then it became pretty clear pretty fast.
>
> Q. When did you realize what was happening? How quickly?
>
> A. When he -- when he started having sex with me.
>
> …
>
> Q. At some point there you realize what's happening and what do you tell him?

A. I told him that I was tired and that I just wanted to sleep. I was really struggling.

R. 744-46.

Q. So, we talked about this one incident waking up to what Captain Edwards was doing. Did that happen again while you lived there in Beavercreek?

A. Yes.

Q. When is the next time it happened?

A. I can't tell you the exact next time it happened, but it's something that started happening regularly.

Q. Okay. The first time you woke up and you told Captain Edwards what you told him, the next time that it happened did you do the same thing?

A. No. I was -- I was scared because he had gotten angry at me for my reaction and I didn't know -- I didn't know what reaction he wanted from me to avoid him getting angry.

Q. So, what did you do the next time this happened in Beavercreek, Ohio?

A. I just pretended to be asleep.

Q. You said you pretended to be asleep?

A. Mm-hmm. Yes.

…

Q. And this time you just testified he -- you pretended you were asleep?

A. Yes.

Q. Why?

A. Because I was scared.

Q. What were you scared of?

> A. I was scared of him getting angry at me again for not acting like I was into it or, you know, or not making my -- I don't know. I was just -- I didn't know what I could give him so he wouldn't get angry at me.
>
> …
>
> Q. As he is having sex with you and you're pretending to be asleep is he shaking you trying to wake you up?
>
> A. No.
>
> Q. Is he verbalizing, "Hey, wake up"?
>
> A. No.
>
> Q. Is he saying, "I know you're awake"?
>
> A. No.
>
> Q. He just keeps doing it?
>
> A. Yes.
>
> Q. Did this happen again between the time that you're there in Ohio?
>
> A. Yes. It happened a few times. I can't tell you exactly how many or exactly when that was something that started happening.

R. 750-53. The direct examination continued:

> Q. And so, you decided to move in with him again?
>
> A. At the end of 2019, yes. Not only did we talk about moving back in together, we also started talking about marriage.
>
> Q. Again, on these trips together, this occurrence where you woke up in the night, was there any time when he was having sex with you when you woke up in the night?
>
> A. A few times. Yes.
>
> Q. Can you quantify or remember the amount of times?

> A. No. I would say my best guess on average when we were physically together it was probably once a week.
>
> Q. And then those occurrences, we are not going to go in depth like I did the other, but how would you respond? What would you do when you woke up?
>
> A. Kind of a mixture and I think that depended on what our mood was because we were fighting a lot. So, if we had been fighting I would – I would just pretend to be asleep. Sometimes I would say no. So, it just depends.
>
> Q. Was there any time where you woke up – where he woke you up and you actually participated in having sex with him?
>
> A. No. I mean, we were still having sex but no, not in that context.

R. at 757-58.

Specification 4 of Charge II alleges that Capt Edwards sexually assaulted S.L. "on divers occasions, at or near Rancho Santa Margarita, California, between on or about 1 September 2020 and on or about 31 December 2020…when [Capt Edwards] knew or reasonably should have known she was asleep." Charge Sheet. Once again, the only witness to this incident was S.L. During trial, S.L. described this allegation during direct examination as follows:

> Q. Okay. So, I want to talk about the going to sleep incident at Rancho Santa Margarita. We had talked about these incidences before when you're asleep. When, if ever, did that happen again when you're in Rancho Santa Margarita?
>
> A. If happened a few times. The night I was just talking about where I was upset and he told me he had created a dating app, it happened that night.
>
> …
>
> Q. And you go to sleep.

A. Mm-hmm.

Q. Do you know how long you were asleep? I mean, it's hard to gauge but…

A. I'm not sure.

Q. When you woke up what was happening?

A. He was having -- he was having sex with me.

Q. Had he already penetrated you by the time you woke up?

A. I think just starting to.

…

Q. At this point you wake up, and what you do?

A. I pretended to be asleep.

…

Q. Did this happen more than once when you were in Rancho Santa Margarita?

A. A few times. Yes.

…

Q. [S.L.], this happens -- we'll go back to that night he had sex with you when you are sleep [sic]. Where does he finish?

A. In me.

Q. Does he clean you off?

A. No. I mean, we normally had like towels for this reason. But on his own, no.

Q. You were pretending to be asleep. Did you ever wake up and, you know, let him know you are awake?

A. In this time, no.

…

Q. Okay. And I'm unclear. So sorry. The next time you remember when you are sleep [sic] and he starts having sex with you, you said that was a couple of weeks later. Do you remember the circumstances of that night?

A. When I had come back from visiting my mom? I'm sorry. I'm getting confused what you're talking about.

Q. Yeah. Let's talk about that. Let's talk about that. You come back from visiting your mom up in Northern California?

A. Yes.

Q. And what happens then?

A. I came back and he was mad at me for leaving.

Q. And when did you go to sleep that night?

A. Later. I don't know the time.

Q. Did he want to have sex with you before you went to sleep?

A. Yes.

Q. And what did you do in response to that?

A. I mean, we had sex pretty often, so I don't remember like how soon to bed we had sex, but I remember I didn't want to a couple of these times before.

Q. Okay. When you go to sleep again, do you remember how long you were asleep before you were awoken?

A. No.

Q. When you awake that night, what's happening?

A. He was having -- having sex with me.

…

Q. When you woke up, what did you do?

A. Nothing really.

Q. Did you pretend you were asleep again?

A. When I woke up?

Q. When you woke up to him having sex with you?

A. Oh, I'm sorry. I thought you were talking about the next morning. No. Then, no. I just continued to pretend to be asleep.

…

Q. And when you pretended to be asleep, did you ever wake up in these times and say, "Hey"?

A. Some -- a couple of times, but usually I would just pretend to be asleep.

R. at 840-48.

By contrast to Specifications 2 and 4 of Charge II, the members acquitted Capt Edwards of Specification 5 of Charge II. R. at 1451. That Specification alleged that Capt Edwards penetrated S.L.'s anus without her consent. Charge Sheet. However, the facts developed by the trial counsel through the testimony of S.L. suggest that this alleged assault occurred while S.L. was actually asleep. R. at 855-57. S.L. described this incident as follows:

Q. Okay. So, this is a little different. You don't remember the entire walk back to the hotel?

A. Correct.

Q. Where do you find yourself now, what do you remember next after getting back?

A. I remember waking up on the edge of the bed.

Q. And when you wake up on the edge of the bed, describe how you are positioned on the bed.

A. I was laying [sic] face down on the bed naked, the bottom half of me naked.

Q. And what was happening?

A. When I woke up Jordan was asleep. He was in bed and I was there.

Q. Okay. So, you wake up and he is asleep in bed?

A. Yes.

Q. And then what happens?

A. At the time I just kind of said his name to see if he was awake, and he wasn't, and then I went to bed.

Q. Okay. And then what happens next?

A. I mean, at the time I could tell that something had happened. I was in pain and naked laying on the edge of the bed, so I kind of put the pieces together. And the next morning I asked him if he had sex with me in the way that I said I didn't want to, because when we were having dinner and drinking, I specifically told him I did not want to have sex in a certain way [referring to anal sex].

….

Q. I understand. So, just to come back to the moment, you've found yourself on the edge of the bed, you've woken up, you called Jordan's name, you fell back asleep, and now you wake up again and what is he doing?

A. He woke up in a bad mood. Like his eye was hurting or something. I'm not really sure. He woke up in not a good mood. And when I had asked him what happened, I asked him if he had sex with me in that way, and I asked him why he just left me on the edge of the bed, he apologized for leaving me on the edge of the bed, but he said it was hot

> to be able to do whatever he wanted to me. So, he did not apologize for the other portion of what happened.
>
> Q. So, to be clear at this point, you didn't wake up when it was happening?
>
> A. No.

R. at 855-57. Thus, in describing this alleged sexual assault through the penetration of her anus by Capt Edwards' penis, S.L. described an act that occurred while she was legally incapable of consenting due to being asleep. R. at 857. This importantly contrasts with the way she described the facts of Specifications 2 and 4 of Charge II, as explained in more detail below.

Nonetheless, the military judge instructed the members as to the elements of Specification 2 of Charge II:

> That between on or about 1 January 2019 and on or about 31 August 2020, at or near Beavercreek, Ohio, on divers occasions, the accused committed a sexual act upon [S.L.], by penetrating her vulva with his penis;
>
> That the accused did so when [S.L.] was asleep; and
>
> That the accused knew or reasonably should have known that [S.L.] was asleep.

R. at 1365. The military judge also instructed the members as to the elements of Specification 4 of Charge II as well:

> That between on or about 1 September 2020 and on or about 31 December 2020, at or near Rancho Santa Margarita, California, on divers occasions, the accused committed a sexual act upon [S.L.], by penetrating her vulva with his penis;
>
> That the accused did so when [S.L.] was asleep; and

> That the accused knew or reasonably should have known that [S.L.] was asleep.

R. at 1367.

The military judge also instructed the members under both Specifications 2 and 4 of Charge II that "[a] sleeping, unconscious, or incompetent person cannot consent." R. at 1366, 1368. In between instructions for Specifications 2 and 4 of Charge II, the military judge instructed the members on Specification 3 of Charge II, which alleged lack of consent, and read the instruction for consent. R. at 1366-67. The military judge also instructed on consent for Specifications 1, 5, and 6 of Charge II. R. at 1364-65, 1369, 1370-71. During closing argument, the trial counsel stated:

> We're talking about the times where he penetrated her while she was asleep, and then she woke up. Now, if she continued to not do anything and pretend she was asleep, that's still the crime that we're alleging.

R. at 1401.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. Article 66(c), U.C.M.J., 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is] convinced of the accused's guilt beyond a reasonable doubt.'" *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (second alteration in original) (*quoting United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted).

Law

A review for factual sufficiency involves "a fresh, impartial look at the evidence," adopting "neither a presumption of innocence nor a presumption of guilty" in order to independently determine whether the evidence constitutes proof beyond a reasonable doubt for each required element. *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. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "In the military justice system, where service members accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 February 2016) (unpub. op.). This authority provides "a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

The testimony of only one witness may be enough to meet the burden of proving an accused's guilt, "provided the witness's testimony is relevant *and sufficiently credible*" to affirm the finding of guilt on appeal. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (emphasis added) (citation omitted).

"Any person subject to this chapter who commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring is guilty of sexual assault and shall be punished as a court-martial may direct." Article 120(b)(2)(B), UCMJ. A sexual act includes "the penetration, however slight, of the penis into the vulva or anus or mouth." Article 120(g)(1)(A), UCMJ. Under the Code, consent means:

> A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

Article 120(g)(7)(A), UCMJ. Additionally, "[a] sleeping, unconscious, or incompetent person cannot consent." Article 120(g)(7)(B), UCMJ.

The CAAF held in *Sager* that the lower court erred when it found that "'asleep, unconscious, or otherwise unaware that the sexual act is occurring'[5]. . .created a single theory of criminal liability. . . ." *United States v. Sager*, 76 M.J. 158, 159 (C.A.A.F. 2017) (*quoting* Article 120(b)(2), UCMJ, 10 U.S.C. § 920(b)(2)). Instead, the plain reading of the language makes clear that "otherwise unaware" means a different manner of being unaware than from asleep and from unconsciousness. *Id.*

[5] The same language is used in the *2019 MCM* for Article 120(b)(2)(B).

at 162. Further, the ordinary meaning of each reflect different and separate theories of liability or criminality. *Id.*

Analysis

The Government had to prove beyond a reasonable doubt that S.L. was actually asleep during the "divers occasions" of sexual assault alleged both under Specification 2 and Specification 4 of Charge II. They failed to do so and as such, the findings of guilt are legally and factually insufficient. Not only did S.L. testify to being awake during the alleged conduct occurring in both specifications, she also testified that she was pretending to be asleep on numerous of the occasions. R. at 751, 852. However, because the Government specifically chose to charge that the sexual acts occurred "when [Capt Edwards] knew or reasonably should have known [S.L.] was asleep," the specifications are factually and legally insufficient. Finally, the trial counsel recognized this issue with the evidence and thus told the members that, "if [S.L.] continued to not do anything and pretend she was asleep, that's still the crime that we're alleging." R. at 1401. Specifications 2 and 4 of Charge II must be set aside and dismissed, with prejudice.

A. S.L. was not credible.

As a starting point, S.L. lacked credibility and evidentiary support. S.L. maintained a motive to lie at the time she made the allegations to law enforcement. It was not until after Capt Edwards filed for divorce on 4 March 2021 (R. at 1052) that S.L. sought and received a restraining order against him on 5 March 2021. R. at 1052. Then, and for the first time, S.L. reported her allegations to law

enforcement and Capt Edwards' chain of command. R. at 904-05. She alleged that Capt Edwards had been controlling her movements, sexually assaulting her in various ways throughout their time together, and placing her in fear of bodily harm. Charge Sheet. Yet, S.L. made no attempts to make any allegations until after Capt Edwards filed for divorce. The two had been through multiple "break ups" before, but breaking up had not meant anything in the past since the two would be in regular communications even after the break up, and history had shown that they would get back together. R. at 756-57. This time in March 2021 was different. Capt Edwards had actually filed for divorce, and there did not seem to be a future left, prompting S.L.'s allegations.

Not only did S.L. have a motive in making these allegations, she lacked credibility when filing for a restraining order and making a report to law enforcement. At the time of that initial report, S.L. immediately provided messages with a deleted text from Capt Edwards in an attempt to make it look like he was harassing her. *See* R. at 893, 937-38. S.L. testified under oath that when Capt Edwards sent her a message asking if she was selling her body to Russians, she decided to get a restraining order. R. at 892-93, 928. Explicitly, she said, "[t]his is the point where I decided to get a restraining order, after seeing this message specifically…this just seemed to be a bit – a bit much, a bit crazy. I don't – I don't know how else to explain it." R. at 893. The circuit trial counsel asked if S.L. had any context for the message and S.L. said, "no." *Id.* S.L. stated that Capt Edwards had never accused her of selling her body to the Russians before, but had accused her

of cheating before. *Id.* The circuit trial counsel testified for S.L. when asking the next leading question, "You said that scared you. I mean, how scared did that make you feel that you got a restraining order?" *Id.* S.L. had not testified that the message scared her up to this point; nonetheless, she responded, "[p]retty scared. And just to add a little bit more context, at this point he knew my address . . . so that in addition to the messages getting just more outlandish." R. at 893. She said this message was "[t]he turning point that made [her] file a restraining order." R. at 928. She "felt it was the only thing [she had] left to do." R. at 893. The Government published this message exchange to the members. Pros. Ex. 24, 25; R. at 891-93.

Trial defense counsel asked S.L. if there were any other messages in Prosecution Exhibit 25 and S.L. said, "This is what I got off my phone." R. at 927-28. S.L. confirmed that she was not missing any messages. R. at 928. The trial defense counsel then asked if S.L.'s sworn testimony was that she did not delete any messages. *Id.* In response, S.L. said "I have deleted messages throughout the relationship. I don't think I deleted any messages here." *Id.* The trial defense counsel then confronted S.L. with Defense Exhibit A for Identification, which was almost the same text message exchange. R. at 929; App. Ex. LVII. Defense Exhibit A for Identification is not contained within the ROT, but appears to be the first page of Appellate Exhibit LVII based on the line of questioning surrounding the exhibit. *See* R. at 927-29, 1066, 1075-76, 1077. An examination of Appellate Exhibit LVII reveals a text message stating "Another bad dream[,]" which is missing from the screen shots provided by S.L. to law enforcement and offered by the Government as Prosecution

Exhibits 24 and 25. This deleted message immediately preceded the question about S.L. selling her body to the Russians. *See* App. Ex. LVII at 1. When confronted about her act of deleting the text that explained Capt Edwards' "bad dream" prior to taking a screenshot of the messages and filing a domestic violence restraining order 48 hours later, S.L. testified that she did not know how to answer. R. at 939. S.L. claimed that "even with the additional text, [her] actions would have been the same and [she did not] think that really change[d] anything." R. at 940. In reality, the missing text provided context for why, at 0300 hours in the morning, Capt Edwards would message: "You're selling your body aren't you? To the Russians" – he woke up after a bad dream, as stated in the deleted text. *Id.*

When questioned further about S.L. and Capt Edwards' discussion about the bad dream, S.L. claimed there were messages after, but didn't know what they were about. R. at 941. At this point, the trial defense counsel showed S.L. Appellate Exhibit LVII and confirmed that there was more context to that conversation that was the "turning point" of their relationship. R. at 941-43. In fact, following the text about selling her body to the Russians, Capt Edwards messaged, "I can't stop these dreams" followed by, "My love, where are you[,]" and "I saw it happen in my dream[.]" App. Ex. LVII at 2. He then went on to describe the dream and said he "woke up crying" and he had "another weird dream" involving her, but that he knew "they were just dreams, but felt real is all[.]" *Id.* at 3. When S.L. said in the messages that she did not know how to respond to the text regarding selling her body to Russians,

Capt Edwards explained again that "[i]t was just a dream, [he] wanted to tell [her] about it lol" and "[y]ou know how real dreams can feel." *Id.* at 4.

S.L. claimed that this question about selling her body to Russians scared her and was the final straw – the turning point – which caused her to file for a restraining order to stop the "harassment" by Capt Edwards. The trial counsel seemingly embraced this explanation in presenting the Government's case to the members. However, it is clear from the context and additional messages that Capt Edwards was reacting to a bad dream. He even told S.L. that eight times. App. Ex. LVII. He was not threatening to show up at her address and harass her or hurt her, but that is exactly what S.L. wanted the civil court, law enforcement, and the panel of members to think. S.L. deleted a text that provided context and purposefully did not provide the texts that followed, which also provided context. Ultimately, given the course of their relationship and the impetus to S.L. reporting to law enforcement, it is clear that S.L. lacked credibility. If that was not clear from the messages and her conduct alone, it can also be seen in the fact that the members did not believe her when it came to the other four specifications of sexual assault, as they acquitted Capt Edwards of those.[6]

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[6] Also concerning for S.L.'s credibility is the fact that she previously stated to Capt Edwards that she struggled to distinguish between dreams and reality, and that she required psychiatric care to do so. *See, e.g.,* Preliminary Hearing Officer Exhibit C at 1-4.

B. S.L. was awake but "pretending" to be asleep.

The Government needed to prove S.L. was asleep beyond a reasonable doubt under both Specifications 2 and 4 of Charge II, and they simply did not do so factually. Further, legal sufficiency requires that a reasonable factfinder could find the essential elements beyond a reasonable doubt, but that is not the case here.

Although both Specification 2 and Specification 4 of Charge II are analyzed individually below, S.L.'s "victim impact statement" submitted at sentencing highlights this issue for both allegations. After Capt Edwards was convicted, contrary to his pleas, of these specifications, S.L. presented a Court Exhibit for the military judge's consideration. Court Exhibit A. In it, she says, "I was so scared that I had to pretend to be asleep while being sexually assaulted." Court Exhibit A at 1. And that's exactly Capt Edward's point herein – that S.L. was pretending to be asleep during the sexual acts. For an appellant, an unsworn statement submitted by a victim in sentencing seems to be the perfect time to set the record straight. S.L. could have easily said that she was "so scared of a man that would sexually assault a woman in her sleep" or that she was "so scared of what would happen when I went to sleep because of his history of sexually assaulting me while I slept." But S.L. chose her words carefully, because the truth of this case is that S.L., while perhaps subjectively believing she did not consent, was capable of consenting. She was merely *pretending* to be asleep, and the Government failed to prove she was *actually* asleep beyond a reasonable doubt.

i. The Government did not prove S.L. was asleep under Specification 2 of Charge II.

Of note, the first person to indicate something happened while S.L. was asleep was the circuit trial counsel in a leading question during direct examination. R. at 744. S.L. first described that Capt Edwards "had started having sex with [her] during the night. And [she] had told him again, you know, [she was] just so tired and he continued to have sex with [her] anyways. And then afterwards he got angry at [her] for pretending – for pretending like [she] didn't like it." *Id.* S.L. herself was not describing being asleep. Instead, she testified that she told Capt Edwards she was tired, and he continued to have sex with her – as in, she was awake and communicating, but he continued to have sex with her despite her misgivings. R. at 746. She then described that he got angry at her afterwards for pretending she did not like it – not for being asleep or even pretending to be asleep. R. at 747. Then when describing it later, she testified she woke up a little confused, but that she realized what was happening "when he started having sex with [her]." R. at 745. As in, she woke up and *then* he started having sex with her. It was then that she told him she did not want to have sex and she alleged that he kept having sex with her anyway. R. at 746. Capt Edwards then got mad because S.L. "was acting like [she] wasn't into it." R. at 747. These are not descriptions of S.L. being asleep when Capt Edwards was penetrating her vulva with his penis. To the contrary, these are descriptions of Capt Edwards allegedly initiating a physical encounter with S.L. while she was sleeping, causing her to awaken, voice her dissatisfaction, and frustrate Capt Edwards.

Later during questioning, the circuit trial counsel asked another leading question, "[s]o, we talked about this one incident waking up to what Captain Edwards was doing. Did that happen again while you lived there in Beavercreek?" R. at 750. Again, S.L. did not describe waking up to Capt Edwards' penis already inside of her when she awoke — she testified she was merely confused (R. at 745). Confusion is a conscious emotion, not a description of a sleeping condition. S.L. then "realized" what was happening when he *started* having sex with her. *Id.* The circuit trial counsel asked what happened the next time "it happened" and if she did the "same thing." R. at 750. S.L. replied, "no" because she was scared since he got angry for her reaction last time – acting as though she did not enjoy the sex – so she did not know what way to act in order to "avoid him getting angry." *Id.* Again, this shows clearly that S.L. was actually awake but merely pretending to be asleep. The fact that S.L. was able to cognitively process Capt Edwards' previous reactions and decide that she did not want to upset him all indicate that she was conscious and capable of consenting. S.L. responded to the circuit trial counsel's question that "the next time this happened[,]" she "pretended to be asleep." R. at 751. The circuit trial counsel followed up with another conclusory question, "But you're thinking back now on these incidents when you wake up and he's having sex with you. Is that correct?" R. at 752. However, at no point had or did S.L. testify that Capt Edwards' penis had penetrated her vulva, however slight, prior to her waking up – i.e. while she was asleep. Instead, S.L. repeated that she pretended to be asleep, because she "was scared of him getting

angry at [her] again for not acting like [she] was into it" and she "didn't know what [she] could give him so he wouldn't get angry at [her]." *Id.*

The circuit trial counsel looped back again, asking a legally conclusory question without soliciting details: "Again, on these trips together, this occurrence where you woke up in the night, was there any time when he was having sex with you when you woke up in the night?" R. at 757. To which, S.L. responded, "A few times. Yes." *Id.* The circuit trial counsel doubled down on not asking for details by saying, "we are not going to go in depth like I did the other, but how would you respond? What would you do when you woke up?" *Id.* Of course the circuit trial counsel did not want to go in depth like "the other" time, because what S.L. testified to happening "the other" time was waking up confused, and *then* Capt Edwards started to have sex with her, prompting her to pretend to be asleep. This clearly shows that S.L. was capable of consenting and not asleep. The circuit trial counsel acknowledged this was an issue when, in closing argument, he advanced that the times when S.L. was pretending to be asleep counted as "the crime" alleged in the charge and specification, which is plainly wrong and inconsistent with fact and law. R. at 1401.

ii. The Government did not prove S.L. was asleep under Specification 4 of Charge II.

As for the allegations under Specification 4, the circuit trial counsel asked if any "sleep incident[s]" or "incidences before when [she's] asleep" happened in Rancho Santa Margarita. R. at 840. S.L. responded, "[i]t happened a few times." Id. S.L. described one instance in particular. R. at 840-42. She said she went to sleep and when she woke up "[h]e was having -- he was having sex with [her]." R. at 841. When

asked if he was already penetrating her when she woke up, S.L. responded, "I think just starting to." *Id.* S.L. did not say Capt Edwards' penis was already inside her or that he had already penetrated her vulva or vagina. Instead, she said when she woke up she thinks he was *starting* to penetrate her — she was not asleep even when he started to penetrate her, because she was consciously aware of it starting to happen. When she woke up and he then started to penetrate her vagina with his penis, she again "pretended to be asleep." *Id.* The circuit trial counsel then asked, "Did you consent to him having sex with you at that point?" R. at 842. S.L. said, "No." *Id.* The problem with this question is that the specification was not alleging lack of consent. Instead, it alleged that Capt Edwards committed a sexual act upon S.L. – penetrating her vulva with his penis – when he knew or reasonably should have known she was asleep. Charge Sheet. The very nature of the question indicates that the trial counsel believed S.L. had the ability to consent. If S.L. lacked the ability to consent, whether she actually consented is irrelevant, given the second element of that offense is that Capt Edwards committed the sexual act when S.L. was actually asleep. R. at 1365, 1367.

There is only one point in time when S.L. states in response to the question, "When you awake that night, what's happening?" that she says, "[h]e was having – having sex with me." R. at 847. This statement came after the circuit trial counsel had already said, "The next time you remember when you are sleep [(sic)] and he starts having sex with you, you said that was a couple of weeks later." R. at 846. Here, there is no questioning as to whether he had already penetrated her or was

starting in the manner she described the previous occurrence. Moreover, there is insufficient detail to understand where this offense occurred in time and space. Regardless, in every other instance S.L. described, Capt Edwards had taken some action to wake S.L., leading up to him starting to penetrate her when she is already awake and just pretending to be asleep.

Again here, the circuit trial counsel asked if S.L. consented to sex that night while she was asleep. R. at 847. However, lack of consent is not an element of the offense charged and based on *Sager*, lack of consent is a wholly different and separate theory of liability or criminality. 76 M.J. at 162. In the end, the circuit trial counsel misled the members by saying that when S.L. was pretending to be asleep and Capt Edwards was penetrating her "that's still the crime we're alleging." R. at 1401.

C. S.L. clearly described a sexual assault that occurred during her sleep, but the members acquitted Capt Edwards of that allegation.

In this context, the contrast of other allegations in this case is important. As described above, in Specification 5 of Charge II, the Government alleged that Capt Edwards penetrated S.L.'s anus with his penis without her consent. Charge Sheet. However, what S.L. described in sworn testimony was an event that occurred during her sleep, when she was incapable of consenting.

In describing this incident, S.L. testified that she "[woke] up on the edge of the bed" and that "Jordan was asleep." R. at 855. S.L. further testified that she "could tell that something had happened" because she "was in pain and naked laying on the edge of the bed." R. at 855-56. According to S.L., the next morning she asked

Capt Edwards what occurred, to which S.L. said he responded "that it was hot to be able to do whatever he wanted to me," referring to anal sex. R. at 857.

Notably, the members acquitted Capt Edwards of this allegation. R. at 1451. However, in this example, we see the way in which the Government could have established that Capt Edwards penetrated S.L.'s vulva while she was asleep, as alleged in Specifications 2 and 4 of Charge II. S.L. was clearly capable of describing an event that occurred during her sleep, to include the sensations that followed and the reactions of Capt Edwards. In describing this incident involving anal sex, she essentially testified that she was asleep. Unfortunately for the Government, they charged this offense as occurring without consent. But in describing the incidents alleged in Specifications 2 and 4 of Charge II, S.L. testified that she was awake but "pretending" to be asleep. And now, unfortunately for the Government, the evidence is neither factually nor legally sufficient to establish that S.L. was actually asleep during those acts.

In conclusion, the Government did not prove what is charged. Although Capt Edwards could *potentially* have been found guilty on the evidence of the sexual acts if charged differently, i.e., without consent, he is not guilty as charged. The specifications required proof that S.L. was asleep during the "divers occasions" of sexual assault. This Court cannot be convinced beyond a reasonable doubt as to Capt Edwards' guilt under Specifications 2 and 4 of Charge II as S.L.'s own testimony was that she was awake but pretending to be asleep during these events. The members acquitted Capt Edwards of a similar event in which S.L. was clearly asleep,

calling further into question the factual and legal sufficiency of these particular allegations. Just as the military judge instructed the members, proof that S.L. was actually asleep is an element to the offenses charged and was simply not proven by the Government by the standard required. R. at 1365, 1367.

Even considering legal sufficiency, a reasonable factfinder could not have found all the essential elements – especially that S.L. was asleep during the alleged sexual acts – beyond a reasonable doubt.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside and dismiss Specifications 2 and 4 of Charge II, and set aside the sentence for each.

III.

CAPT EDWARDS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

Prior to trial, the Defense requested the military judge "instruct the panel members that they may only return findings of guilty on those specifications in which they render a unanimous verdict." App. Ex. II. The Government opposed the motion. App. Ex. III. The military judge denied the motion. App. Ex. XXXIX. In providing Appellant forum advice, the military judge advised Capt Edwards that he could be convicted if three-fourths of the members concurred as to guilt. R. at 11-12, 296. Later, the military judge instructed the members that they may return a verdict of guilty if three-fourths of the members concurred. R. at 1432. The members returned

findings of guilt with no indication of whether these findings were unanimous. R. at 1450-52.

Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The Court of Appeals for the Armed Forces (CAAF) granted review in *United States v. Anderson* to determine whether a military accused has a constitutional right to a unanimous verdict, and hence, whether Article 52, UCMJ, is unconstitutional. 82 M.J. 440 (C.A.A.F. 2022) (order granting review). It has granted trailer review of the same issue in at least a dozen cases. *See, e.g., United States v. Martinez*, 83 M.J. 8 (C.A.A.F. 2022) (order granting review). As Appellant preserved this issue at trial by motion, this Court should — and must — decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

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

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Respectfully submitted this 24th day of May, 2023.

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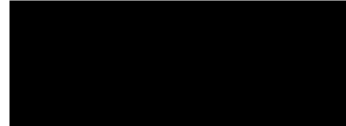
CERTIFICATE OF FILING AND SERVICE

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 24 May 2023.



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Air Force Appellate Defense Division

APPENDIX

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

IV.

CAPT EDWARDS' SENTENCE TO FORTY-TWO MONTHS OF CONFINEMENT AND A DISMISSAL IS INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (*citing United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

Law and Analysis

"Congress has vested responsibility for determining sentence appropriateness in the Courts of Criminal Appeals. The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (internal citations omitted). As the CAAF has made clear, "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations and internal quotations omitted). This provision "requires that the members of [the Courts of Criminal Appeals] independently

determine, in every case within [their] limited Article 66, U.C.M.J., jurisdiction, the sentence appropriateness of each case [they] affirm." *Id.* at 384-85 (alterations in original) (citations and internal quotations omitted).

Further, CCAs have the discretion to consider and compare other courts-martial sentences when that Court is reviewing a case for sentence appropriateness and relative uniformity. *See United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001). Appellant bears the burden of demonstrating that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). In determining sentence appropriateness, this court considers "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson,* 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

Capt Edwards stands convicted of two specifications of sexual assault on divers occasions and one specification of conduct unbecoming an officer and gentleman. Capt Edwards' sentence to forty-two months of confinement is unduly severe, particularly in comparison to sentences received in closely related cases. This is especially true for Charge V and its Specification – conduct unbecoming an officer and gentleman – for which Capt Edwards received an unduly severe punishment of six months' confinement. Moreover, should this Court believe that Specifications 2 and 4 of Charge II are factually and legally sufficient, the adjudged sentences to consecutive confinement do not adequately account for the fact that the victim of those offenses was asleep at the time of their occurrence. Although a sexual assault

is a traumatic event, that trauma is subjectively lessened in the case of a sleeping victim, who, by all accounts, lacks the consciousness to experience the traumatic event as it is occurring. Along the same lines, the particular impact on this victim (S.L.) should be placed within the context of the fact that she continued in a relationship with Capt Edwards long after the alleged acts of sexual assault, to include engaging in consensual sex with him well after these offenses occurred. Furthermore, given this particular appellant and his service record, such lengthy confinement in conjunction with a dismissal is disproportionate to the convicted offenses. At the time of his court-martial, Capt Edwards had served in both enlisted and officer positions in the USAF for more than thirteen years; during that time, he had an overseas deployment to Al Udeid. Pros. Ex. 36. Combined with other mitigating and extenuating factors, Capt Edwards' service record and the context of the acts for which he stands convicted justify significant relief.

WHEREFORE, Capt Edwards respectfully requests this Court grant appropriate sentence relief.

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Captain (O-3) JORDAN S. EDWARDS, USAF *Appellant.*	))))))))	ANSWER TO ASSIGNMENTS OF ERROR ACM 40349 Panel No. 1

ANSWER TO ASSIGNMENTS OF ERROR

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23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Captain (O-3) JORDAN S. EDWARDS, USAF *Appellant.*	))))))))	ANSWER TO ASSIGNMENTS OF ERROR ACM 40349 Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED EVIDENCE OF [APPELLANT'S] UNCHARGED ACTS OF ALLEGED "COERCIVE CONTROL" TO SHOW AN INTENT TO DOMINATE OR CONTROL S.L., AS SUCH INTENT IS UNRELATED TO S.L.'S CHARGED INABILITY TO CONSENT.

II.

WHETHER SPECIFICATIONS 2 AND 4 OF CHARGE II ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THERE LACKS EVIDENCE THAT S.L. WAS ACTUALLY ASLEEP AT THE TIME OF THE ALLEGED OFFENSES.

III.

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

IV.[1]

WHETHER [APPELLANT'S] SENTENCE TO FORTY-TWO MONTHS OF CONFINEMENT AND A DISMISSAL IS INAPPROPRIATELY SEVERE.

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[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Ms. SL met Appellant online in June 2017 and then met in person a month of two later. (R. at 703.) At the time, Ms. SL was 24-years-old, was in the process of divorcing her husband, had two young children, and was living in Hawaii where Appellant was stationed. (R. at 703-05.) Appellant's and Ms. SL's relationship became intimate soon after they began seeing one another. (R. at 708.)

Ms. SL detailed that when they were together, she and Appellant would have sex two or three times a day. (R. at 710.) Ms. SL testified that there were times when she enjoyed intercourse with Appellant and was a full participant. (R. at 711.) She also detailed times when she consented to having sex but Appellant would be frustrated or angry. (R. at 712.) Ms. SL said sex would happen when Appellant was in those moods and that "I wouldn't say I was excited for it to happen." (Id.)

In May 2018, Ms. SL moved to California. In July 2018, Appellant came to California to visit Ms. SL for a week. Ms. SL testified that Appellant was unhappy when she arrived at the airport with her two children because Appellant "wanted to have sex in the parking lot when I picked him up." (R. at 709.) Once back at her apartment, the two had consensual sex. (R. at 710.) In August 2018 and October 2018, Ms. SL traveled to Ohio to visit Appellant where he had been reassigned. (R. at 724, 729.) Ms. SL stated the two continued to have sex multiple times a day when they were together. (R. at 730.)

By this time, Appellant wanted Ms. SL to turn on read receipts for text messages so Appellant would know when she had read his texts and also for her to share her location on her

phone. Ms. SL said, "And if my location was turned off or the read receipts were turned off, it would cause a very big argument." (R. at 725.) Appellant would accuse Ms. SL of cheating or doing things on purpose to upset him. (R. at 726.) Appellant also expected Ms. SL to send him pictures to verify that she was at the places she told him she would be. (R. at 729.) Ms. SL stated she would comply because it would squash arguments between the two. Appellant would also call Ms. SL a "selfish lover" if he wanted to have sex but she did not. (R. at 732.)

When Ms. SL returned to California after her October 2018 trip, Appellant sent her a message breaking up with her. (R. at 733.) Appellant stated the reason was because of the kids, adding, "He said he didn't like – he likes his kids but didn't like other kids and it was too much." (Id.) Despite breaking up, the two continued to communicate and ended up back together by December 2018. (R. at 739.) In December 2018, Appellant came to visit Ms. SL in California and then the two flew to Missouri to visit Appellant's family. (Id.)

In February 2019, Ms. SL and her two children moved in with Appellant in Ohio. (R. at 741.) The new household included Appellant and his two children and Ms. SL and her two children. (R. at 742.) Ms. SL called it "overwhelming" and she felt "very tired" caring for four children. (Id.) Still, she and Appellant continued to have sex two to three times per day. (R. at 743.) While Ms. SL said Appellant would put pressure on her to have sex, Ms. SL said the intercourse remained consensual. Still, Ms. SL said she would get sore from all of the sex and would tell Appellant, but that he "didn't care." (R. at 744.)

Ms. SL then testified to multiple times when she would wake up and Appellant would be having sex with her. (R. at 744.) She explained, "I was pretty tired just having a difficult time with the transition, and he had wanted to have sex before bed and I didn't want to because I was tired and he was frustrated. We went to bed, and then he had started having sex with me during

the night. And I had told him again, you know, I'm just so tired and he continued to have sex with me anyways. And then afterwards he got angry at me for pretending -- for pretending like I didn't like it." (Id.)

Ms. SL reaffirmed that prior to going to sleep, she would clearly tell Appellant that she did not want to have sex and that Appellant would because frustrated. (R. at 745.) She would then wake up during the night and Appellant would be having sex with her from behind. (R. at 745-46.) Ms. SL stated that Appellant's penis would be inside her vagina. (R. at 746.) Ms. SL stated that she had never told Appellant that he was free to have sex with her while she slept. (R. at 745.)

On the first occasion, Ms. SL said she woke and "told him that I was tired and that I just wanted to sleep. I was really struggling." (R. at 746.) However, Ms. SL said, "He just kept having sex." (Id.) Once he ejaculated inside of her, Appellant got up and became mad at Ms. SL because she was acting like she was not into it. (R. at 747.)

When asked if similar instances of Appellant having sex with her while she slept occurred, Ms. SL said yes, adding, "I can't tell you the exact next time it happened, but it's something that started happening regularly." (R. at 750.) She said the second time it happened occurred about a week after the first incident. (R. at 751.) Ms. SL explained that the next times it happened she did not react the same way because Appellant "had gotten angry at me for my reaction and I didn't know – I didn't know what reaction he wanted from me to avoid him getting angry." (R. at 750.) Instead, when she would awake and he was having sex with her, she would just pretend to still be asleep because she was "scared of him getting angry at me again." (R. at 751-52.)

Ms. SL again denied ever telling Appellant he could have sex with her while she slept. (R. at 752.) Ms. SL also detailed that during these instances, Appellant would not try to wake her up or ask if she was awake. (R. at 753.)

In April 2019, Ms. SL moved out of Appellant's house and back to California. (R. at 754.) The two continued to communicate and by the end of 2019, Ms. SL moved back into Appellant's house in Ohio and the two talked about marriage. (R. at 756-57.) During this time, the two would occasionally take trips together and Ms. SL testified that there were a "few times" when she would wake up to Appellant having sex with her. (R. at 757.)

Appellant and Ms. SL were married on December 9, 2019. (R. at 758.) However, after moving back in with Appellant, Ms. SL said the relationship between Appellant and her children was not good, adding that the relationship between her son and Appellant was "really bad." (R. at 759-60.)

Ms. SL also testified that Appellant would often have fits of anger when he would throw a plate in her direction, throw a bowl of candy, punch walls, or swipe books off of her dresser. (R. at 763.) Ms. SL said that while Appellant was doing these things, he would "be yelling at me and calling me names and telling me that I should be scared of him." (Id.) Ms. SL added, "It was terrifying to have someone yell at you and usually cowering over me telling me that I should be afraid of him while throwing things in my direction."

Though Ms. SL moved back in with Appellant in November 2019, she would move back out just a few months later in February 2020. (R. at 758.) Ms. SL explained that while at a dance class in February, she received a text message from Appellant saying that he "had to beat [Ms. SL's son's] ass or . . . something to that degree." (R. at 765.) Prosecution Exhibit 4 shows the text conversation between Ms. SL and Appellant. In it, Appellant wrote, "I just caught [Ms.

SL's son] with his tablet in his room with his light on and whooped his ass." (R. at 803.) Ms. SL noted that her son was four at the time. The morning after she received this text message, Ms. SL found bruises on her son's back side. (R. at 800.)

The following night, Appellant had another violent interaction with Ms. SL's son that involved Appellant chasing the child through the house, screaming at him that the "world doesn't fucking revolve around you," and hitting him with a kitchen utensil. (R. at 804.) Ms. SL said she initially was unable to calm Appellant down so she got Appellant to follow her upstairs and she initiated sex with him because that had calmed him down in the past. (R. at 805.)

The next morning, another argument arose between Appellant and Ms. SL. (R. at 810.) Ms. SL said Appellant began screaming at her, punching walls and glass pictures to the point that Appellant's hand was bleeding. (Id.) Appellant told Ms. SL that, in relation to discipling her son, "he could do whatever he wanted because it was his house." (R. at 811.) Ms. SL called the entire incident "very scary." Ms. SL said she went downstairs, grabbed her son, and the two left for the police station. (Id.)

Soon thereafter, Ms. SL and her children moved back to California. (R. at 817.) Ms. SL stated that she was at a low point in her life and had isolated herself from everyone. She stated she also wanted to help Appellant get better so the two remained in touch. In May, while her children were visiting their father for the summer, Ms. SL traveled to see Appellant in Ohio. (R. at 823.) She ended up staying with Appellant until August when the two traveled to Los Angeles. (R. at 824.) During this time, the two began having sex multiple times a day again.

In August, the two traveled to Rancho Santa Margarita and stayed with Appellant's aunt. (R. at 836.) Ms. SL said the relationship there was not very good and that they were "fighting a lot." (R. at 838.) Ms. SL said Appellant told her "a couple of times he didn't know why he

brought me." (Id.) Ms. SL said Appellant was going through her phone "all the time" and asking for location and read receipts. (Id.) Since her own lease in California had expired, Ms. SL said she did not have a home so she stayed with Appellant and his aunt.

Ms. SL also described incidents at Rancho Santa Margarita where Appellant would again have sex with her while she was asleep. (R. at 840.) On one night, Appellant had asked for sex but Ms. SL had refused, which put Appellant in a bad mood. (R. at 841.) Ms. SL then went to sleep only to be woken up to Appellant penetrating her vagina with his penis. (Id.) Like the numerous times this had occurred before, Ms. SL pretended to be asleep because "[w]e were already fighting and I – I knew what happens when he was mad at me." (R. at 842.) Ms. SL again stated that she never told Appellant he could have sex with her while she slept. (Id.)

Ms. SL said this happened a "few times" at Rancho Santa Margarita from September 2020 until the end of November 2020. (R. at 842-43, 846-47.) During this time, Ms. SL acknowledged that she had consensual sex with Appellant as well, but it was initiated by Appellant, and this it was not enjoyable, adding, "We were just always fighting. I was afraid of him. I was afraid to leave. I was afraid to say. It was just – it was just a bad situation." (R. at 845.) When asked if she ever confronted Appellant about having sex with her while she slept, Ms. SL responded, "There was no point really. There wasn't a point. We had had a conversation in the past about me being tired or having a migraine and it didn't fix anything. There was just no point." (R. at 848.) Ms. SL also testified that Appellant on multiple occasions had said it was "hot" for him to be able to do whatever he wanted to her. (R. at 858.)

By November 2020, Appellant was still living at his aunt's while Ms. SL had moved in with her mom. (R. at 859.) Ms. SL eventually blocked all communication with Appellant. (R.

at 861.) However, Appellant began reaching out to Ms. SL's friends and family so Ms. SL "unblocked him so he wouldn't reach out to anybody." (R. at 870.) This occurred in early 2021.

During this timeframe, Appellant sent Ms. SL messages through various messaging platforms telling her to, among other things, "[g]o fuck someone else," and calling her a "cheating white whore liar," a "selfish manipulative bitch," and a "garbage human being." (*See generally* Pros. Exs. 15-25.)

In March 2021, Ms. SL filed for a restraining order against Appellant. (R. at 896-97.) When Appellant continued to attempt to contact her, Ms. SL eventually contacted the police. (R. at 904.) At some point thereafter, Ms. SL also shared her concerns with Appellant's command. (Id.)

On cross-examination, Ms. SL stated that she filed a restraining order on March 5, 2021. (R. at 1052.) When asked if March 4, 2021, the day before, was when Appellant filed for divorce from her, Ms. SL said that "sound[ed] correct." (Id.) She then explained that Appellant told her that he was filing for divorce as a way for him to get her back and for her to come back to him. (Id.) Ms. SL explained that after she was served with divorce paperwork, she asked Appellant, "If you were planning on serving me with this paperwork, why do you continue to overwhelm me with text messages and calls?" (R. at 1059.) Appellant responded that "he still hoped that [there] was hope." (Id.)

On redirect examination, Ms. SL stated that the outcome of Appellant's trial had no impact on the custody of her own children or on her now-completed divorce from Appellant, adding that the couple had no children together. (R. at 1058.) Ms. SL stated the reason she filed the restraining order was because she "wanted [Appellant] to leave me alone." (R. at 1072.)

The panel convicted Appellant of the following three specifications: (1) committing a sexual act upon Ms. SL by penetrating her vulva with is penis, when he knew or reasonably should have known she was asleep. on divers occasions, at or near Beavercreek, Ohio, between on or about 1 January 2019 and on or about 31 August 2020 (Charge II Specification 2); (2) committing a sexual act upon Ms. SL by penetrating her vulva with is penis, when he knew or reasonably should have known she was asleep, on divers occasions, at or near Rancho Santa Margarita, California, between on or about 1 September 2020 and on or about 31 December 2020 (Charge II, Specification 4); and (3) committing conduct unbecoming an officer and a gentleman by yelling at Ms. SL, throwing objects at or near her, and punching walls, on divers occasions, at or near Beavercreek, Ohio, between on or about 1 January 2019 and on or about 31 August 2020 (Charge VI and its Specification). (R. at 1451.)

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 ADMITTING 404(b) EVIDENCE REGARDING APPELLANT'S PATTERN OF COERCIVE CONTROL OVER MS. SL.

Standard of Review

A military judge's ruling under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 will not be disturbed except for a clear abuse of discretion. United States v. Moore, 78 M.J. 868, 873 (A.F. Ct. Crim. App. 2019) (*citing* United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999). "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." Moore, 78 M.J. at 873 (*citing* United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010); United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Law

As it related to Mil. R. Evid 404(b), this Court stated in Moore, "Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion and cannot be used to show predisposition toward crime or criminal character. However, such evidence may be admissible for another purpose, including to show, inter alia, motive, intent, plan, absence of mistake, or lack of accident." Moore, 78 M.J. at 873, *citing* Mil. R. Evid. 404(b)(2); United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010). This Court also noted that the "list of potential purposes in Mil. R. Evid. 404(b)(2) 'is illustrative, not exhaustive.'" Moore, 78 M.J. at 873, *citing* United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989).

This Court applies a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

1. Does the evidence reasonably support a finding by the factfinder that Appellant committed other crimes, wrongs, or acts?

2. Does the evidence of the other act make a fact of consequence to the instant offense more or less probable?

3. Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403?

United States v. Reynolds, 29 M.J. 105, 109 (C.A.A.F. 1989).

When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000). The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *See, e.g.*, United States v. Baldwin, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (*citing* Stephen A. Saltzburg et al., Military Rules of Evidence Manual 490 (4th ed. 1999)).

In Moore, this Court found that a military judge did not abuse his discretion by admitting evidence of controlling behaviors exerted by an accused over the victim of a sexual assault during their dating relationship. In that case, the appellant and his girlfriend were sleeping in his bed and she awoke to the appellant wrapping his arms around her chest, pulling her tight against him, and repeatedly penetrating her vagina with his penis despite the victim loudly and repeatedly telling the appellant to stop. Moore, 78 M.J at 872.

The victim in Moore detailed a list of controlling behaviors employed by the appellant, including but not limited to, restricting access to the victim's friends and family, limiting her access to an asthma inhaler, using demeaning language, telling her how to wear her hair, paying close attention to her eating and exercise habits, and requiring frequent check-ins when the two were apart. Moore, 78 M.J. at 871-73. The victim also testified at trial about her relationship with Appellant and explained that, when Appellant told her to do something, she would comply because "things were easier if [she] just did it" and the appellant would "ignore" or "get upset" with her if she said "no." Id. at 873. The victim also stayed that she stayed in the relationship as long as she did because she had "convinced" herself "that it was fine" and did not report the

assaults because Appellant would "[g]et mad" and had told her she "would ruin his life" if she did. Id.

Using the Reynolds factors, this Court found the military judge did not err in admitting the evidence. For the first prong, this Court found the victim's testimony could reasonably support a finding that the appellant committed these acts and that the victim's testimony about specific acts of the appellant's controlling behavior were corroborated in part by other testimony. Moore, 78 M.J. at 874. For the second prong, this Court held as follows:

> Evidence of Appellant's acts of controlling behavior was probative of these facts of consequence—lack of consent and mistake of fact as to consent. It is clear from AC's testimony that Appellant set expectations for AC and would get angry or abuse her verbally when she did not meet those expectations. It is equally clear that in response, AC would at times comply to appease Appellant "because things were easier" than if she did not. Appellant's controlling behavior demonstrated that he had the motive and intent to repress, instead of respect, her personal autonomy and thus was probative of her lack of consent.

Id. at 875. Finally, for the third prong regarding Mil. R. Evid. 403, this Court agreed with the military judge that the probative value was not substantially outweighed by the danger of unfair prejudice. Notably, the military judge held that the uncharged acts in that case were "not particularly aggravating," and this Court stated that "the uncharged acts were much less serious than the charged acts and most were not criminal in nature." Id.

Additional Facts

Before trial, the Government provided notice to the Defense that, pursuant to Mil. R. Evid. 404(b)(2), it intended to introduce evidence at trial of Appellant's pattern of uncharged acts to show Appellant's "pattern of coercive control he exerted over the relationship with [Ms. SL] – his motive and plan – which included physical and sexual abuse of [Ms. SL], but also emotional manipulation and control over her children to keep her from leaving. It also helps to explain

certain 'counterintuitive victim behaviors' that resulted in [Ms. SL] not reporting the scope of [Appellant's] crimes immediately." (App. Ex. X at 16.) The Government also sought to introduce evidence "to establish [Appellant's] plan of control over his victims[2], to explain their fear and wariness to speak with others about the incidents, and to explain both the delays in their reporting and the means though which they finally did report." (Id. at 17.)

At trial, Appellant sought to exclude such evidence, arguing the evidence was not admissible under Mil. R. of Evid. 404(b). (Id.) In a response to Appellant's motion, the Government again stated it sought to introduce "certain statements and behaviors [Appellant] used to establish dominance and control over his victims, wear down their autonomy, and that resulted in their feelings of ambivalence about this criminal behaviors and lack of immediate reporting to law enforcement." (App. Ex. XI.)

In a detailed 13-page ruling, the military judge denied Appellant's overall motion, but put limitations on what evidence the Government could present. (App. Ex. XL.) The military judge relied heavily on this Court's decision in Moore throughout his ruling. At one point, the military judge stated the following:

> As pointed out by the parties, the Moore case establishes that the introduction of controlling behaviors in a case involving crimes committed against an intimate partner is permissible under M.R.E. 404(b) to establish a motive and intent to dominate and control on the part of the accused. Such acts might also serve to explain not only the motivations or intent of the accused, but also actions or lack thereof on the part of the victim.

(App. Ex. XL at 6.)

[2] The motion at the time referenced both Ms. KE and Ms. SL. Since Appellant was acquitted of all charges involving Ms. KE, the focus of this issue involves only Ms. SL.

Citing to Reynolds, the military judge thoroughly explained why each prong of the three-pronging Reynolds test was met in this case. For the first prong, the military judge held that "taken as a whole, the evidence presented on the motions in regard to these acts generally supports a finding by a reasonable finder of fact that the accused had an intent and motive to dominate and control both [Ms. SL and Ms. K.E.] as part of his domestic relationships with each named victim." (App. Ex. XL at 7.) Notably, the military judge stated, "Evidence of controlling or coercive behaviors on the part of the accused, and of the alleged victim's responses to those acts, is relevant to why reporting was delayed and why the named victims may have 'normalized' acts such as the ones underlying the charged offenses." (Id.)

For the second Reynolds prong, the military judge held, "There are multiple, non-propensity reasons why evidence that the accused engaged in a pattern of behavior designed to control [Ms. SL and Ms. KE] within the contexts of their respective relationships is relevant to the finder of fact." (Id.)

As to the third Reynolds prong, the military judge conducted a three-paragraph analysis and Mil. R. Evid. 403 balancing test regarding this evidence. (Id. at 7-8.) The military judge held, "To deprive the members of evidence that might inform them as to what the relationships in this case were like would deprive them of critical context that might serve to explain the motivations and intent of the accused and named victims. The Court views this evidence, subject to appropriate limitations as described below, as having significant probative value for the members as they attempt to evaluate the credibility of various witnesses." (Id. at 8.) The military judge then stated, "A properly instructed panel will be able to use this evidence only as permitted by law for its probative value in regard to the charged offenses." (Id.)

The military judge then analyzed each specific piece of evidence the Government sought to introduce and placed "appropriate limitations" as necessary. (Id.) For statements made by Appellant to Ms. SL calling her a "selfish lover," a "whore," a "selfish manipulative bitch," and other belittling names, the military judge found the evidence directly probative to the conduct unbecoming specification of Charge VI as well as "relevant to an argument that the accused had a motive and intent to control [Ms. SL], as it is probative to his reaction when he is displeased with her. His alleged reactions also serve to inform the finder of fact as to the nature of their relationship, and its impact on [Ms. SL's] responses to the acts underlying other charged offenses." (Id. at 9.)

For statements Appellant made to Ms. SL that she should give him whatever he wanted, that it was a wife's obligation to sexually satisfy her husband, that she should be afraid of him, and that Appellant thought it was "hot" for him to be able do whatever he wanted to her while she was drunk or asleep, the military judge held, "The statements are potentially directly relevant to the accused's knowledge (as it relates to a potential mistake of fact defense) that [Ms. SL] was asleep or not consenting as related to the offenses under Charge II. Beyond that, these statements are also relevant to the Government's argument that the accused had a motive and intent to control [Ms. SL]." (Id. at 10.)

As to the Appellant's tracking of Ms. SL's movements through her cell phone and monitoring her activities, the military judge held the evidence was admissible for the same reasons laid out previously in his broad three-pronged Reynolds analysis. (Id. at 11.)

Finally, the military judge provided the following instructions to the members regarding other crimes, wrongs or acts evidence:

> You may consider evidence that the accused may have requested that both [Ms. KE and Ms. SL] provide him with phone location

> data, that he may have been verbally abusive towards both [Ms. KE and Ms. SL], that he may have requested that [Ms. SL] provide him with text message read receipts, and that he may have expected [Ms. SL] to engage in sexual intercourse with him on a frequent basis and may have pressured her to do so, for the limited purpose of its tendency, if any, to prove that the accused was motivated to and intended to control the actions and behaviors of [Ms. KE and Ms. SL].
>
> 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 general criminal tendencies and that he therefore committed the offenses charged.
>
> Additionally, you may consider evidence regarding an alleged incident during which the accused may have struck his stepson for its limited tendency, if any, to prove that the accused was motivated to and intended to control the actions and behaviors of [Ms. SL]. You may also consider this evidence in terms of its tendency, if any, to provide context to the relationship between the accused and [Ms. SL] as well as the relationship between [Ms. KE and Ms. SL] to the extent you believe those factors relate to your consideration of the charged offenses in this case.
>
> 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 general criminal tendencies and that he therefore committed the offenses charged.

(R. at 1385.)

Argument

To begin, Appellant concedes that the military judge did not err in admitting the Mil. R. Evid. 404(b) evidence as it related to allegations involving "without consent," adding that "a pattern of 'coercive control' would be relevant to a lack of consent." (App. Br. at 20.) However, Appellant claims the military judge "abused his discretion by admitting, without limitation, evidence of [Appellant's] acts of 'coercive control,' as such evidence is unrelated to S.L.'s inability to consent as alleged in Specifications 2 and 4 of Charge II." (App. Br. at 15.) Appellant is incorrect on multiple counts.

To start, Appellant overstates his case by claiming the military judge admitted "without limitation" the Mil. R. Evid. 404(b) evidence. Indeed, a review of the military judge's 13-page ruling shows the military judge repeatedly mentioned placing "appropriate limitations" on the proposed evidence and even outright denied admission of one piece of evidence.[3]

Next, the military judge held that one piece of evidence, namely Appellant's statement to Ms. SL that it was "hot" for him to be able to whatever he wanted to her, was directly related to the sleeping specifications in Specifications 2 and 4 of Charge II. Here, Appellant made it plainly clear to Ms. SL that he felt he could have sex with her, and whatever else he wanted, at any time – awake, asleep, with consent or without.

Next, Appellant in his brief seems to be pigeon-holed in his belief that this evidence must be directly, and *only*, related to Ms. SL's "legal inability to consent." (App. Br. at 15.) However, in doing so, Appellant loses the broader context that this evidence can also be used to explain the broader circumstances of his crimes – namely providing the members context as to why Ms. SL did not protest when she was repeatedly awoken to Appellant having vaginal intercourse with her or answering why she did not report these incidents to authorities for such a long period of time. Though the military judge held each of these other pieces of evidence showing Appellant's control and coercion over Ms. SL were pertinent to Specifications 2 and 4 of Charge II because they explained Ms. SL's actions in response to Appellant's sexual assault, Appellant never mentions this portion of the military judge's ruling in his brief, let alone attempts to discredit it.

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[3] Though unrelated to this motion, the military judge also denied a separate piece of Mil. R. Evid. 404(b) evidence the Government sought to admit during the trial. (R. at 614.)

Here, the military judge correctly held that Appellant's control and coercion had a relevant correlation with Ms. SL's actions as it related to Specifications 2 and 4 of Charge II. Bearing in mind Ms. SL's knowledge of Appellant's mindset that he could do whatever he wanted to her whenever he wanted to, Ms. SL also knew Appellant controlled her spending, required her to constantly check-in and be tracked by her phone so Appellant could always know her whereabouts, constantly interfered or grew angry when she interacted with her family, was physically abusive to her son and felt he could discipline him in any way he say fit, threw things at her, and also constantly was angry with her when she denied him sex. Ms. SL testified that she was "afraid of him" and "afraid to leave." (R. at 845.) When asked if she ever confronted Appellant about having sex with her while she slept, Ms. SL responded, "There was no point really. There wasn't a point. We had had a conversation in the past about me being tired or having a migraine and it didn't fix anything. There was just no point." (R. at 848.)

Notably, both at trial and now on appeal, Appellant repeatedly attacked Ms. SL's credibility, motivation to lie, and the timing of her eventual reporting Appellant's crimes against her. (*See* App. Br. at 36-37.) Thus, as the military judge rightly held, this control and coercion evidence provided "critical context that might serve to explain the motivations and intent of the . . . named victims." (App. Ex. XL at 8.)

Ms. SL here dealt with remarkably the same circumstances as the victim in Moore – restricted access to the friends and family, demeaning language, requiring frequent check-ins when the two were apart, a feeling of required compliance because "things were easier" that way, an appellant who would get mad if she said "no," a victim who stayed in a relationship because there was nowhere else to go and a victim who was afraid of reporting an appellant's actions. *See* Moore, 78 M.J. at 871-73. Each case involves a victim with an appellant who "set

expectations" and then "would get angry or abuse" their victim "verbally when she did not meet those expectations." *See* Id. at 875. Each case also involved a victim that would "comply to appease" the appellant to make things "easier." Id. Both again involve an appellant's "controlling behavior [that] demonstrated that he had the motive and intent to repress, instead of respect," their victim's "personal autonomy." Id.

While Moore dealt with a "lack of consent" case, it's holding and rational should not be limited to only "lack of consent" cases as Appellant contends. Instead, as the military judge correctly held here, an appellant's control, coercion, and motive and intent to repress personal autonomy shows not only Appellant's mindset to sleeping victims, but also to the overall mindset of a victim, whether in how they react to being sexually assaulted once awoken or how and when they chose to report the crime. This is especially the case when Appellant made the victim's reactions and reporting a key component in his attacks against Ms. SL.

Here, Appellant's stated belief that he thought it "hot" that he could do whatever he wanted to Ms. SL whenever he wanted to showed a control and coercion motive and intent which goes directly to whether he repeated sexually assaulted Ms. SL while she slept. Further, Appellant's verbal and mental abuse and repression of Ms. SL's personal autonomy provided necessary context as to why Ms. SL pretended to remain asleep after she was repeatedly woken up by Appellant having sex with her, why she never confronted Appellant about his actions, and why she did not report his offenses to authorities sooner.

Next, Appellant claims Ms. SL's claims were "uncorroborated at trial." (App. Br. at 17.) Appellant is again incorrect. First, Ms. KE, Appellant's first wife, testified that Appellant had a history of also going through her phone and Apple watch, tracking her via her phone, checking-in constantly, requiring her to send videos to confirm her whereabouts. (R. at 583-85, 602.)

Moreover, numerous text exchanges entered into evidence show the numerous occasions Appellant used abusive language and called Ms. SL demeaning names. (*See* Pros. Exs 15-24.) While Appellant may not believe his own words are "objective evidence,"[4] this Court should feel otherwise. Each of these pieces of evidence corroborated Ms. SL's testimony and specific examples of Appellant's abusive, controlling, and coercive nature.

Finally, Appellant takes issue with the military judge's "coercive control" instruction and Dr. TC's expert testimony about "control and intimidation and manipulation of a partner" and fear of "something unpleasant" happening to them. (App. Br. at 19-20.) Appellant believes all of this information would be irrelevant as applied to a person that is sleeping. Yet again, however, Appellant fails to recognize the broader context of Appellant's actions – namely that his control and coercion impacted Ms. SL when she woke up in how she responded to the sexual assault (pretending to sleep because she was scared and knew it would only make him madder) and in her not immediately reporting the attack to the authorities. These issues are pertinent to, as the military judge put it, the "critical context" of Ms. SL's actions. Again, this is especially true in this case considering Appellant repeatedly attacked Ms. SL throughout the trial, and now on appeal, regarding her reaction to Appellant's offenses and her delay in reporting Appellant to the authorities.

Additionally, the instructions provided to the members by the military judge corresponded to his ruling, as the use of the evidence was limited to proving Appellant was "motivated to and intended to control the actions and behaviors" of Ms. SL, and to "provide context to the relationship between" Appellant and Ms. SL. (R. at 1385.) Notably, the instructions on two occasions told the members they "may not consider this evidence for any

[4] *See* App. Br. at 17.

other purpose and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." (Id.) Furthermore, neither Appellant nor his counsel objected to the instruction. Moreover, absent evidence to the contrary, this Court may "presume that members follow[ed] [the] military judge's instructions." United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted). There is no reason to discount the effectiveness of these instructions because, and there is no evidence in the record that any member failed to follow these instructions or used this evidence for an improper purpose.

Furthermore, Appellant was not materially prejudiced by the inclusion of this evidence. First, just as in Moore, the uncharged acts here were "much less serious than the charged acts and most were not criminal in nature." Moore, 78 M.J. at 875. Moreover, Appellant had free reign at trial, just as he does now on appeal, to characterize Ms. SL as someone who lacked credibility, had a motive to lie, and was incapable of being controlled. (*See* R. at 1412, App Br. at 36.) In fact, in his ruling, the military judge recognized trial defense counsel was equipped with the evidentiary tools necessary to "contest that the accused was motivated by a desire to control" Ms. SL, and that the "Defense may argue that the nature of these relationships provide a motive on the part of the named victims to exaggerate or fabricate these allegations out of resentment against the accused." (App. Ex. XL at 7-8.) Indeed, Appellant's trial defense counsel questioned Ms. SL about whether or not she also displayed controlling tendencies towards Appellant before arguing that Ms. SL's actions were "not something that someone who is being coercively controlled would do," that she was not a "meek woman," that she "can be

volatile, "does act out," and that this "isn't someone who is capable of being controlled."[5] (R. at 1413, 1427-28.)

Finally, as he points out in his brief, the panel members acquitted Appellant of numerous sexual assault offenses involving Ms. SL. (App. Br. at 22.) However, Appellant then makes the substantial, yet unsupported leap, that this Mil. R. Evid. 404(b) evidence "much have been what tipped the scales with regards to Specifications 2 and 4 of Charge II." (Id.)

Appellant follows his conclusory statement with discussion about trial counsel going to "great lengths to get this evidence of 'coercive control' admitted before the members," and "structur[ing] his direct examination of [Ms. SL] to mirror the anticipated testimony of their expert." (Id.) However, as shown by the record, the trial counsel's use of the "coercive control" evidence went towards proving *all* of the sexual assault allegations, not just the "sleep" specifications. In other words, if Appellant had truly been prejudiced by the Mil. R. Evid. 404(b) evidence under his theory, the logical result would be him being convicted of *all* the offenses, not just the "sleep" specifications. Besides his unsupported, "must have been" statement, Appellant has failed to show how the "coercive control" evidence somehow swayed with the panel to convict him of the "sleep" specifications when they acquitted him of all the "without consent" specifications considering the trial counsel used this evidence to argue the members should convicted him of *all* the sexual assault allegations.

In short, Appellant has failed to show the military judge committed a clear abuse of discretion in this case. The military judge properly conducted a thorough Reynolds test on each piece of evidence, as well as the evidence overall. This also included a thorough Mil. R. Evid.

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[5] Appellant's trial defense counsel even argued Ms. SL had "spoke[n] over the miliary judge" and described it as "a sign of disrespect on her behalf." (R. at 1428.)

403 balancing test. Finally, Appellant has failed to show he was prejudiced. Therefore, this Court should deny Appellant's claims and affirm the findings and sentence in this case.

II.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS 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).

Specification 2 of Charge II as charged under Article 120, UCMJ, states that Appellant "did, on divers occasions, at or near Beavercreek, Ohio, between on or about 1 January 2019 and on or about 31 August 2020 commit a sexual act upon [Ms. SL], by penetrating her vulva with is penis, when he knew or reasonably should have known she was asleep." (Charge Sheet, ROT, Volume I.)

At trial, the military judge instructed the members as to the elements of the offense, as follows:

> (1) That between on or about 1 January 2019 and on or about 31 August 2020, at or near Beavercreek, Ohio, on divers occasions, the accused committed a sexual act upon [Ms. SL] by penetrating her vulva with is penis;
>
> (2) That the accused did so when [Ms. SL] was asleep; and
>
> (3) That the accused knew or reasonably should have known that [Ms. SL] was asleep.

(R. at 1365.)

The military judge instructed that a "sexual act" meant "the penetration, however slight, of the penis into the vulva or anus or mouth." (Id.) The military judge also instructed that a "sleeping, unconscious, or incompetent person cannot consent." (R. at 1366.)

Specification 4 of Charge II as charged under Article 120, UCMJ, states that Appellant "did, on divers occasions, at or near Rancho Santa Margarita, California, between on or about 1

September 2020 and on or about 31 December 2020, commit a sexual act upon [Ms. SL], by penetrating her vulva with is penis, when he knew or reasonably should have known she was asleep." (Charge Sheet, ROT, Volume I.)

At trial, the military judge instructed the members as to the elements of the offense, as follows:

> (1) That between on or about 1 September 2020 and on or about 31 December 2020, at or near Rancho Santa Margarita California, on divers occasions, the accused committed a sexual act upon [Ms. SL] by penetrating her vulva with is penis;
>
> (2) That the accused did so when [Ms. SL] was asleep; and
>
> (3) That the accused knew or reasonably should have known that [Ms. SL] was asleep.

(R. at 1367.) The military judge provided the same definitions for as instructed for Specification 2 above. (R at 1367-68.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual assault in both Specification 2 and Specification 4, 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.

- ***Appellant placed his penis inside Ms. SL's vulva.***

The evidence is clear Appellant placed his penis inside Ms. SL's vulva. Ms. SL testified that on numerous occasions in both Beaverwood, Ohio, and Rancho Santa Margarita, California during the charges timeframes she awoke to Appellant having sex with her, namely placing his penis inside her vulva. Ms. SL detailed the first time this happened in Ohio how she told

Appellant she did not want to have sex prior to falling asleep and how Appellant became frustrated. (R. at 745.) Ms. SL then testified that she next woke up to Appellant having sex with her from behind, specifically stating that his penis was inside her vagina. (R. at 745-46.) Ms. SL then detailed other occasions when this same incident occurred while in Ohio during the charged timeframe. Though she could not say the exact times it occurred, she said "it's something that started happening regularly." (R. at 750.)

Ms. SL also testified to when this same occurrence happened on numerous occasions in Rancho Santa Margarita during the charged timeframe. Ms. SL said that on one evening, Appellant had asked for sex but Ms. SL had refused, which put Appellant in a bad mood. (R. at 841.) Ms. SL then went to sleep only to be woken up to Appellant penetrating her vagina with his penis. (Id.) Ms. SL said this happened a "few times" at Rancho Santa Margarita from September 2020 until the end of November 2020. (R. at 842-43, 846-47.)

- ***Appellant did so while Ms. SL was asleep.***

The evidence is equally clear that Appellant committed these acts while Ms. SL slept. Ms. SL clearly testified how she was asleep in the multiple instances in Ohio and California and then how she would be repeatedly awoken to Appellant's penis inside of her. For the first time in Ohio, Ms. SL detailed how, when she woke up to Appellant's penis inside of her, she told Appellant she was tired, just wanted to sleep, and "was really struggling." (R. at 746.) However, Appellant "just kept having sex." (Id.) For the multiple instances that occurred after this initial sexual assault, Ms. SL stated that when she was awoken to Appellant having sex with her, she would just pretend to remain asleep rather than say anything to Appellant, adding that he "had gotten angry" at her and she was "scared of him getting angry at me again." (R. at 751-52.)

Ms. SL detailed similar circumstances of the multiple sexual assaults that occurred in California. Again, Appellant asked for sex prior to Ms. SL falling asleep, and she said no. Then, Ms. SL said she was awoken to Appellant penetrating her vagina with his penis. (R. at 841.) Like the numerous times before, Ms. SL said she pretended to remain asleep once awoken because she knew "what happens when he was mad at me." (R. at 842.) Ms. SL also detailed the second time this happened in California. (R. at 846.) Again, she explained Appellant wanted to have sex with her before she went to sleep, that she went to sleep, and was awoken to Appellant's penis inside of her body. (R. at 846-47.) She also detailed that here, just as in the past, she pretended to still be asleep once she was awoken and did not confront Appellant because "[t]here was no point really. There wasn't a point. We had had a conversation in the past about me being tired or having a migraine and it didn't fix anything. There was just no point." (R. at 846-47.)

- ***Appellant knew or should have known Ms. SL was asleep.***

Finally, the evidence shows Appellant knew or should have known Ms. SL was asleep each and every time he sexually assaulted her. First, as noted above, Appellant knew Ms. SL had specifically told Appellant on at least two of these occasions that she did not want to have sex that night, to which Appellant grew angry. Then, waiting until she was asleep to "do whatever he wanted to her," Appellant knew his girlfriend and eventual wife was asleep with her back was to him and that some amount of time had passed since she had gone to sleep. Considering these circumstances, Appellant either knew or well should have known Ms. SL was sleeping.

In sum, the evidence overwhelmingly shows Appellant inserted his penis into Ms. SL's vulva while she slept and that Appellant either knew or reasonably should have known Ms. SL was asleep.

Before this Court, however, Appellant makes the same arguments that proved unpersuasive at trial before the panel members. These arguments should meet an equal fate before this Honorable Court.

First, as he did at trial, Appellant claims Ms. SL was "not credible" and had a "motive to lie at the time she made the allegations to law enforcement." (App Br. at 36.) Yet, the evidence shows Ms. SL had no such motive. The two had no children together and Ms. SL stood to gain nothing in the couple's divorce based on the allegations against Appellant. Appellant then attempts to insinuate Ms. SL made the allegations only after "there did not seem to be a future left" between the two. (App. Br. at 37.) Yet, the evidence shows it was Ms. SL who was seeking to distance herself from Appellant in the month's leading up to the divorce filing, and it was Appellant who hoped to reconcile.

Next, Appellant spends four pages of his brief discussing text messages sent from Appellant to Ms. SL that involved talk about Ms. SL selling her body to Russians. This stemmed from Prosecution Exhibit 25, a text exchange in which Appellant wrote to Ms. SL, "You're selling your body aren't you? To the Russians." (*See* Pros. Ex. A.) Ms. SL testified that this exchange scared her and served as the "turning point" for her to pursue a restraining order against Appellant. (R. at 928.)

On cross-examination, Appellant's counsel attempted to discredit Ms. SL by accusing her of deleting messages from the text string prior to providing the text exchange to law enforcement. Ms. SL denied deleting messages in the exchange. (R. at 1077.)

Then, as Appellant admits in his brief, Appellant's counsel "confronted [Ms. SL] with Defense Exhibit A for Identification." (App. Br. at 38.) Appellant notes in his brief that he was unable to locate Defense Exhibit A for Identification within the ROT but believed the first page of Appellate Exhibit LVII appeared to be the first page of that Defense Exhibit. (App. Br. at 38.) Appellant then cites to Appellate Exhibit LVII six additional times in place of Defense Exhibit A for Identification.

However, what Appellant fails to mention in his brief is that Defense Exhibit A for Identification was never admitted into evidence. In fact, the military judge denied the exhibit's admission due to a lack of foundation. (R. at 1077-78.) Further, the military judge later instructed the members that Defense Exhibit A for Identification was "not admitted into evidence and you will not have that for your deliberations." (R. at 1388.)

Considering this Court's review of factual sufficiency is limited to evidence admitted at trial, Appellant's complete reliance on the contents of the unadmitted Defense Exhibit A for Identification to attack Ms. SL's credibility must be ignored. Moreover, Appellant's attempts to disparage Ms. SL are completely unrelated to her testimony regarding the multiple times Appellant sexually assaulted her in her sleep.

All told, Appellant's attacks on Ms. SL's credibility rely either on unadmitted evidence or the same attacks he used against her at trial and were well before the panel who had the opportunity to personally observe Ms. SL's testimony. Despite these attacks, the panel found beyond a reasonable doubt that Appellant sexually assault Ms. SL in her sleep on multiple occasions in multiple locations. This Court should not disturb that verdict.

Next, Appellant completely misses the context of Ms. SL's testimony regarding the circumstances of Appellant's sexual assault against her. Appellant contends Ms. SL was

"pretending to be asleep during the sexual acts" but was actually never asleep at all during the acts. (App. Br. at 41-42.) Appellant again is mistaken. A full reading of Ms. SL's testimony regarding the assaults in both Ohio and California show that she was initially asleep when Appellant began having sex with her and would then only *pretend* to be asleep *after* she was awoken to Appellant's penis inside of her vagina.

As detailed previously, Ms. SL's testimony makes clear that she was asleep on multiple occasions in both Ohio and California when she was awoken by Appellant having sex with her. (*See* R. at 744-53, 840-848.) For Specification 2, Ms. SL detailed the first time she awoke with Appellant's penis inside of her. (R. at 745.) Appellant goes to great lengths to argue that Ms. SL stating, "When he – when he started having sex with me" somehow intimates Appellant did not start having sex with her until she was awake. (*See* App Br. at 43.) However, reading Ms. SL's testimony in full context shows Ms. SL was detailing what caused her to "first wake up" – which was when he started having sex with her. (R. at 745.) In other words, Appellant starting to have sex with her while she was asleep, which is what caused her to wake up. Furthermore, Ms. SL plainly testified that what happened to her that first night was "something that started happening regularly." (R. at 750.) Furthermore, Ms. SL replied, "Yes," when asked if the incidents she was recalling were incidents when she would wake up to Appellant having sex with her. (R. at 752.) A plain reading of Ms. SL's testimony shows she was asleep when Appellant sexually assaulted her multiple times in Ohio.

The same holds true for Specification 4 and the incidents in California. Here, Appellant is forced to admit that Ms. SL clearly testified that she went to sleep and woke to Appellant "having sex" with her. (*See* App. Br. at 44, *citing* R. at 841.) Appellant is also forced to admit that Ms. SL testified such incidents while she was asleep happened "a few times" while the two

were in California. (*See* App. Br. at 44, *citing* R. at 840.) However, Appellant takes issue with Ms. SL saying Appellant was "just starting to" penetrate her when she woke. (App. Br. at 45.) Yet, a full-context reading of Ms. SL's testimony shows this is the same situation as in Specification 2 above – that is, Appellant "starting to" penetrate her while she was asleep is what caused her to wake up. (R. at 841.) Here, the complete context of Ms. SL's testimony shows that Appellant had penetrated Ms. SL, however slight, before she awoke from her sleep.

Ms. SL also clearly testified that the same circumstance occurred a few weeks later. The dialogue between Ms. SL and the trial counsel went as follows:

> TC: When you go to sleep again, do you remember how long you were asleep before you were awoken?
>
> Ms. SL: No.
>
> TC: When you awake that night, what's happening?
>
> Ms. SL: He was having – having sex with me.
>
> TC: Okay. What was he using, what part of his body?
>
> Ms. SL: His penis.
>
> TC: And into what part of your body?
>
> Ms. SL: My vagina.
>
> TC: Did you consent to the sex that night while you were asleep?
>
> Ms. SL: No.

(R. at 846-47.) Here, once again, Ms. SL's testimony makes it plainly clear that she was asleep, and not merely *pretending* to be sleep, while Appellant had sex with her by placing his penis into her vagina. Here, as it pertains to legal sufficiency, this Court must draw every reasonable inference from the evidence in the record of trial in favor of the prosecution. *See* McGinty, 38 M.J. at 132. Yet, Appellant asks this Court to do the opposite. It should decline that request.

In sum, the evidence adduced at trial shows Appellant penetrated Ms. SL's vulva with his penis, that he did it repeatedly while she was sleeping, and that he either knew or should have known that she was asleep.[6] The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of the sexual assault specifications against Appellant were met. This Honorable Court should likewise be convinced that a reasonable factfinder could have found all the essential elements of the offenses beyond a reasonable doubt. 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.

III.

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

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 1337). Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment

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[6] Notably, Appellant makes no attempt in his brief to argue he was mistaken in any way as to whether Ms. SL was sleeping when he repeatedly sexually assaulted her.

rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 40-41).

In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

The Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), review granted 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022). It rejected the same claims Appellant raises now:

> Ramos does not purport, explicitly or implicitly, to extend the scope of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in Ramos refer to courts-martial at all. Accordingly, after Ramos, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in Ramos.
> …
> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also*, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

IV.[7]

APPELLANT'S APPROVED SENTENCE IS ENTIRELY APPROPRIATE.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This Court should affirm sentences it finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(d), UCMJ. This Court also has the power to disapprove a mandatory minimum sentence. United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

In order to determine the appropriateness of the sentence, this Court must consider: (1) the particular appellant, (2) the nature and seriousness of the offense, (3) the appellant's record of service, and (4) all matters contained in the record of trial. United States v. Amador, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005) (*citing* United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); United States v. Alis, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998)).

This determination is separate from an act of clemency, i.e., treating an accused with less rigor than he deserves due to a consideration of mercy. The service appeals courts are not

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[7] This issue is raised in the appendix pursuant to Grostefon, 12 M.J. at 436–37.

authorized to engage in exercises of clemency. Healy, 26 M.J. at 396; *see also* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Analysis

Convicted of sexual assaulting his then-wife in her sleep on multiple occasions across many months in two states and a conduct unbecoming an officer charge that involved throwing objects near or at her, Appellant claims his rightfully-deserved sentence to 42 months confinement and a dismissal is inappropriately severe. (App. Br, Appendix, at 1.) Appellant believes his sexual assault offenses are somehow less severe or caused less trauma to Ms. SL because she was "a sleeping victim, who, by all accounts, lacks the consciousness to experience the traumatic event as it is occurring." (Id. at 2-3.)

Appellant is mistaken. To start, Appellant's sentence is entirely appropriate. Looking at the facts and circumstances of his crimes, as well as Appellant personally, a sentence to 42 months confinement and a dismissal is deserved. As described in Issue II above, Appellant repeatedly sexually assaulted his sleeping wife. Appellant undoubtedly believed he could do what he wanted to Ms. SL whenever and however he wanted, regardless of her personal autonomy and her wishes to simply be able to sleep in peace without fear of being sexually assaulted by her husband. In doing so, he repeatedly violated his own wife. Due to Appellant's actions, Ms. SL stated she had been "torn [] to pieces" and experienced trauma that "changed" her and made her "feel things that I will never be able to properly describe." (R. at 1477.) Ms. SL continued in her victim impact statement:

> I continue to go through waves of shock, sadness, surreal numbness, and flashbacks while trying to restart my life. Healing from the trauma of these events requires something larger than an apology, a referral to a support group, a class in breathwork, or time could ever give. There is nothing in this world that will ever give me back that time or fix these deep wounds.

> I am desperate to find a sense of personal security and regain the confidence in my life needed to maintain any type of a relationship. I find myself struggling to trust coworkers, family members, friends, and strangers because the person I once loved very much betrayed my trust in every way. In the midst of our relationship, I found myself confused, isolated, and believed I had no way out. I was so numb, torn down, and helpless that I thought I had no hope left.

(R. at 1477-78.) While Appellant may believe that his "sleeping victim" lacks the ability to experience trauma from his horrendous crimes, Ms. SL's own words show otherwise and highlight exactly why Appellant's sentence is just, deserved, and ultimately, appropriate.

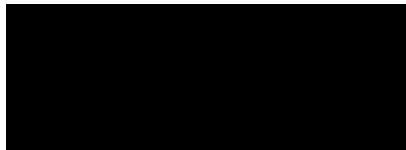
Moreover, the maximum sentence faced by Appellant highlights the seriousness of this offense. Here, Appellant faced a maximum confinement sentence of 61 years and a mandatory dismissal. However, the military judge sentenced Appellant to only 42-months confinement, a 95-percent reprieve from the maximum allowed. (R. at 1505.) Moreover, the sentence was 65-percent less than the 10-year confinement sentence the trial counsel argued for during sentencing. (R. at 1498.) Yet, Appellant comes to this Court asking for even more relief in the form of reducing his confinement even further.

Notably, Appellant's attempt to explain why he should receive a reduced sentence centers on the fact that Ms. SL "continued in a relationship with [Appellant] long after the alleged acts of sexual assault." (App. Br, Appendix, at 3.) Yet, this Court need only look at Ms. SL's testimony and victim statement to know why she did not leave him or report him for so long – as she stated in her victim impact statement, "I still think about the fear I felt during that horrible time when he was covered in blood, screaming at me that I should be afraid of him. And I was afraid of him. I was afraid of him for so long." (R. at 1478.) Contrary to Appellant's belief, Ms. SL's fear of leaving Appellant because of his actions only deeps the appropriateness of his sentence.

All things considered, Appellant's sentence amounts to a lawful and legally supportable sentence. Evaluating the facts and circumstances in the record of Appellant's case, the seriousness of his offenses, his service record, his particular character and rehabilitative potential, and in consideration of the entire record, this Honorable Court should leave his entire sentence undisturbed.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.



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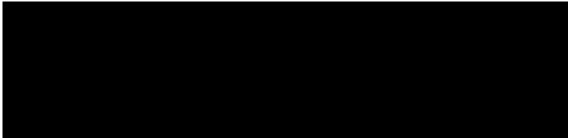

MARY ELLEN PAYNE
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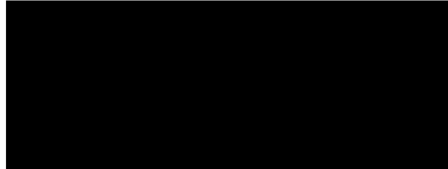
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 23 June 2023 via electronic filing.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Captain (O-3) **JORDAN S. EDWARDS** United States Air Force *Appellant*	)))))))))	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40349 Filed on: 29 June 2023

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

COMES NOW, Appellant, Captain (Capt) Jordan S. Edwards, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed 23 June 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 24 May 2023 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

I.

THE MILITARY JUDGE ERRED WHEN HE ADMITTED EVIDENCE OF CAPT EDWARDS' UNCHARGED ACTS OF ALLEGED "COERCIVE CONTROL" TO SHOW AN INTENT TO DOMINATE OR CONTROL S.L., AS SUCH INTENT IS UNRELATED TO S.L.'S CHARGED INABILITY TO CONSENT.

As stated in the Capt Edwards' Opening Brief, the true error of the military judge in this case was admitting evidence of Capt Edwards' alleged acts of coercive control to support Specifications 2 and 4 of Charge II, which involved a theory of criminal liability that does not require a showing of lack of consent. App. Br. at 11-23. In its Answer, the Government argues that the evidence was admissible to show the "broader circumstances of [Capt Edwards'] crimes"

(Gov. Ans. at 17) and to establish "how [victims] react to being sexually assaulted once awoken or how and when they chose to report the crime." Gov. Ans. at 19. However, those were not the purposes for which the military judge admitted the evidence in this case. The military judge specifically instructed the members that they were to use evidence of Capt Edwards' acts of coercive control to "prove that the accused was motivated to and intended to control the actions of [K.E.] and [S.L.]." R. at 1385. The military judge provided no other instructions to the members explaining the relevance of this evidence. Thus, the evidence was not admitted and utilized by the members to show the circumstances of a relationship, the reactions of the named victim, or the decision-making process utilized by the named victim in reporting the incident. The military judge solely admitted the evidence to show a pattern of controlling behavior, which is entirely irrelevant to the alleged victim's legal state at the time of the incident in question (i.e. "asleep").

The Government also states that the military judge instructed the members that evidence of coercive control was offered to provide "necessary context" to the relationship between Capt Edwards and S.L. Gov. Ans. at 19. However, that was clearly *not* the instruction to the members provided by the military judge. In fact, the military judge instructed the members that "evidence regarding an alleged incident during which the accused may have struck his stepson" was provided to establish the context of the relationship. R. 1385. Evidence of this alleged incident involving his stepson is not subject to the assignments of error in this case. That said, the Government's misunderstanding in this regard provides a critical distinction – the military judge instructed the members that evidence of "coercive control" was only relevant to Capt Edwards' motivation and intent to control the actions and behaviors of S.L., not to provide context of their relationship. Thus, all arguments by the Government that the evidence supported the context of this relationship are overtaken by the military judge's very instruction at trial, in which the military judge

specifically omitted that language as it related to the evidence of coercive control. Along the same lines, the Government now argues that evidence of acts of coercive control was admissible to explain that S.L. was "pretending to sleep because she was scared and knew it would only make him madder." Gov. Ans. at 20. However, that was not the Government's argument at trial and has no relevance as it relates to whether Capt Edwards had sexual intercourse when he knew or reasonably should have known that S.L. was asleep. Regardless, at no point did the Government argue that Capt Edwards' controlling actions were offered to explain why S.L. pretended to be asleep at the time of the alleged offenses. Instead, the evidence was admitted for a specific purpose, as stated in the instruction to the members – "to prove that the accused was motivated to and intended to control the actions and behaviors of…[S.L.]." R. at 1385. Whether a victim felt "controlled," and whether an accused was motivated to exert control, is irrelevant as it relates to the legal condition of S.L. as it relates to Specifications 2 and 4 of Charge I. Thus, the military judge erred by failing to appropriately limit the admissibility of the Mil. R. Evid. 404(b) evidence in this case, prejudicing the accused by forcing him to defend against irrelevant evidence admitted to buttress unsupported allegations of sexual assault.

WHEREFORE, Capt Edwards respectfully requests that this Honorable Court set aside the findings as to Specifications 2 and 4 of Charge II, and set aside the sentence for each.

II.

SPECIFICATIONS 2 AND 4 OF CHARGE II ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THERE LACKS EVIDENCE THAT S.L. WAS ACTUALLY ASLEEP AT THE TIME OF THE ALLEGED OFFENSES.

The Government opened their analysis under this issue with there being "no credible basis . . . to disturb [Capt Edwards'] just verdict and sentence." Gov. Ans. at 25. The Government further asserted the panel had "ample evidence to convince them of [Capt Edwards'] guilt beyond

a reasonable doubt." *Id.* However, the panel acquitted Capt Edwards of a majority of the specifications of sexual assault—four out of six—allegations involving S.L. for which her credibility was equally at issue. The Government argues that S.L.'s testimony was sufficient, claiming that S.L. "was initially asleep when [Capt Edwards] began having sex with her and would then only *pretend* to be asleep *after* she was awoken to [Capt Edwards'] penis inside of her vagina." Gov. Ans. at 30. Here, as the Trial Counsel did in direct examination of S.L., the Government is replacing S.L.'s actual testimony with testimony of its own. As Capt Edwards detailed in his Opening Brief, S.L. never specifically testified that she was asleep when Capt Edwards allegedly penetrated her vulva with his penis. Instead, S.L. described the circumstances much different. She said that, on one occasion when she woke, Capt Edwards "started having sex with [her]." R. at 745. She stated that, on another occasion when she woke, he was "just starting to" have sex with her. R. at 841. All in all, the facts do not establish, beyond a reasonable doubt, that S.L. was actually asleep when Capt Edwards penetrated her vulva with his penis.

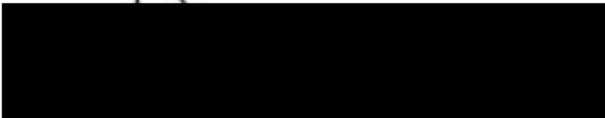
The Government's best argument on this issue is that, regarding one occasion, S.L. testified that when she awoke, Capt Edwards was "having sex with [her]." Gov. Ans. at 31; R. at 846-47. However, S.L. provided absolutely no context for this incident. She did not testify to where it occurred, when it occurred, or how it occurred. Of note, this was after she had previously described that after she woke up, he started to have sex with her. Instead, S.L. provided only vague answers to Trial Counsel's questions regarding this occurrence, and those answers do not provide sufficient evidence to conclude that the allegation of this single event was proven beyond a reasonable doubt.

Ultimately, both at trial and in its Answer to this Court, the Government replaces its needed conclusions with the testimony of S.L. Just as Trial Counsel led S.L. through direct examination, so does the Government here—putting words in S.L.'s mouth by concluding that what she must

have meant was different than what she ultimately testified to. Proof, in evidence, that S.L. was actually asleep is an element to the offenses charged and was simply not proven by the Government by the standard required.

WHEREFORE, Capt Edwards respectfully requests this Honorable Court set aside and dismiss Specifications 2 and 4 of Charge II, and set aside the sentence for each.

Respectfully submitted this 29th day of June, 2023.



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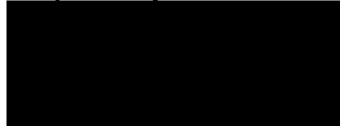
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 June 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40349**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Jordan S. EDWARDS	)	
Captain (O-3)	)	
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

TANICA S. BAGMON
Appellate Court Paralegal