IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	14 November 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **20 January 2023**. The record of trial was docketed with this Court on 22 September 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,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 November 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

14 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40343 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	12 January 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 February 2023**. The record of trial was docketed with this Court on 22 September 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan and Fairchild Air Force Base, Washington. He was convicted and sentenced by a panel of members. Contrary to his pleas, the members found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ);[1] one charge and one specification of attempted sexual abuse of a child, in violation of Article 80, UCMJ;[2] and one charge and one specification of willful dereliction of duty, in violation of Article 92, UCMJ. *Entry of Judgment in the Case of United States v. AB Daniel O. Gause-Radke*, dated 24 May 2022 (EOJ). Consistent with his pleas, the members also acquitted Appellant of one charge and three specifications of assault, in violation of

[1] The members acquitted Appellant of three specifications under this Charge.
[2] The members acquitted Appellant of one specification under this Charge.

Article 128, UCMJ. *Id*. The members sentenced Appellant to restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. EOJ. The convening authority reduced the restriction and hard labor to that which had already occurred. *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

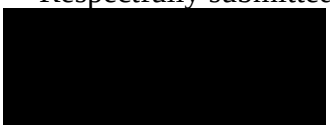
Respectfully submitted,

[redacted]
DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 January 2023.

Respectfully submitted,



DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

12 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40343 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	10 February 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 March 2023**. The record of trial was docketed with this Court on 22 September 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan and Fairchild Air Force Base, Washington. He was convicted and sentenced by a panel of members. Contrary to his pleas, the members found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ);[1] one charge and one specification of attempted sexual abuse of a child, in violation of Article 80, UCMJ;[2] and one charge and one specification of willful dereliction of duty, in violation of Article 92, UCMJ. *Entry of Judgment in the Case of United States v. AB Daniel O. Gause-Radke*, dated 24 May 2022 (EOJ). Consistent with his pleas, the members also acquitted Appellant of one charge and three specifications of assault, in violation of

[1] The members acquitted Appellant of three specifications under this Charge.
[2] The members acquitted Appellant of one specification under this Charge.

Article 128, UCMJ. *Id*. The members sentenced Appellant to restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. EOJ. The convening authority reduced the restriction and hard labor to that which had already occurred. *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

13 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40343 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	14 March 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 April 2023**. The record of trial was docketed with this Court on 22 September 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan and Fairchild Air Force Base, Washington. He was convicted and sentenced by a panel of members. Contrary to his pleas, the members found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ);[1] one charge and one specification of attempted sexual abuse of a child, in violation of Article 80, UCMJ;[2] and one charge and one specification of willful dereliction of duty, in violation of Article 92, UCMJ. *Entry of Judgment in the Case of United States v. AB Daniel O. Gause-Radke*, dated 24 May 2022 (EOJ). Consistent with his pleas, the

[1] The members acquitted Appellant of three specifications under this Charge.
[2] The members acquitted Appellant of one specification under this Charge.

members also acquitted Appellant of one charge and three specifications of assault, in violation of Article 128, UCMJ. *Id*. The members sentenced Appellant to restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. EOJ. The convening authority reduced the restriction and hard labor to that which had already occurred. *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 18 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Seven cases have priority over the present case:

1. *United States v. Nestor*, ACM 40250: The record of trial consists of six volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Counsel expects the Government to file its Answer on 16 March 2023 with Reply Brief to follow.
2. *United States v. Hernandez*, ACM 40287: The record of trial consists of five volumes. The transcript is 226 pages. There are seven Prosecution Exhibits, 27 Defense Exhibits, and 10 Appellate Exhibits. Counsel is writing the AOE brief.
3. *United Stats v. Portillos*, ACM 40305: The record of trial consists of three volumes. The transcript is 124 pages. There are four Prosecution Exhibits, eight Defense

Exhibits, 17 Appellate Exhibits, and one Court Exhibit. Counsel is currently reviewing the record.

4. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 1 May 2023.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 March 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

14 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40343 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	12 April 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 May 2023**. The record of trial was docketed with this Court on 22 September 2022. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan, and Fairchild Air Force Base, Washington. He was convicted and sentenced by a panel of members. Contrary to his pleas, the members found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ);[1] one charge and one specification of attempted sexual abuse of a child, in violation of Article 80, UCMJ;[2] and one charge and one specification of willful dereliction of duty, in violation of Article 92, UCMJ. *Entry of Judgment in the Case of United States v. AB Daniel O. Gause-Radke*, dated 24 May 2022 (EOJ). Consistent with his pleas, the

[1] The members acquitted Appellant of three specifications under this Charge.
[2] The members acquitted Appellant of one specification under this Charge.

members also acquitted Appellant of one charge and three specifications of assault, in violation of Article 128, UCMJ. *Id*. The members sentenced Appellant to restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. EOJ. The convening authority reduced the restriction and hard labor to that which had already occurred. *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 20 cases; 8 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Two cases have priority over the present case:

1. *United Stats v. Portillos*, ACM 40305: The record of trial consists of three volumes. The transcript is 124 pages. There are four Prosecution Exhibits, eight Defense Exhibits, 17 Appellate Exhibits, and one Court Exhibit. Counsel is finalizing the Brief on Behalf of Appellant for submission to this Court.
2. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 1 May 2023.

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,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 April 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40343**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Daniel O. GAUSE-RADKE	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 12 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 13th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **20 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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant.*	)	No. ACM 40343
	)	12 May 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 June 2023**. The record of trial was docketed with this Court on 22 September 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan, and Fairchild Air Force Base, Washington.[1] He elected to be tried and sentenced by a panel of members. Record (R.) at 31, 1076. Contrary to his pleas, the members found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ);[2] one charge and one specification of attempted sexual assault of a child, in violation of Article 80, UCMJ;[3] and one charge and one

[1] Venue changed from Misawa AB to Fairchild AFB due to host-nation complications arising from the COVID-19 global pandemic.
[2] The members acquitted Appellant of three specifications under this Charge.
[3] The members acquitted Appellant of one specification (attempted sexual abuse of a child) under this Charge.

specification of willful dereliction of duty, in violation of Article 92, UCMJ. R. at 1071. Consistent with his pleas, the members also acquitted Appellant of one charge and three specifications of assault, in violation of Article 128, UCMJ. *Id*. The members sentenced Appellant to a reprimand, forfeiture of $1,000.00 pay per month for three months, restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. R. at 1165. The convening authority reduced the restriction and hard labor to that which had already occurred. *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022.

The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Appellant is not currently in confinement.

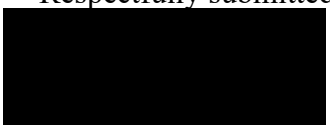
Counsel is currently assigned 17 cases; 7 cases are pending initial AOEs before this Court. Undersigned counsel has thoroughly reviewed the record of trial and has written a large majority of a lengthy brief on behalf of the client. Accordingly, an enlargement of time is necessary to complete and file Appellant's brief. Though, with no fault of Appellant, undersigned counsel has been working on other assigned matters. One case has priority over the present case:

1. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's supplement to the petition for grant of review is due to the Court of Appeals for the Armed Forces on 22 May 2023.

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,

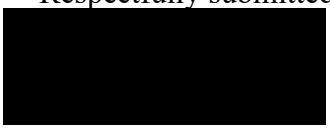


DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 May 2023.

Respectfully submitted,



DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force


12 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40343 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DANIEL O. GAUSE-RADKE
Airman Basic (E-1),
United States Air Force,
Appellant.

No. ACM 40343

BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Other

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant*.	)	No. ACM 40343
	)	Filed on: 7 June 2023

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

Assignments of Error

I.

WHETHER THE FINDINGS OF GUILTY FOR SPECIFICATIONS 1 AND 4 OF CHARGE I ARE FACTUALLY AND LEGALLY INSUFFICIENT?

II.

WHETHER THE FINDING OF GUILTY FOR SPECIFICATION 1 OF CHARGE II IS FACTUALLY AND LEGALLY INSUFFICIENT?

III.

WHETHER THE FINDING OF GUILTY FOR THE SPECIFICATION OF CHARGE IV IS FACTUALLY AND LEGALLY INSUFFICIENT?

Statement of the Case[1]

On 28 January 2022, and 4-9 April 2022, Appellant was tried by general court-martial at Misawa Air Base, Japan, and Fairchild Air Force Base, Washington.[2] He elected to be tried and sentenced by a panel of members. Record (R.) at 31, 1076. Contrary to his pleas, the members

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

[2] Venue changed from Misawa to Fairchild due to host-nation complications arising from the COVID-19 global pandemic.

found Appellant guilty of one charge and two specifications of sexual abuse of a child, in violation of Article 120b, UCMJ;[3] one charge and one specification of attempted sexual assault of a child, in violation of Article 80, UCMJ;[4] and one charge and one specification of willful dereliction of duty, in violation of Article 92, UCMJ. R. at 1071. Consistent with his pleas, the members acquitted Appellant of one charge and three specifications of assault, in violation of Article 128, UCMJ. *Id*. The members sentenced Appellant to a reprimand, forfeiture of $1,000.00 pay per month for three months, restriction for two months, hard labor without confinement for three months, and a dishonorable discharge. R. at 1165.

The convening authority reduced the restriction and hard labor to that which had already occurred by the time he took action.[5] Record of Trial (ROT) Vol. 1, *Decision on Action – United States v. AB Daniel O. Gause-Radke*, dated 10 May 2022. The military judge entered judgment accordingly. ROT Vol. 1, *Entry of Judgment in the Case of United States v. AB Daniel O. Gause-Radke*, dated 24 May 2022 (EOJ).

Statement of Facts

Overview

There are essentially two phases of the charged conduct in this case. The first phase, covering Charges I, III, and IV, involves the interactions between Appellant and BW. With Charge I, the Government accused Appellant of various strict liability offenses for allegedly committing

[3] The members acquitted Appellant of three specifications under this Charge.
[4] The members acquitted Appellant of one specification (attempted sexual abuse of a child) under this Charge.
[5] Without clarification in the record, it seems as if Appellant was illegally subjected to his restriction and hard labor without confinement before those punishments became effective upon entry of judgment. *See* Article 57(a)(6), UCMJ. It also seems as if Appellant's commander imposed this premature restriction more onerously than adjudged by the court-martial. *See* ROT Vol. 3, Clemency Submission of Matters, *U.S. v. Airman Daniel O. Gause-Radke*, dated 20 April 2022.

acts with BW, a female who had not attained the age of 16, at Misawa Air Base, Japan. ROT Vol. 1, Charge Sheet at 1, 3. Appellant was acquitted of three of these five allegations; the members only found Appellant guilty of touching BW's breast and intentionally exposing his genitalia to BW. R. at 1071. In Charge IV, the Government alleged Appellant was willfully derelict in the performance of his duties by allowing BW to enter his dorm room on Misawa in violation of local policy. ROT Vol. 1, Charge Sheet at 1, 3. The members convicted Appellant of this offense. R. at 1071. The touching of the breast was alleged to have occurred in Appellant's dorm room. Finally, as to the "Phase 1" offenses, the members acquitted Appellant of all three physical assaults alleged by BW. R. at 1071 (Charge III).

The second phase of the court-martial (Charge II) consists of a law enforcement operation seeking to induce Appellant to commit crimes with a person believed to be BW. Once BW's parents found out that she was involved in some type of in-person relationship with Appellant, they reported him to the Air Force Office of Special Investigations (OSI). R. at 493. BW did not want to report Appellant; it was solely the parents' decision. R. at 893. From there, OSI agents took control of BW's personal cell phone and her social media accounts and began an undercover operation as BW to entice Appellant to commit certain offenses. R. at 494. The Government alleged two different attempt crimes for these conversations in Charge II. ROT Vol. 1, Charge Sheet at 2. The members convicted Appellant of attempting to commit sexual assault of a child (attempted penetration of her vulva with his penis) when Appellant showed up in person to meet BW and found an OSI agent instead; they acquitted Appellant of attempting to commit sexual abuse of a child by indecent language. R. at 1071.

The record of trial contains no electronic messaging between the actual BW and Appellant; those conversations were not saved or do not exist. R. at 661. The conversations that were

admitted into evidence are conversations between Appellant and OSI Special Agent (SA) SS posing as BW. Prosecution Exhibits (Pros. Ex.) 2, 6; Defense Exhibit (Def. Ex.) E. Any evidence about what Appellant was told by the actual BW or would have known about BW's age came from her testimony at trial. R. at 306.

The two defenses deployed at trial were mistake of fact as to age and entrapment. *See*, *e.g.*, R. at 920 (findings instructions on mistake of fact as to age); R. at 929 (findings instructions on entrapment); R. at 995 (Defense closing argument). They both feature prominently in this appeal.

BW and Appellant in Real Life

BW lived on Misawa because her dad, a contractor, worked there. R. at 284. She attended Edgren Middle High School (EMHS). *Id*. Sixth through twelfth grades were combined in one school because the size of the student body did not support the existence of separate high schools and middle schools on Misawa. R. at 286. BW testified she was 13 years old in summer 2020 when she met Appellant, the summer between seventh and eighth grade. *Id*.

The two met at the Airman Family Readiness Center (AFRC) on Misawa. R. at 292. BW was waiting for her 16 year-old friend, a receptionist, to get off work. R. at 293, 341. Appellant came into the AFRC in uniform. *Id*. Appellant broke an "awkward silence" in the lobby by talking to BW about her cast. R. at 294. He then asked her what to do in the area because he had just moved to Misawa as a new Airman. *Id*. BW never told Appellant her age during this first meeting but may have indicated she was in middle school. R. at 295. BW confirmed she did not think Appellant was flirting with her. R. at 296. Appellant did not seek or get any of BW's contact information before departing. R. at 297. Although this was July 2020, three months into the COVID-19 pandemic, BW testified there were no requirements to wear a mask. R. at 342.

A few days later, he added her as a contact on Snapchat. R. at 300. Online social

engagement was especially important for connectedness because of the pandemic. R. at 350. Appellant added BW via a Snapchat feature called "quick add." R. at 343. The quick add feature indicates that the other person is nearby, and they share three or more mutual friends. R. at 773. This indicated to Appellant that he and BW at least shared several mutual friends. *Id*. BW did not remember what they talked about during their Snapchat conversations. R. at 303. BW and Appellant spoke regularly on the phone. R. at 304. She thinks she told Appellant she was 14 years old on Snapchat. *Id*. BW does not remember ever mentioning her age again. R. at 305. BW never told Appellant her age in person. R. at 306. BW listed on her Instagram profile she was in high school. R. at 379.

BW would often "hang out" with her brother's 17-year-old friends in high school. R. at 353. She knew her friends on the cheerleading team at least had "one night stands" with Airmen, if not actual relationships. R. at 352. BW was familiar with the concept of dating and "getting boys." R. at 351. BW's parents would be "pretty upset" and "wouldn't be happy" if they found out she was dating an Airman. R. at 355. BW had some sort of relationship with an Airman prior to meeting Appellant; BW's parents found out about him, and they kept a closer watch on her after that. R. at 356-57. BW's parents would check her phone once a month, and more frequently if she was grounded. R. at 353.

Appellant asked BW about her "older friends." R. at 305. The two discussed an older teenager (17-18 years old) named "Destiny" who was friends with BW's 17-year-old brother at the high school. *Id*. Appellant, though, quickly dismissed this because he already knew Destiny through Tinder, an 18+ dating application. R. at 349. Destiny was dating another Airman. R. at 353. BW testified the topic of their conversations became sexual in nature at this point. R. at 306.

She mentioned Appellant asked her for nude photos.[6] R. at 307. BW testified Appellant sent her a picture with his penis exposed.[7] R. at 310. BW did not offer this photo to OSI. Although OSI possessed BW's phone, it either did not look for or did not locate this picture. R. at 424. No photograph was admitted into evidence.

BW did not screenshot or save a single one of these conversations. R. 321. BW testified she was getting "more and more" uncomfortable as the conversations endured. R. at 319. Yet, she sent him photos and videos of herself in yoga pants. R. at 317. BW still continued to participate in the conversations in the face of this alleged discomfort. R. at 319. Despite the discussions being more sexual in nature, she also did not remove him as a friend on Snapchat. R. at 370. Instead, she agreed to come to his dorm room when he asked if she wanted to watch a movie. R. at 321. BW and Appellant never saw each other in person between initially meeting in the AFRC and this dorm room situation. R. at 346. According to her testimony, Appellant approached BW in person and invited her to his room. R. at 322. She did not think "there was going to be ill intent behind it," notwithstanding the aforementioned sexual conversations which made her "uncomfortable." *Id*. She thought "he was a friend, go over and watch a movie." *Id*. BW testified they went to his second-floor dorm room. R. at 324. In BW's first interview with OSI, she never mentioned going to his dorm room or anything that happened in it. R. at 371-72. She had just "forgotten" the "entire dorm room incident." R. at 373. BW regained "vivid detail ever since the interview." R. at 374.

Yet, as her testimony goes, the two sat on his bed in his room. R. at 325. BW testified Appellant kissed her on her cheek. R. at 327. She also testified he touched her bra covering her

[6] The members acquitted Appellant of this conduct. R. at 1071 (Charge I, Specification 5).
[7] The members convicted Appellant of this conduct. R. at 1071 (Charge I, Specification 4).

breast.[8] R. at 328. There was no skin to skin contact. R. at 328-29. BW then claimed her friend Destiny text messaged her and she left the dorm room. R. at 331. BW never testified Appellant touched her buttocks.[9] BW never testified Appellant caused her to touch his penis.[10] BW also testified to a series of alleged assaults, including Appellant throwing her on his shoulders and carrying her around base for an entire minute.[11] R. at 395. BW and Appellant "Facetimed" for about 30 minutes after the alleged assaults. R. at 422-23.

BW's brother found out about Appellant from rumors going around at the combined middle-high school. R. at 361. The brother then told BW's mother. R. at 360. The mother got "really upset." R. at 363. The mom found out BW had been lying about her age. *Id*. Only then did OSI get involved. R. at 409.

OSI Takes Over

SA SS was the OSI agent at Misawa who pretended to be BW on her phone in communications with Appellant. R. at 493. He previously attended all the regular OSI training at the Federal Law Enforcement Training Center (FLETC). R. at 486. He also attended a training for Internet Crimes Against Children (ICAC) operations. R. at 487-88. The training was mostly focused on the "do-nots," i.e., things that are illegal. R. at 488. In these ICAC operations, an agent messages a real-life individual to see if they would be willing to commit a crime against a child and, if so, they arrest the individual. R. at 651. SA SS admitted people lie all the time online. R. at 563. SA SS received training on entrapment. R. at 554. He understood entrapment is real and that it generates moral and ethical concerns on top of the obvious legal consequences. *Id*. The

[8] The members convicted Appellant of this conduct. R. at 1071 (Charge I, Specification 1).
[9] The members acquitted Appellant of this conduct. R. at 1071 (Charge I, Specification 2).
[10] The members acquitted Appellant of this conduct. R. at 1071 (Charge I, Specification 3).
[11] The members acquitted Appellant of this conduct. R. at 1071 (Charge III, Specifications 1-3).

agent agreed that the result of entrapment is inducing an innocent person to commit a crime. *Id*.

ICAC-style messaging is accomplished on typical social media platforms like Facebook Messenger, Snapchat, Kik, WhatsApp, and Whisper. R. at 488. There are two types of operations: an online persona (a complete fake identity created for the luring) and a "live victim" persona, where, as here, the agent takes over communications for an actual individual. R. at 489. Online personas are typically easier for the agent because the agent controls the entire relationship whereas the "baseline has already been set" for live victim takeovers. R. at 492. Of the ICAC operations done by SA SS, less than five were of the live victim variety like he attempted here with BW's persona. R. at 492-93.

SA SS expressed his understanding that he is supposed to introduce his age into the discussion as early as possible in these conversations. R. at 490. This is called an "age disclosure" and occurs when "the law enforcement agent [] discloses the age to the target of how old either your persona or the live victim is." R. at 556. Age disclosures can be "hard" or "soft." R. at 557. A hard disclosure provides an actual age like "I'm 13 years old." *Id*. Hard disclosures are required in ICAC operations. *Id*. They should be introduced "into the conversations as early as possible." R. at 559. Soft disclosures suggest an age or are indicative of an age without it being explicit, such as "I can't come over because I don't have a driver's license yet." R. at 558. Soft disclosures are "not enough." *Id*.

"Age reminders," where an agent repeats the persona's age, are also "great" to do, but not necessarily "required." R. at 560-61. Age reminders are a "best practice." R. at 561. The purpose of the age reminder is to ensure the target individual does not think they are speaking with a person of age, which would make the chats legal. R. at 562. Finally, "age confirmation" is getting the individual to confirm the underage disclosure. *Id*. SA SS does not seek age confirmation; instead

in response to the defense counsel's question, "How do you know they believe you [with regard to an age disclosure]," SA SS responded, "Doesn't matter." R. at 565. SA SS had never been taught—and said the concept did not make sense to him—to give the individual an "off-ramp," i.e., an opportunity not to commit the crime. R. at 569-71.

Agents are also not supposed to introduce a sexual topic that had not already been discussed by the suspect. *But see* Pros. Ex. 6 at 10-11 (SA SS bringing up oral sex and sexual intercourse by himself without Appellant introducing the concepts); R. at 717 (SA SS conceding he brought up sexual intercourse for the first time). If a topic is brought up by the suspect, however, it can be talked about "all day long." R. at 490. This is called "mirroring." R. at 572. As an example, SA SS testified that if an individual asked to watch a movie, an agent could not suggest oral sex as a response. R. at 491. In a live victim setting, the agent must necessarily rely on what the victim tells the agent about topics that have been previously brought up. If the live victim is untruthful, the agent is misinformed about what is actually a new topic as compared to what can be talked about "all day long." R. at 490, 580.

SA SS became involved in the operation when BW's parents came to OSI to allege Appellant had inappropriately interacted with their daughter. R. at 493. SA SS talked to the parents, got consent to take over her accounts, assumed her identity, and communicated with Appellant as BW without ever talking to BW herself. R. at 494, 593-94. SA SS admitted that these conversations with Appellant before he ever spoke with BW were "certainly potentially based on lies that were told to OSI." R. at 594. SA SS agreed a "strong argument could be made [that] she wasn't being completely forthright with OSI." R. at 590. SA SS also conceded he built "all of the information for this live person persona based on very shaky information." R. at 593. SA SS needed to do a clarification interview with BW because of the various factual problems that

had arisen in the conversation with Appellant. *Id*. Eventually, he talked with BW. R. at 495. He was limited on what he could do in that clarification interview because SA SS agreed that the "policies and procedures of OSI and just military law enforcement in general" was to not bring back an alleged victim to challenge their story. R. at 594-95. The same tactics that can be used when an agent disbelieves an accused are not allowed to be used to challenge a victim interview. R. at 597. As such, SA SS agreed he was "forced to essentially take that piece of evidence or that as fact that [BW] actually disclosed her age to [Appellant], [he was] required to essentially take that as fact or believe that happened." R. at 600. After some waffling on cross-examination, the following ensued:

> Q [DC]. So you had to essentially assume as a truth when she told law enforcement that she told [Appellant] she was 14, when she had potentially lied on other facts? On important facts?
>
> A [SA SS]. Correct.
>
> Q. Okay. And that's also problematic, isn't it?
>
> A. Correct.

R. at 601.

Prosecution Exhibit 2 is a Snapchat conversation between SA SS and Appellant.[12] BW named Appellant "Stupid" in her Snapchat. R. at 604. The conversation clearly designates that before SA SS's intervention, Appellant "unadded" BW from Snapchat, which means he deleted her as a contact, and they were no longer able to message. Pros. Ex. 2 at 1. Thus, in order to connect on Snapchat, SA SS proactively reached out to Appellant to reconnect. *Id*. SA SS agreed

[12] It is an incomplete set of messages. The Defense completed the full conversation. *See* Def. Ex. E. Defense Exhibit E (18 pages), picks up where Prosecution Exhibit 2 (9 pages) leaves off. The prosecution exhibit fails to show, *inter alia*, that a week elapsed between conversations, SA SS invited Appellant to Kik on multiple occasions before Appellant clicked on the link, and the extent of SA SS's encouragement to Appellant to click on the second link. *See* Def. Ex. E at 6-15.

that "when you un-add someone, that could be an indication that the individual does not want to communicate or talk to that person anymore." R. at 607. After SA SS re-established this social media connection,[13] Appellant expressed concern he was not actually talking to the real BW. Pros. Ex. 2 at 6 ("Am I even talking to [BW] rn?").[14] Appellant unequivocally stated, "I'm just gonna call it quits here I'm sorry I'm not trying to risk it." *Id*. at 5. Even after Appellant expressed doubts about who he was talking to and vowed an intent to "call it quits," SA SS persisted to communicate on Snapchat. R. at 501. SA SS continued in spite of his acknowledgement that his "training indicates that that is a clear indication [Appellant] did not want to have anything to do with [BW]." R. at 613. There was "an individual clearly indicat[ing] he doesn't have any intent to proceed further." *Id*. SA SS further agreed there was "nothing to indicate there was any desire for future activity with [BW]." R. at 614. However, on cross-examination, SA SS would not concede his next message to Appellant after Appellant wanted to call it quits ("Well that's dumb.") was an encouragement to continue the conversation. R. at 616.

After Appellant wanted to "call it quits," SA SS created a new user profile on an application called "Kik," and provided that link to Appellant. Pros. Ex. 2 at 7. Kik is a generic chatting application where one "can engage in conversation with anyone once you know their username." R. at 502. Almost a week elapsed between August 7th when the SA SS sent the Kik invitation and August 13th when Appellant clicked on that link. *Compare* Pros. Ex. 2 and Def. Ex. E *with* Pros. Ex. 6. SA SS had to send the link for Kik two times before Appellant clicked on it. R. at 631. Even at that point, Appellant asked to Facetime because he was not confident that he was talking to the actual BW. R. at 631; Def. Ex. E at 16.

[13] SA SS agreed this "re-add" was him "reinitiating with [Appellant.]" R. at 608.
[14] "Rn" means "right now."

The conversation between Appellant and SA SS on Kik is captured in Prosecution Exhibit 6.[15] Again, Appellant asked to Facetime BW right away; SA SS declined and called Appellant a "weirdo" for suggesting it. Pros. Ex. 6 at 1. Appellant suggested going for "a drive" or "a movie dinner." *Id*. at 1. He wanted to drive around and see the caves. *Id*. SA SS redirected to the dinner and movie option, preferring to watch a movie in Appellant's room[16] instead of the base theatre as Appellant suggested. *Id*. at 2. When SA SS said, "would we go to your room," Appellant answered "Yah that's where my tv [is.]" *Id*. SA SS asked, "Is your tv big lol[?]" to which Appellant responded by sending a photo of his actual tv monitor.[17] *Id*.

At this point in the conversation when they were talking about what they would do in Appellant's bedroom—the two had been talking for a week—SA SS had not given a single required hard age disclosure or requested an age confirmation. R. at 646-47. SA SS was still going off the in person "base-line" between BW and Appellant that BW did, in fact, tell Appellant her actual age, but also agreed he had "no baseline at all" because BW lied to OSI about her interactions in real life with Appellant. R. at 647; *see also* R. at 647-49 (defense counsel confronting SA SS about his continued assertion that BW had told Appellant her real age in person in the face of the many lies BW told OSI). SA SS continued, "Some things didn't match up, sure. But was I like, I'm throwing all of her credibility out the window[?] No, I had no reason not to believe she was not credible." R. at 671-72. He chose to believe her even though she had lied

[15] There are four screen shots per page, read sequentially in the order of: 1) top left; 2) top right; 3) bottom left; and 4) bottom right.
[16] When SA SS started chatting with Appellant on Snapchat and Kik, he did not know BW had been to Appellant's room because BW failed to disclose that entire event and in fact suggested she had never been to his room. R. at 589, 634. SA SS agreed he introduced the topic of the room, but he would not concede that suggestion was geared towards a sexual purpose. R. at 638-39.
[17] On cross-examination, defense counsel challenged SA SS as to whether "is your tv big lol" was a sexual innuendo in reference to penis size. R at 643. SA SS would not concede it was. R. at 644.

because of his "experience working child cases previously." R. at 672.

On Kik, SA SS suggested they meet on base by the bowling alley. Pros. Ex. 6 at 3. The agent alluded to "other guys" BW was messaging. *Id*. SA SS did not concede the "other guys" comment was designed to make BW seem older. R. at 653. The two discussed which movies they would watch, with SA SS confirming it would be in Appellant's room. Pros. Ex. 6 at 4. A couple days passed, and nothing happened. *Id*. at 4-6.

Then, SA SS first disclosed his age to Appellant when he wrote, "I'm actually 13 not 14 but ima be 14 in like 3 months so I'm pretty much 14." *Id*. at 7. Appellant immediately responded, "You told me 16 before." *Id*. Appellant continued, "I swear you did." *Id*. At trial, SA SS testified that Appellant's assertion that BW had previously told him she was 16 took him by surprise because BW told OSI something entirely different. R. at 508. This surprise was "clearly [] indicative that [BW] told him she was 16 before." R. at 673-74. Confronted with this new information, SA SS still did not request an age confirmation because it "didn't matter to [him]." R. at 675-76. SA SS testified he was not "focused" on whether or not Appellant believed BW was 13; he was only concerned that he disclosed the age. R. at 677. Instead of doing an age confirmation, SA SS did "almost the opposite" and stated, "I never told you 16 lol." R. at 678; Pros. Ex. 6 at 7. After this, there were no more discussions about age. R. at 682.

After the age disclosure, again wondering who he was speaking with, Appellant requested to Facetime. Pros. Ex. 6 at 7. Several more days passed with no meaningful advancement in the conversation. *Id*. at 7-9. At this point, SA SS confirmed there was nothing in the conversations about sex.[18] R. at 684. But, in the Kik chat, SA SS suggested BW would stay in the dorm room

[18] Even though sex had not been mentioned in the Kik chat, the operational plan to arrest Appellant was already underway. R. at 684.

overnight. Pros. Ex. 6 at 9. The agent suggested Netflix.[19] *Id*. SA SS said he was "nervous" to come to the room. *Id*. Appellant wrote, "[BW] I'm not going to push you to do anything you don't wanna do I don't want you to come over just for that kinda stuff." *Id*. at 10. SA SS asked Appellant to "teach [her] how to do things?"[20] *Id*. In response to the question "What exactly would you do to me? Lol," Appellant responded "Find out tomorrow. I'd make you popcorn and braid your hair while we watch a movie." *Id*. Though later admitting Appellant's intent was not sexual when he was talking about braiding hair and watching movies (R. at 706), SA SS changed to topic of conversation to oral sex. Pros. Ex. 6 at 10.

> Q [DC]. And we can agree Special Agent, that the term going down on me is to oral -- some form of oral sex. Is that right?
>
> A [SA SS]. Correct. That is correct.
>
> Q. Nowhere in these chats is oral sex discussed until you brought it up, is that correct?
>
> A. That is correct.
>
> Q. Okay. [Appellant] brings up popcorn, movies, and hair braiding. Right?
>
> A. Correct.
>
> Q. You bring up oral sex?
>
> A. That was previously mentioned in person between the two.
>
> Q. You have no proof or confirmation that that was brought up in person?
>
> A. Based off the information that I was provided by [BW].
>
> Q. Based on someone that had a history of lying to law enforcement. Is that correct?
>
> A. Correct.

[19] *See* R. at 690-91 for a discussion of what the slang term "Netflix and chill" means.
[20] SA SS, after pages of confrontation (R. at 702-04), would not concede the question "So would you teach me how to do things?" was sexual in nature. R. at 704 ("There is nothing sexual about that message at all.").

R. at 707-08; *see also* R. at 708-09 (cross-examination crystallizing SA SS introduced concepts into the Kik conversation for which he had no confirmation had ever been discussed in real life). Defense counsel asked, "And we'll never know, will we, if you didn't bring up sex, if this conversation would have ever turned sexual. We don't know. Is that right?" R. at 709. SA SS reluctantly responded, "I mean, I guess you're right. We would never know." *Id*. Defense counsel also challenged SA SS on BW's motive to fabricate, i.e., being a grounded teenager, in trouble with her parents, losing social media privileges, and having rumors swirl about her in a small school. R. at 711-12. To this, SA SS remarked, "As a law enforcement agent, it's not my job to determine if someone has a motive to fabricate. I obtain the facts and go forward." R. at 712.

The oral sex conversation prompted a back-and-forth exchange about various sexual acts, with SA SS asking what foreplay was. Pros. Ex. 6 at 11. Appellant screenshotted a website from Planned Parenthood about foreplay. *Id*. SA SS brought up sexual intercourse, pregnancy, and condoms. *Id*. On cross-examination, SA SS conceded there was "absolutely no conversation in the chat about intercourse, penile, vaginal, penetration" until he brought it up to Appellant. R. at 715. Once SA SS introduced the topic of sexual intercourse into the conversation and asked, "Do I need to bring anything tomorrow or do anything before?" Appellant responded, "Shave." Pros. Ex. 6 at 11. Defense counsel challenged SA SS about the need for an age confirmation at this point, suggesting that the need to shave would have been for an older teenaged female as opposed to a 13 year-old who may have just started puberty. R. at 720-21. SA SS did not do so, despite agreeing with defense counsel "this will also be a very good time to do another age disclosure or age reminder." R. at 720; Pros. Ex. 6 at 12.

At this point, the "take down operation [was] well underway" and there was never a secondary age disclosure, age confirmation, or age reminder. R. at 721. The rest of the

conversation on Kik involved setting up a time and place to meet. Pros. Ex. 6 at 12-13. SA SS neglected to save the final chats between him and Appellant; no record of those exists. R. at 722-23. No one knows exactly what was said immediately before the "take-down." R. at 724.

OSI secured a house on Misawa AB for the meet up to occur; this was called Operation Gentle Dragon. R. at 512, 666. When Appellant showed up at the house, armed OSI agents arrested him. R. at 725. Appellant did not resist arrest. *Id*. SA SS testified agents found an energy drink and condoms in the car; however, the military judge sustained a defense-lodged objection to Prosecution Exhibits 7 and 8 (photographs of the supposedly seized items) for chain of custody and foundation issues. R. at 523-24.

Appellant's Subject Interview at OSI

OSI agents transported Appellant to their detachment headquarters and placed him inside an interrogation room. R. at 726. He was not free to leave. R. at 729. The object of bringing a subject into the station for interrogation is to get them to admit to the conduct.[21] R. at 730. Agents did not read Appellant his rights for about 20 minutes; instead, they sought to build rapport. *Id*. Appellant's interrogation with OSI was admitted into evidence as Prosecution Exhibit 11; the Government edited out the rapport building from the disc it offered into evidence. R. at 732.

Appellant waived his rights to remain silent and to an attorney. R. at 736. He said, "yea, I'm happy to talk to you." *Id*. Appellant willingly unlocked his phone, removed the passcode, and provided consent to search his phone.[22] R. at 770. SA SS was "adamant about getting him to make an admission that he wanted sex with a minor, because that's what he was there for." R. at 736. Appellant wrote a statement and an apology letter at the agent's request. Pros. Ex. 9, 10.

[21] At one point, SA SS testified his intent was to get the "truth" from Appellant but did not see the need to do the same with BW. R. at 735.
[22] The Government did not offer any evidence resulting from a search of Appellant's phone.

Appellant wrote he "touched her boobs." Pros Ex. 9 at 3. The statement did not indicate whether he touched the breast directly or through the clothing. The agents asked him "So did you grab her breasts?" R. at 798. Appellant said, "Yes." *Id*. SA SS clarified, "Over the shirt or under the shirt? Or both?" *Id*. Appellant said, "Both." *Id*. Appellant did not indicate whether he touched the breast directly or through the clothing, just that it was over the shirt and under the shirt. After initially denying it, Appellant admitted to sending one picture of his penis to BW. R. at 795.

Appellant wrote, "I went to meet with her to watch movies and catch up and potentially have sex if she wanted it." Pros. Ex. 9 at 3. Appellant also described his understanding of BW's age with the agents:

> [Appellant]: I would have constantly had that thinking back -- because she told at first, I think she said 16. And then lied and said 15. And lied and said 14. So, keep pushing back, I really don't know her age ----
>
> [SA SS]: Right.
>
> [Appellant]: And so thinking about it, and -- I wouldn't have sex with her.

R. at 793.

In his statement, Appellant wrote, "I believe she was older[.] [S]he kept changing her age as the longer we talked." Pros. Ex. 9 at 3. Defense counsel asked SA SS if it concerned him Appellant thought BW was older; the agent replied, "No." R. at 742-43. The written statement does not assert how old Appellant thought BW was. R. at 745. The apology letter also did not contain any indication of Appellant's knowledge of BW's age. Pros. Ex. 10 at 1. He signed the apology letter, "Senserly, Daniel." *Id*.

Additional facts are offered below, as necessary.

Argument

I.

THE FINDINGS OF GUILTY FOR SPECIFICATIONS 1 AND 4 OF CHARGE I ARE FACTUALLY AND LEGALLY INSUFFICIENT.

Standard of Review

Issues of legal and factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "[A]ssessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citations omitted).

Law

A. Legal and Factual Sufficiency generally.

"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). "[I]n resolving questions of legal sufficiency, [a CCA is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). "The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the CCA is] convinced of the appellant's guilt beyond a reasonable doubt." *Rodela*, 82 M.J. at 525 (alterations, internal quotation marks, and citation omitted). "In conducting this unique appellate role, [a CCA] take[s] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [an] independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id*. (internal quotation marks and citations omitted).

B. Statutes, Rules, Definitions, and Defenses.

"Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." Article 120b(c), UCMJ. A child means "any person who has not attained the age of 16 years." Article 120b(h)(4), UCMJ. There are four different ways the UCMJ defines "lewd act." They are sexual contact with a child, intentional exposure of certain body parts to a child, intentionally communicating indecent language to a child, and indecent conduct. Article 120b(h)(5)(A)-(D). Due to the mixed verdict in this case, only "sexual contact" and "intentional exposure" are relevant to this appeal. *See* R. at 1071.

Specification 1 of Charge I alleged Appellant committed "a lewd act upon [BW], a child who had not attained the age of 16 years, by touching the breast of [BW] with [Appellant's] hand . . . with an intent to gratify the sexual desire of [Appellant]." ROT Vol. 1, Charge Sheet at 1. "Sexual contact" in Article 120b, UCMJ, means the same thing as it does under Article 120, UCMJ. Article 120b(h)(1). "The term 'sexual contact' means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object." Article 120(g)(2), UCMJ.

Specification 4 of Charge I alleged Appellant committed "a lewd act upon [BW], a child who had not attained the age of 16 years, by intentionally exposing his genitalia to [BW], with an intent to gratify the sexual desire of [Appellant]." ROT Vol. 1, Charge Sheet at 3. The intentional exposure of genitalia to a child may occur "by any means, including via any communication technology." Article 120b(h)(5)(B), UCMJ. The specification did not allege the means of the

exposure, namely whether the intentional exposure was live or via communication technology. ROT Vol. 1, Charge Sheet at 3.

> Mistake of fact as to age is a defense to a prosecution under Article 120b, UCMJ.
>
> [I]t need not be proven that the accused knew that the other person engaging in the [] lewd act had not attained the age of 16 years, but it is a defense in a prosecution [for] sexual abuse of a child, which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

Article 120b(d)(2), UCMJ; *see also* R.C.M. 916(b)(3) (same), R.C.M. 916(j)(2) (same). In a split opinion, this Court recently affirmed the findings of guilt in an Article 120b, UCMJ, prosecution where the theory on appeal was the appellant honestly and reasonably believed the person with whom he had sexual relations was over the age of 16. *See United States v. Thompson*, No. ACM 40019 (rem), 2023 CCA LEXIS 210 (A.F. Ct. Crim. App. 18 May 2023) (unpub. op.). Judge Gruen dissented and would have found the convictions factually insufficient. *Id*. at *19 (Gruen, J., dissenting). In her view, the "totality of the circumstances presented in the record of trial [left her] convinced that Appellant met his burden to prove by a preponderance of evidence that he had a reasonable mistake of fact regarding VP's age."); *see also id*. at *19-23 (explaining the facts in the record supporting this conclusion).

C. Sufficiency of pleading.

The military is a notice pleading jurisdiction. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). "It is the government's responsibility, by virtue of its control of the charge sheet, to place the accused on notice of the offense he must defend against." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citation omitted).

"A charge and specification will be found sufficient if they, 'first, contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend,

and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Fosler*, 70 M.J. at 229 (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). This criteria has been codified in court-martial procedure. *See* R.C.M. 307(c)(3).

A "certain degree of specificity and accuracy is required" and such a "step is essential to the fundamental fairness of the criminal justice process because it provides an accused with adequate and proper notice of the government's proffer of evidence, and thereby informs the accused of what he or she needs to defend against at trial." *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022). "The defense [is] entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *Id*. at 140 (citing *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017)).

D. The Charge Sheet and Due Process.

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 422 U.S. 100, 106 (1979). Indeed, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. at 107 (*quoting Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). "[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *United States v. Girouard*, 60 M.J. 5, 10 (C.A.A.F. 2011). "To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added) (internal citations omitted).

"There is no dispute that the government controls the charge sheet . . . ." *Reese*, 76 M.J. at 301. In fact, as the Court of Appeals for the Armed Forces (CAAF) unanimously observed, the government has "complete discretion" over how to charge an accused and the Government "accept[s] the risk" that an appellant may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021); *see also United States v. Turner*, 79 M.J. 401, 410 (C.A.A.F. 2020) (Maggs, J., dissenting) (insisting upon the importance of "those with responsibility for drafting the charge and specification to take the care necessary to avoid errors.").

Analysis

The findings of guilty for Specifications 1 and 4 of Charge I are factually and legally insufficient because, by a preponderance of the evidence, Appellant demonstrated that he actually and reasonably believed BW was at least 16 years of age. Individually, the specifications are also insufficient. Regarding Specification 1 (touching the breast), the evidence demonstrated that any contact of the chest region happened above the bra. However, because the Government specifically chose to charge "sexual contact" by touching "the breast" itself, the finding for this specification is factually and legally insufficient. Finally, regarding Specification 4 (intentional exposure), the Government's charging scheme failed to identify if such exposure was in person or via communication technology, as Due Process and fair notice required. It also lacked sufficient proof of the exposure. The Charge and Specifications must be set aside and dismissed, with prejudice.

A. The findings of guilty for Specifications 1 and 4 of Charge I are factually and legally insufficient because Appellant satisfied his burden to establish a mistake of fact as to age defense.

It is a complete defense to all specifications in Charge I if Appellant proved by a preponderance of the evidence that he honestly and reasonably believed BW was 16 years old. Article 120b(d)(2), UCMJ; R.C.M. 916(b)(3), R.C.M. (j)(2). Appellant satisfied this burden.

1. The mistake was honest.

The evidence demonstrates it is more likely than not Appellant was mistaken as to BW's age. The most probative piece of evidence is the Kik messaging after the first and only hard age disclosure from SA SS, where Appellant responds, "You told me 16 before." Pros. Ex. 6 at 7. He then tellingly stated, "I swear you did." *Id*. This response was immediate and exculpatory. It came under the circumstances where Appellant did not know he was talking to law enforcement. He did not know he was under investigation. He did not even know what the legal age of consent was. Under these circumstances where he does not know he is under investigation, thought he was talking to BW, and did not know the legal threshold, 16 is not just a convenient number to get himself out of criminal liability. Appellant said, "You told me 16 before," because BW told him she was 16. It is that simple.

In his statement to OSI, Appellant later wrote, "I believe she was older[.] [S]he kept changing her age as the longer we talked." Pros. Ex. 9 at 3. Really, the only question is if it was reasonable for him to think so. Due to BW's credibility issues, and the additional factual reference points below, it was reasonable—at the very least, to a preponderance standard. In terms of Article 120b(d)(2), UCMJ, R.C.M. 916(b)(3), and R.C.M. 916(j)(2), this Court can conclude from this message that Appellant honestly believed she was 16.

2. The mistake was reasonable.

The following recitation of facts in this record of trial demonstrate Appellant's honestly held belief was objectively reasonable—at least to the preponderance of the evidence standard. This non-exhaustive list should be considered, along with anything this Court finds appropriate, to determine in aggregate whether the Defense eclipsed its 50.1% threshold burden to establish the affirmative defense. No one fact controls the day; together they show that anyone in Appellant's position—especially a first-term 19-year-old Airman from Arkansas, in a global pandemic, across the ocean and away from home for the first time—would have been so mistaken.

1. BW attended a school, EMHS, that combined middle school and high school. R. at 284-86. With grades six-twelve combined students at that school ranged from about twelve-eighteen years old.
2. BW's Instagram profile only showed that she was in high school attending "EHS." R. at 379. Thus, it appears she dropped the middle school designation to make it look like she was in high school.
3. In their first meeting at the AFRC, BW never told Appellant her age. R. at 295.
4. Appellant added BW as a contact on Snapchat with the "quick add" feature. R. at 343. The quick add feature indicates that the other person is nearby, and they share three or more mutual friends. R. at 773. Because Appellant was 19 years old, connected to other younger Airmen who would have been at least 18 years old, his mutual friends would certainly have been more likely to have been over the age of 16 than under the age of 16. Appellant's Snapchat friends would most likely be Airmen. This means that BW was also friends with older Airmen or, at least, she was friends with older high school students such that she would have mutual friends with Appellant.
5. BW would often "hang out" with her brother's 17-year-old friends in high school. R. at 353. She knew her friends on the cheerleading team at least had "one night stands" with Airmen, if not actual relationships. R. at 352.
6. BW was familiar with the concept of dating and "getting boys." R. at 351.
7. BW had some sort of a relationship with an Airman prior to Appellant. R. at 356. This would indicate to Appellant that either BW was older, or at least, another Airman thought so too.
8. Appellant and BW discussed an older teenager (17-18 years old) named "Destiny" who was friends with BW's 17-year-old brother at the high school. R. at 305. Appellant, already knew Destiny through Tinder, an 18+ dating application. R. at 349. Destiny was dating another Airman. R. at 353. This set of facts together would make Appellant think BW was at least 16 if her friends were 17 or 18 year olds. If her friend was on an 18+

dating application like Tinder, it would again indicate that BW herself was older, or at the very least, surrounding herself with older people.

In *Thompson*, the appellant met an individual on an 18+ chatting application, they texted vociferously for two months without her telling him her age, she discussed drinking and using edible marijuana, and she claimed to be a college student who participated in international travel. Respectfully, there is much more evidence demonstrating the reasonableness of any mistake on Appellant's part than existed in *Thompson*, where this Court split on the issue. *Thompson*, unpub. op. at *19. If this esteemed judges of this Court divided on this issue in that case, Appellant's case merits a finding of legal and/or factual insufficiency in the other direction.

In aggregate, the Defense elicited enough evidence to surpass the preponderance standard, a standard in application that is not that difficult to overcome. *See Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and concurring in the judgment) ("This instruction plainly informs the jurors that the prosecution must prove its case by more than a *mere preponderance* of the evidence, yet not necessarily to an absolute certainty.") (emphasis added). Though these facts already carry the day, it is also appropriate to consider what evidence the Government offered to support an argument that any mistaken belief was objectively unreasonable. That analysis, too, generates the same conclusion: the mistake of fact defense applies to all of Charge I.

3. The Government's evidence does not negate the applicable defense.

The Government provided no objectively-verified indication Appellant knew BW was under 16 or that it would have been unreasonable for him to think she was at least 16. There are no Snapchats. Appellant never responded in the Kik conversations saying he knew she was under 16; in fact, he says the opposite. Pros. Ex. 6 at 7 ("You told me 16 before."). Appellant's written statements (Pros. Ex. 9, 10) do not confirm he knew she was underage. To the contrary, Appellant

wrote, "I believe she was older[.] [S]he kept changing her age as the longer we talked." Pros. Ex. 9 at 3. He also told SA SS, "I would have constantly had that thinking back -- because she told at first, I think she said 16. And then lied and said 15. And lied and said 14. So, keep pushing back, I really don't know her age." R. at 793. All of these pieces of evidence *offered by the Government* not only fail to dispel the mistake of fact as to age defense, but actually make the defense for Appellant.

The *only* evidence that Appellant "knew" BW's age comes from BW herself. BW claimed she told Appellant on Snapchat she was 14 years old. R. at 304. She admits she never spoke of her age again. R. at 305. What this means—*at best*—taking BW's claims at face value, she only told Appellant her age *one time*. That's it. Moreover, this one supposed disclosure would have been provided in light of the factual context discussed above, one in which the overwhelming conclusion would be that BW was at least 16 if not 17 or 18 years old. This single disclosure would not necessarily negate the host of other evidence which identified BW as someone who was older. *Supra* at 24-25.

Moreover, BW is far from credible, and this Court should be reluctant to take her word for it that she disclosed her actual age to Appellant. Defense counsel thoroughly exposed her lies on many occasions throughout the litigation. A rather telling exchange between defense counsel and SA SS—one of probably at least a dozen or so exchanges—demonstrates the point:

> Q [DC]. So you had to essentially assume as a truth when she told law enforcement that she told [Appellant] she was 14, when she had potentially lied on other facts? On important facts?
>
> A [SA SS]. Correct.
>
> Q. Okay. And that's also problematic, isn't it?
>
> A. Correct.

R. at 601. On top of lies, BW possessed a firm and definitive motive to fabricate, although SA SS said it was not his job to ascertain that.[23] R. at 712. BW was a young teenager, in a small high school with rumors spreading about her, she was getting in trouble with her mom, and she was grounded without social media privileges. R. at 711-12. To a 13 year old during the onset of the pandemic, that can be the world. If this Court concludes, as it should, that BW was not a credible witness, there is no longer any evidence which negates this defense. And *even if* this Court concludes as a factual matter that BW told Appellant her age in person on one occasion, there is a still enough evidence for Appellant to have met his burden to prove he was honestly and reasonably mistaken as to her age by a preponderance of the evidence.

4. Conclusion.

Because Appellant satisfied his burden to prove he was mistaken as to BW's age, the findings of guilty for both Specifications 1 and 4 of Charge I must be set aside and dismissed, with prejudice. If this Court agrees regarding mistake of fact as to age, the arguments below in sections (B) and (C) are moot. Moreover, practically speaking, if this Court agrees Appellant met his burden of mistake of fact as to age in this assignment of error, it is dispositive of Issue II, *infra,* too because the mistake of fact as to age within the context of Charge II is much easier for Appellant to satisfy for two reasons. First, the charged and convicted attempt in Charge II required specific intent to commit sexual assault upon a child. If Appellant honestly and reasonably believed BW was 16 at a preponderance standard, the Government did not prove beyond a

[23] Appellant takes issue with SA SS, a federal law enforcement agent, declaring under oath that it is "not [his] job to determine if someone has a motive to fabricate." R. at 712. A law enforcement agent *must* consider the likelihood or unlikelihood of an allegation brought to his or her attention. This *must* necessarily include the accuser's motive to fabricate, bias, and veracity. It was an abdication of his evidence collecting and report authoring function to blatantly disregard such considerations.

reasonable doubt Appellant had a specific intent to have sex with a child,[24] nor did it prove beyond a reasonable doubt Appellant did not have an honest belief BW was 16.[25] Second, in the context of entrapment, there would be no evidence Appellant was predisposed to engage in sexual acts with a child if all of his communications were with someone who he thought was 16 years old.

B. The finding of guilty for Specification 1 of Charge I is factually and legally insufficient because the evidence and specification do not align.

The Government did not prove what it charged. Specification 1 of Charge I alleged Appellant committed "a lewd act upon [BW], a child who had not attained the age of 16 years, by *touching the breast* of [BW] with [Appellant's] hand . . . with an intent to gratify the sexual desire of [Appellant]." ROT Vol. 1, Charge Sheet at 1 (emphasis added). Sexual contact can occur when a touching, either directly or through the clothing, contacts a specific body part, including the breast. Article 120(g)(2), UCMJ.

The specification alleged Appellant touched BW's breast, BW's actual anatomical body part, and not the clothing that covers it. Proof that Appellant touched BW's actual breast is what was factually and legally required for sufficiency as charged, but the evidence said something different. BW's testimony was that Appellant's hand touched the outside of her sports bra which covered her breast. R. at 328-29. This was a very specific description elicited by the circuit trial counsel in her direct examination. Nowhere in her testimony did BW claim Appellant touched her breast directly. Appellant's admissions tell the same story. Whether it be what he told OSI agents

[24] If that were the case, Appellant's specific intent would be to have sex with a 16 year old, an act not criminal.

[25] As discussed below, because attempt is a specific intent crime, the mistake of fact as to age need only have been honest. R.C.M. 916(j)(1). It need not also have been reasonable under the circumstances. *Id*.

in his interview (R. at 798) or what he wrote on his witness statement (Pros. Ex. 9 at 3), Appellant only confirms he touched the breast underneath the shirt, but over the bra.

That is legally and factually deficient under this charging scheme. Appellant's conviction of this specification would have been sufficient if the Government charged Appellant with "commit[ing] a lewd act . . . by touching the breast of [BW] through the clothing. . . ." But it did not charge Appellant that way. Just because Appellant's actions *could* yield criminal liability if charged a certain way does not mean Appellant's conviction under *this charging scheme* is factually and legally sufficient. Said another way, just because *the definition* of sexual contact includes touching of a certain body part directly or through the clothing, that does not mean any *specification* involving touching authorizes both possibilities. The Government limited itself with its charge sheet and the Defense reasonably received its notice from that charging decision. *Armstrong*, 77 M.J. at 469.

The Government, who maintained exclusive and absolute prosecutorial discretion to charge the case on *its* charge sheet exactly how it saw fit, must live with the natural and foreseeable consequences of its chosen language. *See Mader*, 81 M.J. at 108. By choosing to only specify "breast" in the specification, the Government "accepted the risk" that if the evidence did not indicate the flesh of the breast was touched, Appellant would be acquitted. *Id.*; *see also Turner*, 79 M.J. at 410 (C.A.A.F. 2020) (Maggs, J., dissenting). The distinction between touching directly or through the clothing is not significantly different than the distinction between touching a penis with a hand versus touching a penis with a mouth, the modification at issue in *Reese* itself. 76 M.J. at 299. In both cases, it is the "means" by which crime was committed, i.e., how the crime occurred. If such a change would be a major change under R.C.M. 603 as it was in *Reese*, it would also have been a major change for the Government to request the language "through the clothing"

be added to the specification after the Government concluded its case. *See also Simmons*, 82 M.J. at 141 (holding a modification after the presentation of evidence and the Government rested its case was a "major change," and thus, impermissible).

Simply, the Government did not prove what it charged. The finding of guilty must be set aside and dismissed, with prejudice.

C. The finding of guilty for Specification 4 of Charge I is factually and legally insufficient because the Government failed to plead the means by which any indecent exposure occurred, and the evidence of such exposure is lacking.

1. The charge sheet.

For this specification, the intentional exposure may have occurred in person or via communication technology. Article 120b(h)(5)(B), UCMJ. In Specification 4 of Charge I, the Government alleged neither; it merely alleged Appellant exposed himself to BW but did not allege how. ROT Vol. 1, Charge Sheet at 3. Fundamentally, this is a problem of notice. *See Dunn*, *Armstrong*, *Reese*, *Mader*, *Simmons supra*.

The Government did not identify the method of exposure on its charging document. The charge sheet itself—the Defense's principal form of notice (*see Armstrong*, 77 M.J. at 469)—induces the belief that the exposure was alleged to have occurred in person and not via communication technology. Specification 3—immediately preceding this specification—alleged sexual abuse of a child by sexual contact, to wit: causing BW to touch Appellant's penis. ROT Vol. 1, Charge Sheet at 3. Specification 4, at issue here, then alleges intentional exposure of the penis. The specifications cover the same date range in the same location. The reasonable inference and logical deductive reasoning one would employ when reading these specifications consecutively is that intentional exposure of the penis and Appellant causing BW to touch his penis are successive acts in the same place at the same time, especially considering the date range and

location are identical in both specifications. Factually, this could have occurred by BW touching Appellant's penis then his pants coming off thereby leaving him exposed, or alternatively, Appellant's pants coming off exposing his penis leading to BW's hand touching his penis. Either way, from a notice perspective, the specifications appear to be linked.

In order for the Defense to adequately and constitutionally on notice, the Government had to designate whether the intentional exposure was live or via communication technology. To not do so would criminalize two different behaviors in the same specification, or by analogy, put two hooks on the end of a single fishing line. The purpose of notice pleading is to inform a defendant of the exact charge against which he must defend and allow him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Fosler*, 70 M.J. at 229. This specification neither informed Appellant of the type of exposure alleged nor does it bar future prosecution of another offense. The Government could copy and paste this exact same specification into a new charge sheet and seek conviction, now on a "new" theory of live exposure. That this is theoretically possible demonstrates the specification is defective on its face, both in terms of the notice it provided and the lack of protection it provides Appellant in the future.

2. The evidence.

Insufficient notice from the charge sheet aside, the evidence of intentional exposure by communication technology is hardly convincing. No picture was ever found or introduced into evidence. Appellant willingly consented to the search of his phone, unlocked it, and removed the passcode. If there was any physical evidence to support the charges in this case, it is reasonable to conclude the Government would have offered it. Relatedly, OSI had BW's phone, and either found nothing or chose not to look at it. Under either formulation, there is no picture and there are

no Snapchats in evidence. This evidentiary shortcoming could be fatal. *See* Mil. R. Evid. 1002 (designating as a general rule that an original photograph is required in order to prove its content).

This means the only evidence that could substantiate this allegation are BW's testimony and/or Appellant's admissions. Although the testimony of only one witness may be enough to meet the burden of proving an accused's guilt, BW's credibility was decisively destroyed with defense counsel's blistering cross-examinations of both her and SA SS. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006). Defense counsel effectively demonstrated that BW lied on numerous occasions, ranging from the benign to the very core of the charged allegations in this case. The mixed verdict within Charge I proves as much; they only convicted when Appellant self-incriminated with his own words in his subject interview and authored documents. Pros Ex. 9, 10, 11. That being said, Appellant initially denied sending any picture and only agreed after some commendable trickery from SA SS.

> [SA SS]. So, as you guys communicated on Snapchat, did you ever send her any explicit photos or anything like that?
>
> [[Appellant]. [Shook his head.].
>
> [SA SS]. Okay. You never send her any explicit photos?
>
> [Appellant]. Correct.
>
> [SA SS]. Okay. I want you to think about that really hard before you answer me again, [Appellant]. As you guys talked on Snapchat, did you ever send her any explicit photos?
>
> [Appellant]. Maybe.
>
> [SA SS]. Okay. How many did you send her? Was it five or more?
>
> [Appellant]. No.
>
> [SA SS]. Less than five?
>
> [[Appellant]. [Nodded his head.]

[SA SS]. Was it three?

[Appellant]. Probably.

[SA SS]. Okay. Were they of your penis?

[Appellant]. Maybe one.

[SA SS]. Maybe one? Okay. So you sent her one picture of your penis? Was it erect?

[Appellant]. Maybe. I don't remember, I really don't.

R. at 794-95. This exchange must be put in context of SA SS admitting the "object of bringing a subject into the station for interrogation is to get them to admit to the conduct." R. at 730. If SA SS was actually focused on getting the truth, he would have pressed BW upon learning of her lies. But he "didn't see the need to" (R. at 735) even in spite of her known dishonesty. This may have been in part of OSI's policy to not challenge an alleged victim's theory of what happened. R. at 594-95.

In light of 1) there being no picture; 2) BW's decisive lack of credibility, which the members designated with their findings; and 3) SA SS's stated and acknowledged trickery and deceit designed to produce an admission regardless of the truth, this Court should conclude the finding of guilty to Specification 4 of Charge I is factually and legally insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss Specifications 1 and 4 of Charge I, and Charge I, and set aside the sentence.

II.

THE FINDING OF GUILTY FOR SPECIFICATION 1 OF CHARGE II IS FACTUALLY AND LEGALLY INSUFFICIENT.

Standard of Review

See Issue I *supra*.

Law

A. Legal and Factual Sufficiency generally.

See Issue I *supra*.

B. Statutes, Rules, Definitions, and Defenses.

"Any person subject to this chapter [] who attempts to commit any offense punishable by this chapter [] shall be punished as a court-martial may direct, unless otherwise specifically prescribed." Article 80(b), UCMJ. An attempt is an "act, done with specific intent to commit an offense under this chapter [], amounting to more than mere preparation and tending, even though failing, to effect its commission." Article 80(a), UCMJ.

Specification 1 of Charge II alleged Appellant "attempt[ed] to commit a sexual act upon [BW] a person whom he believed to be a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: penetrating [BW's] vulva with his penis." *See* ROT Vol. 1, Charge Sheet at 3. The elements of attempt are: 1) that the accused did a certain overt act; 2) that the act was done with the specific intent to commit a certain offense under the UCMJ; 3) that the act amounted to more than mere preparation; and 4) that the act apparently tended to effect the commission of the offense. *2019 MCM*, Pt. IV, para. 4.b.(1)-(4). The target offense under the UCMJ for the second element of the attempt was sexual assault of BW, a violation of Article 120b, UCMJ. *See* ROT Vol. 1, Charge Sheet at 3. The elements of that offense are: (1) that the accused committed a sexual act upon a child, to wit: penetrating [BW's] vulva with his penis.; and (2) that at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years." *2019 MCM*, Pt. IV, para. 62.b.(2)(a)(i)-(ii).

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused

believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). "If the ignorance or mistake goes to an element requiring . . . specific intent. . . , the ignorance or mistake need only have existed in the mind of the accused." *Id*. Because attempt is a specific intent crime, the mistake as to age need only have existed in Appellant's mind; it need not also have been objectively reasonable under the circumstances. Thus, for this attempt crime, the Government was required to prove beyond a reasonable doubt Appellant did not honestly possess such mistaken belief. *Compare* R.C.M. 916(b)(1) and 916(j)(1) (burden on the Government) *with* R.C.M. 916(b)(3) and 916(j)(2) (burden on Defense). R.C.M. 916(j)(2) only applies to "a prosecution under Article 120b(b), sexual assault of a child, and Article 120b(c), sexual abuse of a child. It does not apply to attempts thereof.

Entrapment is also a defense, which will be discussed extensively below, as it has its own set of definitions, burdens, and case law.

C. Entrapment.

"It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." R.C.M. 916(g). It is an affirmative defense. *See United States v. Kitchen*, No ACM. 40155, 2023 CCA LEXIS 58, at *15 (A.F. Ct. Crim. App. 3 Feb. 2023) (unpub. op.). As this Court recently explained :

> The defense has the initial burden of showing some evidence that an agent of the Government originated the suggestion to commit the crime. *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992). Once the defense of entrapment is raised, "the burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense . . . ." *Id*. (citations omitted). When a person accepts a criminal offer without an extraordinary inducement to do so, he demonstrates a predisposition to commit the crime in question. *Id*. (citations omitted). "Inducement" means more than merely providing an appellant the means or opportunity to commit a crime. *United States v. Howell*, 36 M.J. 354, 360 (C.M.A. 1993) (citations omitted). Instead, the Government's conduct must: create[ ] a substantial risk that an undisposed person or otherwise law-abiding

> citizen would commit the offense. Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. *Id*. at 359–60 (emphasis, internal quotation marks, and citations omitted).

Id. at *16-17. The "defense of entrapment comes into play" when "the Government's deception actually implants the criminal design in the mind of the defendant." *United States v. Russell*, 411 U.S. 423, 436 (1973).

In *United States v. Johnson*, this Court determined the appellant was not entrapped because the agent informed the appellant she was "13 years old" and the appellant continued to engage in conversations despite repeated assertions of that same age. No. ACM 39911, 2022 CCA LEXIS 92, at *20 (A.F. Ct. Crim. App. 10 Feb. 2022) (unpub. op.). In *United States v. Jennings*, the Navy-Marine Court of Criminal Appeals (NMCCA) concluded the appellant was not entrapped when he—not the agent—introduced the concept of sex. No. 201700241, 2019 CCA LEXIS 42, at *10 (N.M. Ct. Crim. App. 4 Feb. 2019) (unpub. op.); *see also United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *17 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.) ("It was consistently [Anderson] who turned the conversation to sexual subjects."), *review granted on other grounds United States v. Anderson*, 82 M.J. 440 (C.A.A.F. 2022).

Analysis

There are at least two reasons why Appellant's conviction for attempted sexual assault of a child in Specification 1 of Charge II is factually and legally insufficient. First, Appellant possessed an honestly held belief BW was at least 16 years old. The Government did not prove beyond a reasonable doubt Appellant was not so mistaken. Second, OSI entrapped Appellant. For either of these reasons, the findings of guilty for Specification 1 of Charge II and Charge II must be set aside and dismissed, with prejudice.

A. The Government did not prove beyond a reasonable doubt Appellant did not honestly believe BW was at least 16 years old.

Appellant incorporates the entirety of his argument, *supra*, that his mistake of fact as to age was honest and reasonable *and* that he met *his burden* to prove such by a preponderance of the evidence in the Article 120b, UCMJ, context (Charge I). But here, in the context of attempt, the burden landscape and elements change, such that a successful mistake of fact defense is far easier to satisfy for the Charge II offenses than for the Charge I offenses. For this attempt, the Government has the burden, that burden is beyond a reasonable doubt, and the reasonableness of the mistake is of no consequence.[26] R.C.M. 916(b)(1); R.C.M. 916(j)(1).

For attempted sexual assault of a child as charged in Specification 1 of Charge II, the Government needed to prove beyond a reasonable doubt Appellant had the specific intent to penetrate the vulva of BW, someone who had not attained the age of 16. Therefore, even if there was evidence to suggest Appellant intended to have sex with BW but he honestly[27] thought she was 16 years old, the Government failed to meet its burden of proof. In other words, the Government needed to prove beyond a reasonable doubt Appellant knew BW's actual age and that there was no real possibility Appellant was mistaken as to that age. The Government cannot meet this burden.

SA SS and Appellant had been chatting on Kik for an entire week *without a single hard age disclosure*; at no point did the agent specifically articulate BW was 13 years old. R. at 646-47. Likewise, there had been no age confirmation. R. at 647. At no point did SA SS solicit

[26] *Compare with* Charge I, a violation of Article 120b, UCMJ (Defense burden, preponderance of the evidence, honest and reasonable mistake of fact).
[27] Under R.C.M. 916(j)(1), Appellant's mistake of fact as to age need not have been reasonable under the circumstances; it need only have existed in his mind. As the military judge correctly instructed, "The mistake, no matter how unreasonable it might have been, is a defense." R. at 928.

Appellant to verify what he believed BW's age to be, nor did Appellant voluntarily disclose this belief. This might be because SA SS unethically and immorally[28] said it "doesn't matter" if the target of the operation believes the age disclosure. R. at 565; *see also* R. at 675-76 (same). SA SS's justification for failing to do any of these required acts (hard age disclosure) or best practice (age confirmation) to avoid entrapment—or at least save a potential prosecution from failing due entrapment—was the "baseline" between the two individuals. *Id*. According to SA SS, he was referring to BW's assertion that she had disclosed her actual age in person to Appellant at some point. *Id*. But, as defense counsel pointedly extracted from SA SS on cross-examination, the agent had "no baseline at all" because BW lied to OSI about her interactions in real life with Appellant. *Id*. Unconvincingly, SA SS's lone justification for not providing the age disclosure or age confirmation was, "Because the flow the conversation didn't fit it at the time." *Id*. The "flow" of the conversation is hardly a reason upon which a law enforcement agent who is actively trying to solicit a crime for federal criminal prosecution should fail to identify age or confirm Appellant's understanding thereof.

Something very telling happened when SA SS finally disclosed BW's age: Appellant was surprised and provided a different age. *See* Pros. Ex. 6 at 7 ("You told me 16 before. I swear you did."); Pros. Ex. 9 at 3 ("I believe that she was older."). The age of 16 is not a convenient legal exculpation; there is no evidence Appellant had any idea what the actual age of consent was under the UCMJ. He immediately exclaimed "16" because that is what BW told him. Oddly enough, an early exchange in the cross-examination on a different matter demonstrates the legal and factual insufficiency:

[28] The "ethical" and "moral" assertions come from SA SS's earlier recognition that unlawful entrapment presents ethical, moral, and legal concerns. R. at 554.

> Q [DC]. If they show up knowing you're 13, if a target doesn't confirm that, how do you know?
>
> A [SA SS]. If they don't challenge it.

R. at 565. But here, Appellant did, in fact, challenge it. SA SS's understanding was that if a target challenges the age disclosure, it is a basis to believe the target did not believe the age disclosure, and thus, did not think they were committing a crime in the chats. Here, Appellant's challenge to the age disclosure should have revealed to SA SS by his own litmus test that Appellant thought BW was older and, thus, he was not committing a crime in his chats. Not only does this solidify the nullification of the specific intent element, but it also likewise cements the entrapment discussion below. What we have here is a law enforcement agent—in direct defiance to facts in front of his face—persisting to provoke an individual to commit a crime, a crime which the target has no intent to commit. It also suggests the entire "take-down" and subsequent statements to OSI were acted upon and obtained in error because the agent did not have a good faith belief in the underlying criminal activity.

In light of BW's repeated history of lying, that there was "no baseline" at all to go on that she had, in fact, self-disclosed her age to Appellant in real life, and Appellant's immediate contradiction of the hard age disclosure, the Government can hardly say Appellant had the *specific intent* to have sexual intercourse with a *child*. If he had specific intent to have sexual intercourse, in his own mind (which is all R.C.M. 916(j)(1) is concerned with) it was with someone he believed was 16 years old. Even if this is a debatable proposition—which it is not—the Government surely did not prove beyond a reasonable doubt there was no mistake.

Appellant maintains he met the more difficult standard in Issue I*, supra*, where he maintained a burden to prove his honest belief was reasonable; here, at the very least, the Government did not prove beyond a reasonable doubt Appellant did not honestly think BW was

16, reasonable or otherwise. This Court should set aside and dismiss this charge and specification on the mistake of fact basis alone.

B. OSI entrapped Appellant.

After the Defense raised some evidence of entrapment, the Government did not prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense. *Whittle*, 34 M.J. at 208. Thus, this affirmative defense applies and the finding of guilty for the attempt must be set aside and dismissed, with prejudice.

1. *The Defense raised "some evidence" of entrapment*.

It is hardly debatable whether the Defense raised "some evidence" of entrapment. *Id.* An appropriate factual reference point of where to begin the entrapment analysis is the beginning of Prosecution Exhibit 2, where it is evident that Appellant specifically disconnected from (the real) BW on Snapchat, yet SA SS as BW's persona reinitiated communications with him. SA SS agreed that "when you un-add someone, that could be an indication that the individual does not want to communicate or talk to that person anymore." R. at 607. SA SS agreed this "re-add" was him "reinitiating with [Appellant.]" R. at 608. Appellant was done interacting with BW in real life. But for SA SS's reinitiating of the communications, the conversations leading to the charged attempt would never have happened.

Further on in this initial Snapchat with SA SS that the agent initiated, Appellant unequivocally stated, "I'm just gonna call it quits here I'm sorry I'm not trying to risk it." Pros. Ex. 2 at 5. Even after Appellant expressed doubts about who he was talking to and vowed an intent to "call it quits," SA SS persisted to communicate on Snapchat. R. at 501. SA SS continued in spite of his acknowledgement that his "training indicates that that is a clear indication [Appellant]

did not want to have anything to do with [BW]." R. at 613. There was "an individual clearly indicat[ing] he doesn't have any intent to proceed further." *Id*. SA SS further agreed there was "nothing to indicate there was any desire for future activity with [BW]." R. at 614.

Then, SA SS persevered to bring Appellant over to a conversation on Kik. He had to send Appellant multiple invite links to Kik. R. at 631. Almost a full a week elapsed between responses from Appellant. *Compare* Pros. Ex. 2 and Def. Ex. E (August 7) *with* Pros. Ex. 6 (August 13). The reasonable conclusion from the set of circumstances starting with Appellant's "un-add" of (the real) BW from Snapchat to him ultimately clicking on SA SS's second invitation to join Kik is Appellant wanted nothing to do with any type of relationship with BW, physical or online.[29]

2. *The criminal design originated with the Government.*

The actual Kik conversations are more concerning. Appellant, who previously unadded BW on Snapchat, said he was "calling it quits," and needed multiple links to join Kik talked about non-sexual topics until SA SS directed otherwise. Appellant wrote about visiting the caves, watching movies, braiding hair, and eating popcorn. Pros. Ex. 6. at 1-2, 10.

SA SS brought up going to Appellant's dorm room for the first time. Pros. Ex. 6 at 2. Appellant was comfortable watching the movie at the base theatre, but SA SS wanted to go to the room. *Id*. SA SS made an overt sexual reference to the "size" of the screen on which they'd watch the movie; Appellant responded by sending a picture of an actual monitor. *Id*.

SA SS brought up the idea of staying overnight. *Id*. at 9. SA SS brought up oral sex and sexual intercourse by himself without Appellant introducing the concepts. *See* Pros. Ex. 6 at 10-

[29] Although the affirmative defense of voluntary abandonment does not apply because there was no completed attempt with an after-the-fact renunciation of criminal purpose, the spirit of the abandonment doctrine is at play here. *See 2019 MCM*, Pt. IV, para. 4.c.(4). Despite any in-person interactions with BW preceding SA SS's introduction into the saga, Appellant wanted nothing else to do with BW. He was induced back into to a situation he voluntarily left.

11; R. at 709 (SA SS conceding he brought up sexual intercourse for the first time). The two chatted on Kik for over a week and Appellant never brought up sex. R. at 708; Pros. Ex. 6 at 10. SA SS said he was "nervous" to come to the room, an apparent effort to generate a sexual conversation. Pros. Ex. 6 at 9. Appellant wrote, "[BW] I'm not going to push you to do anything you don't wanna do I don't want you to come over just for that kinda stuff." *Id*. at 10. But, SA SS wanted Appellant to admit on the Kik conversation he wanted BW to come over for "that kinda stuff." Unfortunately for SA SS and the Government on appeal, the evidence suggests Appellant's desire to be the opposite.

Throughout the cross-examination when defense counsel confronted SA SS about him introducing concepts into the conversation, the agent relied on his unconfirmed understanding that BW had brought these topics up with Appellant in person, therefore, they were fair game. *See, e.g.*, R. at 708. Defense counsel pressed on this issue. R. at 708-09. SA SS had no prior chats, no prior videos, no forensics, and no corroborating evidence it had *ever* been brought up. R. at 709. SA SS exclusively relied on the word of BW, a teenager who he agreed "got caught and lied to OSI." *Id*. Respectfully, this Court cannot reasonably conclude these topics *had ever* come up before because BW cannot be believed and SA SS's reliance on her honesty was misplaced. Elsewhere in this brief, BW's repeated lies, omissions, and motives to fabricate have been extensively discussed and equally apply for entrapment because if BW had never actually introduced the concepts in real life, they were not "fair game" for online conversation. Instead, they would be an impermissible form of "inducement." *Howell*, 36 M.J. at 359-60.

The contrived conversations in evidence,[30] and the concessions made by SA SS on cross-examination, show SA SS was the initiator, the aggressor, and the steward of the conversation.

[30] Prosecution Exhibits 2 and 6; Defense Exhibit E.

The goal of the whole operation was to get Appellant to commit a crime and SA SS did not take Appellant's self-removal from the conversations or his innocuous conversations about movies and caves for an answer. In fact, the operation to "take down" and arrest Appellant was well underway *before* Appellant ever discussed anything sexual with SA SS. R. at 684.

Relevant to the entrapment discussion, SA SS agreed he introduced the concept of sexual intercourse, a surprising concession indeed. R. at 708. This concession, alone, could end the entrapment inquiry in Appellant's favor: the entrapping agent himself admitted under oath he introduced the topic of conversation of which Appellant was ultimately found guilty. *Cf. Jennings*, unpub. op. at *10 (finding the appellant was not entrapped when he—not the agent—introduced the concept of sex); *Anderson*, unpub. op. at *17. This is the definition of entrapment: SA SS, as a Government agent, originated the idea for this crime. There is nothing more revealing about who originated the criminal design (attempted sexual intercourse with a child) and, thus, whether this is entrapment than an exchange between defense counsel and SA SS on cross-examination.

> Q [DC]. And we'll never know, will we, if you didn't bring up sex, if this conversation would have ever turned sexual. We don't know. Is that right?
>
> A [SA SS]. No, not necessarily. I mean, I guess you're right. We would never know.
>
> Q. We'll never know.
>
> A. Wouldn't know.

R. at 709. Even though the concept of "mirroring" stands for the idea that an agent can talk about a topic brought up by the suspect, "reverse mirroring" seems to have occurred here. Everything was platonic until SA SS made it sexual. Then once the conversations were sexual, Appellant responded in kind. The law, and society, do not want to obtain and sustain convictions on this foundation. *See Russell*, 411 U.S. at 435 ("Congress could not have intended criminal punishment

for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government.").

3. *Appellant was not predisposed to this conduct.*

Many prior arguments apply here. Earlier discussions about reasonable mistake of fact as to age apply in full force in an argument about Appellant's predisposition. If Appellant mistakenly believed BW was 16, his in-person interactions with her do not show he was predisposed to commit any child sex offenses. This case is unlike *Johnson*, where this Court found the appellant was not entrapped because he continued to converse with the agent after repeated disclosures the person was 13 years old; here, there was just the sole age disclosure a week into the online chats, a disclosure which Appellant immediately questioned. *Johnson*, unpub. op. at *20. Also, there is no other evidence in this record of trial suggesting Appellant was predisposed to sexual activity with minors, such as Mil. R. Evid. 414 evidence or any of the original Snapchats between Appellant and BW.

Next, Appellant discussed the activities he was interested in; notably, sexual intercourse is not among them. Appellant suggested going on drives, visiting the caves, watching a movie at the base theatre, eating popcorn, and braiding hair. Pros. Ex. 6 at 1-2, 10. Moreover, Appellant wrote, "[BW], I'm not gonna push you to do anything you don't wanna do I don't want you to come over just for that kinda stuff." *Id*. at 10. Appellant is demonstrating he has platonic intentions with her. Even in a light favorable to the Government, "kinda stuff" may be in reference to sexual behavior generally, but it is not necessarily an indication penile penetration of the vulva is the "kinda stuff" on the table.

Finally, Appellant's OSI statement is incredibly telling. Inculpatory in many respects, Appellant still wrote, "As of tonight I went to meet with her to watch movies and catch up and

potentially have sex if she wanted it." Pros. Ex. 9 at 3. "Potentially" having sex is a football field away from the Government proving specific intent to penetrate BW's vulva with his penis beyond a reasonable doubt. In fact, the military judge's instructions on reasonable doubt establish potential and possibility as something which must yield an acquittal. R. at 941. This Court is similarly bound with regards to factual sufficiency.

4. *Conclusion.*

The Government needed to prove *beyond a reasonable doubt* that Appellant was not entrapped. *Whittle*, 34 M.J. at 208. It landed well short of surpassing the most onerous burden in criminal law. The Defense not only provided "some evidence" of entrapment, it provided overwhelming evidence of entrapment. Appellant wanted nothing to do with BW, but SA SS lured him back on multiple occasions. Once in conversation, Appellant wanted nothing to do with sexual conversations, but SA SS provoked them. SA SS introduced sexual innuendo and sexual topics into a platonic conversation. Without him doing so, "we would never know" if the conversation would have ever turned sexual. R. at 709.

SA SS willingly and blatantly disregarded the moral and ethical concerns surrounding the premise of entrapment. R. at 554. The whole purpose of the prohibition against entrapment is so the Government does not create a criminal out of an individual who would otherwise not be one. *Russell*, 411 U.S. at 435. But here, SA SS baited and lured Appellant into the very conduct for which he now stands charged and convicted. The importance of this entrapment argument goes well beyond Charge II. If SA SS had never engaged in this illegal behavior, Charge I and its specifications would not have been able to stand alone. The members acquitted Appellant of three of the five specifications in Charge I, only convicting on statements made by Appellant himself. Those statements, of course, were the product of SA SS's tactics. They also fully acquitted

Appellant of the alleged assaults against BW in Charge III, presumably due to BW's diminished credibility and the fantastical nature of those claims.

This Court should conclude Appellant was entrapped. Law enforcement needs to be held in check by appellate scrutiny. If these tactics endure, people who never so much as flirt with the law are susceptible to an agent's cunning and persuasion. This Court can provide a valuable reference point to law enforcement agents, prosecutors, and trial judges alike where the boundary is between permissible trickery and illegal entrapment.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss Specification 1 of Charge II, and Charge II, and set aside the sentence.

III.

THE FINDING OF GUILTY FOR THE SPECIFICATION OF CHARGE IV IS FACTUALLY AND LEGALLY INSUFFICIENT.

Additional Facts

The Specification of Charge IV alleged Appellant was willfully derelict in the performance of a duty for allowing BW in his dorm room on Misawa, a duty of which he had actual knowledge. *See* ROT Vol. 1, Charge Sheet at 4. MSgt WC testified for the Government in support of this allegation. *See* R. at 445-81. During the relevant time frame, MSgt WC was the superintendent of unaccompanied housing at Misawa. R. at 446. He came into that position in May 2020, a few months before the charged conduct in the dereliction specification. *Id.*; ROT Vol. 1, Charge Sheet at 4. Appellant lived in the dorms MSgt WC managed and oversaw. R. at 448. There is a sign posted outside the dorm building not to allow visitors under the age of 18. R. at 449. There is no evidence Appellant saw or read those signs, or knew they were there. New Misawa Airmen are typically provided a tri-fold print out of dorm rules. R. at 441; *see also* Pros. Ex. 3. There is no

evidence Prosecution Exhibit 3 was provided to Airmen on the day Appellant was briefed, nor is there evidence Appellant specifically received this pamphlet.

This rule preventing underage visitors is also in a document called the "Dormitory Standards of Conduct." R. at 449; *see also* Pros. Ex. 4. As with the tri-fold, it is typically provided to new dormitory residents. R. at 454. Page 7 is an empty signature page. Pros. Ex. 4 at 7. When Prosecution Exhibit 4 for identification was offered into evidence, defense counsel objected. R. at 455-462. The Defense believed the Government was going to offer a separate signature page into evidence, but there was nothing "to marry the two of those together." R. at 462. The trial counsel argued Prosecution Exhibit 4 for identification was not being offered for the truth of the matter asserted. R. at 464. Defense counsel argued if it was not being offered for the truth, it was irrelevant. *Id*. Overruling the objection, the military judge admitted the document only for the limited purpose that it could potentially go to Appellant's knowledge of the rule. R. at 466. The Government then offered Prosecution Exhibit 5 for identification, the unattached signature sheet. R. at 470. It was admitted without objection. R. at 474.

Standard of Review

See Issue I *supra*.

Law

A. Legal and Factual Sufficiency generally.

See Issue I *supra*.

B. Statutes, Rules, Definitions, and Defenses.

"Any person subject to this chapter who is derelict in the performance of his duties shall be punished as a court-martial may direct." Article 92(3), UCMJ. The elements of this offense are: (1) that the accused had certain duties; (2) that the accused knew or reasonably should have

known of his duties; and (3) the accused was willfully, or through neglect or culpable inefficiency, derelict in the performance of those duties. *2019 MCM*, Pt. IV, para. 18.b.(3)(a)-(c). The Specification of Charge IV alleged Appellant "who knew of his duties" was "derelict in the performance of those duties in that he willfully failed to refrain from permitting [BW], a person under the age of 18, to enter his dormitory, as it was his duty to do." ROT Vol. 1, Charge Sheet at 4. It did not allege the duty was one that he reasonably should have known; it specifically alleged actual knowledge of the duty. *Id*.

A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service. *2019 MCM*, Pt. IV, para. 18.c.(3)(a). A person is "derelict" in the performance of duty when he willfully fails to perform his duties. *Id*. at para. 18.c.(3)(c). "Willfully" means "intentionally" and refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. *Id*. Actual knowledge of duties may be proved by circumstantial evidence. *Id*. at para. 18.c.(3)(b). Such knowledge may be proven by regulations, training manuals, customs of the service, academic literature or testimony, or testimony of persons who have held similar or superior positions. *Id*.

Analysis

The willful dereliction of duty conviction is legally and factually insufficient and should be set aside and dismissed because the Government's documentary evidence and the testimony of MSgt WC do not demonstrate Appellant "knew of his duties," i.e., actual knowledge of a duty to not bring BW to his dorm room.

The Government's evidence for this allegation is thin, at best. It provided a copy of a tri-fold printout called "Dormitory Pamphlet," without providing any evidence Appellant actually received or read it. Pros. Ex. 3. The Government then offered Prosecution Exhibit 4. The

Government did not offer the actual document Appellant signed; instead, it offered a generic example of a policy a new Airman in the dorm would typically sign under normal circumstances. But this was not normal circumstances. This was COVID-19 in the summer of 2020. Few policies across Air Force installations remained the same four months after the onset of the pandemic. In-person briefings were rare. Few base support agencies were even open for in-person visitors. This matters for the Court's sufficiency review because a generic standards briefing that Airmen would typically get under normal circumstances is less probative under these circumstances.

The military judge only allowed Prosecution Exhibit 4 into evidence as a potential indication of knowledge of the duty. The Government then offered Prosecution Exhibit 5, a one-page document purporting to be a receipt of Prosecution Exhibit 4. Yet, "nothing marries these documents together." R. at 462. The Government did not retain a full 7-page copy of the document Appellant received, read, and signed. Pros. Ex. 4. It only kept a signature page in his file. Pros. Ex. 5. But questions still remain whether the attestation in Prosecution Exhibit 5 actually shows Appellant received, read, and understood the contents of Prosecution Exhibit 4. In reality, that signature page could be acknowledging receipt for anything.

This Court should consider an analogy regarding this bifurcation of the policy and the signature page. Imagine, hypothetically, a "failure to go" prosecution under Article 86, UCMJ. An Airman is selected for a random urinalysis and is called to the CSS. The member never reports to the drug demand reduction office to provide a sample. The Government charges this Airman with failing to be at his appointed place of duty at 0900, to wit: the drug demand reduction program office. In this prosecution, the Government would have the duty to prove the accused knew of the time and place of the duty. *See 2019 MCM*, Pt. IV, para. 10.b.(1)(b). It offers into evidence the generic letter Airmen are typically given when selected for urinalysis. It also offers a second,

single sheet of paper called "1st Indorsement to DDRP order." This document has the accused signature but does not show the order he is indorsing receipt for. In such a circumstance, the Government would not have sufficiently shown the accused actually knew where he was supposed to be and when. It only would have shown generally where and when people selected for urinalysis should be, and that the accused signed a paper that may or may not be in reference to the original order. This, simply cannot—and should not—be enough to obtain and sustain a federal conviction.

For the Government to satisfy its burden of proof, it would have needed to offer a full, actual Standards of Conduct document signed by Appellant. It did not. Even the possibility that Appellant's signature in Prosecution Exhibit 5 is related to any document other than Prosecution Exhibit 4 is too great a concern to affirm the conviction on appeal. The Government did not charge this specification as a duty which Appellant knew or reasonably should have known; with the charging language, it heightened its own burden it chose to prove actual knowledge. This makes the testimony about what Airmen typically hear at these newcomer's briefings, what documents Airmen typically receive when they leave, and signs posted on the wall of the dorms of minimal probative value. The evidence must have proven an *actual* knowledge; at best, the Government proved Appellant *may have* or *should have* known of this duty. The finding is insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the Specification of Charge IV, and Charge IV, and set aside the sentence.

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 June 2023.

Respectfully submitted,

[redacted]

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

7 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40343
Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF *Appellant.*	)	Panel No. 2

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

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

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

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
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CERTIFICATE OF FILING AND SERVICE

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

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7 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40343
Airman Basic (E-1)	)	
DANIEL O. GAUSE-RADKE, USAF	)	Panel No. 2
Appellant.	)	

ANSWER TO ASSIGNMENTS OF ERROR

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UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40343
Airman Basic (E-1) DANIEL O. GAUSE-RADKE, USAF *Appellant.*	)	Panel No. 2

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY FOR SPECIFICATIONS 1 AND 4 OF CHARGE I ARE FACTUALLY AND LEGALLY INSUFFICIENT?

II.

WHETHER THE FINDING OF GUILTY FOR SPECIFICATION 1 OF CHARGE II IS FACTUALLY AND LEGALLY INSUFFICIENT?

III.

WHETHER THE FINDING OF GUILTY FOR THE SPECIFICATION OF CHARGE IV IS FACTUALLY AND LEGALLY INSUFFICIENT?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

At the time of Appellant's court-martial in 2022, BW was a 15-year-old ninth grader. (R. at 284-85.) BW lived in Misawa, Japan with her step-father, mother and brother. The family

moved to Japan in March 2020. (R. at 283.) BW went to Edgren Middle High School which included grades six through twelve. (R. at 284-85.)

In the summer of 2020, BW, then 13-years-old, had just completed seventh grade when she met Appellant at the base Airman Family Readiness Center (AFRC). (R. at 286, 292.) Prosecution Exhibit 1 is BW's seventh-grade yearbook photo which BW testified was taken "middle to end of the school year . . . because it was my retake yearbook photo." (R. at 286-91, Pros. Ex. 1.) BW said she looked similar to this photo when she met Appellant. (R. at 291.)

The day she met Appellant at the AFRC, BW was waiting on her friend to get off work so they could go to BW's house. Her friend was a receptionist at the AFRC. (R. at 293.) Appellant approached BW, asked her about the cast she had on her left arm, and asked the two girls if they knew of any places to go in town since he was new to the area. BW told him a few places to go and about the mountains and lakes in the area.

After about five minutes, Appellant told the girls bye and left. (R at 294.) BW specifically recalled telling Appellant that she was in middle school. (R. at 295.) BW responded "No" when asked if she flirted with Appellant, expected to ever talk to him again, wanted to be friend with him, was attracted to him, had a crush on him, or wanted to go on a date with him. (R. at 296-97.) The two also did not exchange any personal contact information.

At the time, BW had a Snapchat account. (R. at 299.) A day or two after initially meeting BW, Appellant found BW on Snapchat and "quick-added" her. BW accepted Appellant's request on Snapchat to be added. (R. at 300.) BW testified that she initially thought this was another "Daniel" she knew when she lived in the states. (R. at 301.)

BW did not recall the exact contents of her initial conversation with Appellant on Snapchat, though she recalled that "something about grade was brought up again, I'm pretty sure

it's because I mentioned how the high school wasn't finished being built yet." (R. at 303.) Eventually, the two were talking on Snapchat multiple times a day. By the second day, however, BW testified, "I remember mentioning that I was 14-years-old." (R. at 304.) When asked how Appellant reacted to this information, BW testified:

> He had asked if I had any older friends that he could hang out with. And I had mentioned [DJ]. That's when he was like "uh no, nevermind, do you have anyone else?" And I was like "what do you mean by that?" and he said "I already know [DJ]."

(R. at 304.) BW agreed that Appellant's essential reaction was whether BW had older friends. (Id.) BW stated that DJ was one of her older brother's friends who was either 17- or 18-years-old at the time. (R. at 305.) BW would later learn that Appellant already knew DJ through the Tinder dating app. (R. at 349.)

BW stated that her age was never brought up again during her conversations with Appellant on Snapchat. However, BW did recall telling Appellant that she was in middle school. (R at 306.)

At some point, BW said things that "turned from more friendly and trying to be welcoming to [Appellant] talking about more sexual sort of conversations," that included sexual jokes and Appellant asking BW about her sexual experiences. (R. at 306-08, 314-15.) To the questions about her sexual experiences, including whether she had ever given anyone oral sex or had actual intercourse, BW told Appellant it was "none of his business." (R. at 307.) BW stated she never expressed an interest in doing any of these things with Appellant.

Appellant also began sending BW pictures of himself in various states of undress, including naked photos of his penis, after BW had told Appellant she was 14. (R. at 309-10, 367-68.) The pictures would come with text saying things like "you like what you see?" (Id.) On one occasion, Appellant sent BW a Snapchat bubble, which was an album of approximately

five to six photos – all of them were photos of Appellant's penis. (R. at 311-12.) When asked how often she received these images or Appellant's talk would turn sexual, BW responded:

> He had said more sexual things than he had actually sent photos. I don't really have an estimate because it wasn't like every day at a set time he was sending things. Sometimes he would just make the sexual conversations or he would make the sexual conversations and send the photos.

(R. at 312.) BW said Appellant sent more pictures of him nude than pictures of him just in boxer shorts. (R. at 313.) BW said she never asked Appellant to send her the photos.

BW would send Appellant non-explicit photos. One on occasion, she sent him a picture and Appellant, as BW explained, "told me that I looked really good in the pants I was wearing and that I should wear them more often," and that "my butt looked nice in them." (R. at 317.)

On another occasion during the evening time, Appellant asked BW to come to his dorm room and that if she did, he "was going to make it worth my while." (R. at 318.) BW took this to mean Appellant was talking about having intercourse. BW continued, "And then there were other times where he had just mentioned me coming over and how it would be fun. And how he would give me oral and then how I would give it back to him and then we could end up doing something else to make it more entertaining." (R. at 320.) Appellant also talked to BW about having oral sex. (R. at 318-19.) BW explained:

> Most of the time it was asking if I had 1 ever given head? If I had ever received head? If he could have me come over so he could give it to me. There were other times where it would be just brought up, most of the time with a joke, and then he'd be like "you should come over and give me head" and something of the sort and so I was –
>
> . . .
>
> At first, I was kind of like "okay this is getting weird" and then, more and more it went on the more and more, I guess you could say uncomfortable, I was starting to get. Because the conversations were less but the sexual conversations became more. It was almost

> as if it wasn't me trying to be his friend anymore, he was trying to use me as a play toy.

(R. at 319.) BW testified she did not want anything more than a friendship with Appellant and had no interest in dating him. (Id.)

BW said the two became Snapchat "friends" the last week of July until she unfriended him the first week of August. (R. at 320-21.) Since the messages were exchanged via Snapchat, BW said she did not save any of the messages between her and Appellant. (R. at 321.)

One evening, BW was sitting outside of the Mokuteki (a restaurant on Misawa Air Base) waiting on her friend DJ when Appellant approached her, made small talk, and asked if she wanted to come to his dorm to watch a movie "because he had just gotten a television." (R. at 321-22.) Mokuteki was located right in front of Appellant's dorm. BW agreed because she did not think "there was going to be ill intent behind it," and she considered him a friend. (R. at 322.) On cross-examination, she explained that she thought her ignoring his earlier pictures and messages "would be enough hint." (R. at 370-71.)

On the way to Appellant's dorm, BW said the two did not hold hands or touch in any way. (R at 323.) BW recalled Appellant's dorm room was on the second floor. BW wore black jeans and a long-sleeved green shirt. (R. at 324.) When BW walked into the room, she noticed Appellant did not have a television, but instead had a "gaming monitor setup." (Id.) Appellant sat down on the edge of his bed and BW sat towards the headboard about two to three feet from Appellant. (R. at 325-26.) BW testified, "[Appellant] was like I don't really have a TV but I have the monitor or whatever that you can watch something on it, and I was like 'What, okay.'" (R. at 325.)

BW said about two minutes went by when Appellant scooted closer to her and began kissing her cheek. (R. at 327.) BW said she never asked or wanted Appellant to kiss her.

Appellant also began touching her left upper thigh. BW said Appellant's actions were "unsettling" and she dipped her head to get away from Appellant. (R at 328.) However, Appellant then put his hand up BW's shirt and touched her breast, adding, "He touched the sports bra and about like right here on the upper part of my chest." (Id.) When he did this, BW testified Appellant said, "Damn." (R. at 329.)

BW said she reacted by pushing his hand off of her, adding, "I didn't expect that." (Id.) BW said Appellant reacted with disappointment. BW then received a message from DJ and left. (R. at 330.) On her way out, Appellant grabbed BW's wrist and "and was like 'you should stay longer.'" (Id.)

BW denied every being in a romantic relationship with Appellant, ever dating him, or ever expressing an interest in dating him. (R. at 428.)

Word of Appellant's interactions with BW eventually made their way to BW's older brother, who then told his and BW's mother. (R. at 360-61.) When asked if her mom found out that she had been lying about her age, BW replied, "Yeah, I told everybody I was 14 though, even around her." (R. at 363.) BW said her mom got upset, adding, "I remember she had gotten upset with me because of what she was hearing at first before she heard the whole story, but I don't ever recall going and her being upset that I lied about my age." (Id.)

BW acknowledged that she did not mention the incident with Appellant in his dorm room to Air Force Office of Special Investigations (AFOSI) Special Agents (SA) during their first interview with her. BW stated she had a panic attack prior to her first interview and that "typically after having a panic attack, or for me at least, it's different for everybody, it takes me a while to get my mind back in check, get my memory okay, be able to actually answer questions without spacing out, having flashbacks. It's just -- I guess I was out of it because I hadn't

regrouped yet. I hadn't been able to fully calm myself down." (R. at 431.) BW also said she was embarrassed about the whole incident, adding, "I thought that it was my fault. I thought that I had given enough signs that I wasn't interested. It not only made me feel embarrassed, but I was disgusted with myself." (Id.) When asked why she felt that way, BW replied:

> Because 13-year-old me, not really into that sort of thing, the sexual conversations, to the sending of photos, to the grabbing of my boobs, that was not something that I guess you could say I was with or for, so I kind of felt violated and disgusted in my own skin, to even the point where for weeks after I was not able to look myself in the mirror.

(R. at 432.)

MSgt WC, the Superintendent of Unaccompanied Housing at Misawa Air Base, testified that Appellant had a second-floor dorm room in the same building as MSgt WC's main office. (R. at 447-48.) MSgt WC stated that Air Force Instruction 32-6000, a 35th Fighter Wing NOTAM, a trifold dorm pamphlet, and a sign posted at the entrance to the dormitory all state that no one under the age of 18 is authorized in the dormitory. (R. at 449.) MSgt WC said all new Airmen attend an in-processing brief where they receive dorm standards, which includes going over the standards page by page. MSgt WC said each Airman then signs an acknowledgement statement stating that they received the standards and understood them. (R. at 450.)

Prosecution Exhibit 3 is the dormitory trifold mentioned by MSgt WC. (R at 451.) The trifold states, "Guest must be 18+ years of age and escorted at all times while in the dormitory." (Pros Ex. 3 at 2.) Prosecution Exhibit 4 is the dormitory standards of conduct mentioned by MSgt WC. (R. at 453.) The first page of the memorandum, in bold and underlined font, reads, "**Guests under the age of 18 are not permitted.**" (Pros. Ex. 4 at 1.) Prosecution Exhibit 5 is an acknowledgement form signed by Appellant. (R. at 473-74.)

SA SS took part in Appellant's investigation. SA SS detailed previous training he had received, including attending the Child Forensic Interview (CFI) Course and also the Internet Crimes Against Children (ICAC) program. (R. at 487.) SA SS explained that the ICAC program essentially involved agents chatting online. SA SS stated the ICAC training included "going over the law of and the rules of engagement," as well as going online and chatting on various social media applications. (R. at 488.) When engaging in conversations with persons online, SA SS explained:

> So our biggest guidelines is when we engage in conversation, obviously getting identifying our age of whatever persona it is that we are taking over, getting the age out there as soon as possible, and the other big thing is we can't ever introduce a topic that hasn't been introduced in discussion by the individual that we are talking to.

(R. at 490.) When asked what was meant by "introducing," SA SS stated, "As in bring it up, specifically referring to like sexual acts. We can't be the one that brings up having like, hey, for example, let's meet up to engage in some sort of a sexual activity." (Id.) SA SS further explained:

> So let's say they discuss like, hey, they bring up the fact like, hey, let's meet up here to have sex. I want to have sex with you when we meet here. We can talk about having sex with them all day long. You know, like what would we do? How would it be, but we can't introduce a new topic into that conversation or I can't bring up the fact like, hey, let's meet up here to have sex.
>
> . . .
>
> So I guess a better example, because sex would be kind of broad, right. A more specific, like, if they mentioned like, hey, let's meet up here to, you know, to have -- to hang out, right, or to watch a movie. I can't be the one saying like, oh, will you also perform oral on me or will I give you a blowjob or whatever the case may be. We

> can match them on the same topic that they are talking whether that be sexual or not, but we can't go outside of that to bring in a new sexual topic.

(Id.)

On cross-examination, Appellant's civilian trial defense counsel questioned SA SS on the basics of entrapment law, including asking, "you agree entrapment's when an otherwise lawful individual commits a crime after the unlawful inducement by a government agent." (R. at 554.) SA SS responded, "Yes." Appellant's counsel also asked, "And would you agree that and the training you have on entrapment, one of the key points is to ensure that you don't unlawfully induce someone?" Again, SA SS responded, "Yes." (Id.)

On the subject of "personas," SA SS explained that he could act online as a fictional persona, one with created photos and e-mail address, or that he could assume the identify of an actual living person. (R. at 489.) For Appellant's case, SA SS assumed the role and identity of BW.

SA SS stated he first became involved in Appellant's case when BW's parents came to the AFOSI office with concerns that a military member had been reaching out and communicating with BW. (R. at 493.) SA SS then detailed how BW's parents provided consent for SA SS to take over BW's Snapchat account and chat as if he was BW. (R. at 494.)

Prosecution Exhibit 2 is the conversation that eventually ensued between SS SA, posing as "BW,"[1] and Appellant. (R. at 498.) During this conversation, "BW" told Appellant that BW's mom had found her Snapchat account, that it needed to be deleted, and asked Appellant to

[1] SA SA's portions of the conversation between him and Appellant while posing as BW will be referenced as "BW."

switch to a different chatting application called Kik. (R. at 502.) At trial, SA SS explained that "Kik" was "pretty much just like a chatting application." (Id.)

In response to "BW" telling Appellant that BW's mom had found out they were talking, Appellant responded, "And are they going to do anything about like secfo or osi?" (Pros. Ex. 2. at 5.) Appellant added, "I'm not trying to get in trouble and shit and lose a career because we were horny," "I'm just gonna call it quits here," and "I'm sorry I'm not trying to risk it." (Id.) "BW" responded, "Well that's dumb, if I was gonna say something I would have [already]."

After some additional back and forth, "BW" typed, "Whatever if you wanna add me on kik there's my username," and "Im deleting snap..if you wanna add me cool…if not then whatever." (Id. at 7-8, R. at 502.) These chats on Snapchat occurred on 7 August 2020.

There would be no contact between Appellant and "BW" until five days later when, on 12 August 2020, Appellant reinitiated the conversation on Snapchat by sending the message "What are you doing."[2] (R. at 761-63, Def. Ex. E.) The next day, 13 August 2020, "BW" responded, "Sry just saw this…not really allowed to get on here." (Id. at 2.) Appellant responded, "Just wanted to see how you are." Appellant would also state that he "just wanted to see how you were doing" and that he would "leave you alone now." (Id. at 6.) "BW" responded, "Its ok…I was hoping you would reach out" and asked, "Are you ok." (Id. at 7.) Appellant responded, "I don't remember your kik lol." (Id at 8.) "BW" provided her Kik username. Appellant would later ask if BW could "get a discord." When "BW" asked if Appellant was going to add her on Kik, Appellant responded, "I'll try" and then again asked,

[2] In his Statement of Facts section, Appellant claims, "the two had been talking for a week." (App. Br. at 12.) However, evidence and testimony show that Appellant and "BW" messaged on 7 August 2020 and then would not talk again until 12 August 2020. When asked "So it really wasn't a week-long conversation that you had with [Appellant]," SA SS replied, "No." (R. at 762.)

"What's you kik again?"[3] (Id. at 15-16.) Appellant would also send BW a message on Snapchat that said, "I miss you." (Id. at 18.)

SA SS stated that Appellant initiated the chat on Kik on 13 August 2020. (R. at 503.) That conversation is contained at Prosecution Exhibit 6. (R. at 504.)

In the conversation, "BW" states that BW has to "do all this stupid things around the house because I'm grounded," to which Appellant responded, "Damn." (Pros. Ex. 5 at 1.) The two discussed going to a movie and dinner and, at one point when "BW" called Appellant "dumb," Appellant responds, "Your moms dumb." (Id. at 3.) When "BW" mentions that BW is grounded "cause mom went through my Snapchat and saw messages with other guys and got mad," Appellant responded, "What other guys," and "You got other hoes giving you hickeys?" (Id.) When "BW" responded, "no you're the only one stupid," Appellant replied, "Shiitt" and "Making me feel special and warm inside." (Id. at 4.) And some additional talk about movies, "BW" says, "Ima go to bed I'll message ya tomorrow." (Id. at 6.)

The next day, Friday, 14 August 2020, Appellant reinitiated the conversation with BW by sending a message that read "How was [your] day?" (Id.) Like he had done the day before, Appellant asked BW if she wanted to Facetime, but "BW" responded, "Not really lol" and "Don't wanna risk getting ground again lol." (Id.) Appellant then asked, "We still on for

[3] While Appellant notes in his Statement of Facts section that a week elapsed between the two Snapchat conversations, Appellant fails to highlight that he was the party who reinitiated the conversation after a week had passed. (*See* App. Br. at 10.) Appellant also states that "SA SS invited Appellant to Kik on multiple occasions before Appellant clicked on the link" and that Defense Exhibit E shows "the extent of SA SS's encouragement to Appellant to click on the second link." (Id.) Later, Appellant also states, "SA SS had to send the link for Kik two times before Appellant clicked on it." (App. Br. at 11.)

However, Appellant fails to note that Appellant stated to BW that he did not remember her Kik username and specifically requested that BW resend the link to him. (Def. Ex. E. at 8, 15-16.)

tomorrow?" (Id. at 7.) "BW" replied, "Can we do like Sunday instead," explained that the next day BW was "having a girls day with mom." Appellant replied, "Ok."

The following exchange then took place:

> "BW": I need to tell you something but you gotta promise not to get mad ok
>
> Appellant: OK
>
> "BW": I'm actually 13 not 14 but ima be 14 in like 3 months so I'm pretty much 14
>
> Appellant: You told me 16 before
>
> "BW": I never told you 16 lol
>
> Appellant: I swear you did
>
> "BW": No stupid
>
> Appellant: FaceTime me real quick ? On this ?
>
> "BW": I'm in the room with my family rn
>
> Appellant: OK after? I just wanna FaceTime you for like 3 mins
>
> "BW": Maybe…I just don't like FaceTime that much lol
>
> Appellant: Please
>
> "BW": We did it once and you always wanna FT lol
>
> Appellant: This will be the last time since you don't like doing it
>
> "BW": Ehh or I just see you Sunday you weirdo
>
> Appellant: Let's do both Lemme FaceTime you tonight
>
> "BW": It's actually annoying how much you're asking to gt me so you can see it's me
>
> Appellant: Sorry

> "BW": If I was gonna tell anyone I wouldn't still be talking to you stupid
>
> Appellant: I know So what you wanna do Sunday?

(Id. at 7-8.)[4]

The next day, Saturday, 15 August 2020, the two began conversing again when "BW" send the message, "Hi." When "BW" said she was watching a movie, Appellant responded, "Wanna come over and watch?" (Id. at 9.) When "BW" mentioned that the two had "never talked about what happened last time" in Appellant's room, Appellant replied, "You said you wanted to wait so we did." (Id. at 9.) When "BW" stated, "So would you teach me how to do things? I don't want to disappoint you," Appellant responded, "You can experiment on me" and "Do something you think I might like and I'll tell you yes or no lol." (Id. at 10.)

When "BW" stated, "You said before you'd go down on me..will that hurt me at all?," Appellant responded, "Maybe a little at first" and "So like the thing is [I don't know] if you finger your self or not or use toys." (Id.) Appellant also stated, "But like your pussy expands when you're horny and wet right so like if you spend time with forplay [sic] it won't hurt as bad at first," and "Also have you sucked dick?" (Id.) Appellant also sent BW a screenshot from Planned Parenthood explaining foreplay. (Id. at 11.) The screenshot, in part, states that foreplay is used to "help prepare the body for intercourse by increasing vaginal lubrication." (Id.)

[4] In Appellant's Statement of Facts section, Appellant states that SA SS testified that "Appellant's assertion that BW had previously told him she was 16 took him by surprise." (App. Br. at 13, *citing* R. at 508.) However, SA SS never testified Appellant's claim "took him by surprise." Instead, SA SS simply stated that his prior information from BW "didn't match up to the fact that she had told him that she was 16." (R. at 508.) Appellant then states, "This surprise was 'clearly [] indicative that [BW] told him she was 16 before." (App. Br. at 13, *citing* R. at 673-74.) However, these words and phrasing were said by Appellant's trial defense counsel, not by SA SS.

When "BW" responded "Prepare the body for intercourse lol" and asked if Appellant would use a condom, Appellant responded, "If you want me too." When "BW" asked "I won't get pregnant will I?," Appellant replied, "No lol." (Id.) When "BW" asked if she need to bring or do anything before the two met the next day, Appellant responded that she should "Shave" her vagina. (Id. at 11-12.) Appellant then asked what time BW was coming over the next day. "BW" said she was getting dropped off at a house on base and asked if Appellant could pick her up there. Appellant agreed.

"BW" then said she as "kinda nervous" and Appellant said "Same." (Id. at 12.) When "BW" asked why he was nervous and that "It's not your first time," Appellant responded, "We said we fucking?" (Id.)

During the conversation, SA SS, as "BW," also asked Appellant to bring a sour-head Bang, which was a type of energy drink. (Id. at 12, R. at 511.) When asked if this was done in order to identify the person and connect what was said in the chat to a physical person, SA SS answered, "Correct." (R. at 512.)

SA SS then explained how Appellant arrived at the residence at the set time on the following day, Sunday, 16 August 2022. (Id.) Once he parked the car, a team of AFOSI agents arrested Appellant. Inside Appellant's car, agents found a Bang sour-head and a box of condoms. (R. at 513.)

During the ensuing interview with AFOSI agents, SA SS testified Appellant admitted that he intended to have sex with BW.[5] (R. at 528.) SA SS also recalled Appellant stating that he believed BW was 15-years-old. (R. at 529.) SA SS stated that BW's age was discussed multiple

[5] A video of this interview is at Prosecution Exhibit 11. The video was played for the members and is discussed further below.

times throughout the interview and that Appellant's statement on how old he thought BW was changed. SA SS stated, "At one point, he said he believed that she was 15. At one point he said that he believed that she was 14, and I want to say maybe 16, but I couldn't -- I don't know exactly." (R. at 530.) Again on cross-examination, SA SS stated that "at the beginning of the interview, [Appellant] told me she was 15," and then at a point later said he believed BW was 16. (R. at 737.) SA SS noted that Appellant mentioned the Japanese laws of consent and how Appellant "believed that we had adapted the Japanese laws being stationed overseas at Japan." (Id.) The military judge took judicial notice during the trial that the Japanese age of consent was 13. (R. at 936.)

SA SS testified that Appellant also admitted to sending pictures of his penis to BW. (R. at 531.) SA SS also testified that Appellant confirmed that he and BW had "hung out in his room and were watching a motive on his laptop," adding that Appellant said he "kissed her on the cheek and on the lips and on the neck, and he said that he left a mark on her neck, a hickie, and he grabbed her breasts over and under the clothing. He grabbed her buttocks, and then she had to leave following that to meet with a friend." (R. at 532.)

SA SS also detailed how Appellant filled out an Air Force Form 1168 and testified that he did not tell Appellant what to write on it. (R. at 533.) Prosecution Exhibit 9 is the statement provided by Appellant. (R at 535-36.) In the written statement, Appellant admitted to kissing BW and "touch[ing] her boobs." (Pros. Ex. 9.) He claimed to "believe that she was older" and that "she kept changing her age as the longer we talked." (Id.) Appellant continued, "As for tonight I went to meet with her to watch movies and catch up and potentially have sex if she wanted it." (Id.) Appellant also wrote, "I also believed we adapted Japanese laws since that's

what I was told at Right Start so I believe we adopted the Japanese age of consent." (Id.) On cross-examination, SA SS testified, "The age of consent in Japan I believe is 13." (R. at 739.)

On cross-examination, SA SS was asked about BW not mentioning the incident in the dorm when she was first interviewed by AFOSI and whether this was "problematic." (R. at 590-91.) Referencing his CFI training, SA SS replied:

> It's not necessarily because dealing with children – so I went to CFI course and I'm certified interview children between the ages of 4 and 12. One of the biggest things that we are taught is that children they don't disclose everything, especially if the parents are involved, if the parents are watching due to embarrassment, due to being judged
>
> . . .
>
> So I guess it wasn't anything new for me ----
>
> . . .
>
> I wasn't surprised.

(R. at 591.)

On redirect examination, SA SS continued to explain why BW may not have mentioned the incident in Appellant's dorm room during her first interview of AFOSI:

> So, the biggest thing that I was trying to get at is going children's parents are specifically involved in an incident, they tend to shut down and the way they responded questions, and how their brain processes a question is different than how an adult processes a question. You know, like did this incident happen. You know, we ask an adult that and it's a yes or no question. When a child, we tried to ask very open-ended questions, and a lot of times they are

> afraid of the judgment that is going to bring on them because they will think that they are the ones that are at fault.

(R. at 754.)[6]

SA SS then explained that BW's parents were not in the room during the second AFOSI interview with BW. (R. at 755.) SA SS explained that during this interview, BW "opened up more about the details of what happened, and just her body language in the room. She seemed more relaxed and at ease." (R. at 756.) SA SS also testified that BW remained consistent throughout all interviews that she told Appellant she was in middle school. (Id.)

Appellant's trial defense counsel also accused SA SS of "introducing" sexual conversation to Appellant when SA SS, as "BW," asked Appellant about oral sex during their Kik conversation. (R. at 707.) SA SS explained that this would be true if the only interactions between Appellant and BW had been the online Snapchat and Kik conversations and his persona as "BW" was only an "online persona." (R. at 708.) However, because BW was a live victim and had a history of conversations with Appellant that included sexual conversations, SA SS testified that "our boundaries and our guidance . . . is a little bit different" because "now we consider the interactions that they had in person." (Id.) As SA SS testified, "Again, not my introduction. It was previously introduced by him and he never denied it, when I said 'You said before.'" (R. at 710.) SA SS also stated that his ICAC training that online personas versus live victims were a "complete different ballgame" that involved different rules. (Id.)

Appellant's trial defense counsel also accused SA SS of "introducing" the idea of sexual intercourse when SA SS, as "BW," highlighted the Planned Parenthood screenshot stated

[6] While Appellant references a portion of SA SS's testimony whether BW's information was "problematic," Appellant then fails to cite this later testimony from SA SS which explains BW's initial actions. (*See* App. Br. at 10.)

"prepare the body for intercourse." (R. at 715.) SA SS responded that the Planned Parenthood screenshot, which was sent by Appellant, mentioned intercourse repeatedly and added, "So technically, intercourse is now introduced into the chat." (R. at 716.) SA SS also noted the Planned Parenthood screenshot sent by Appellant also mentioned birth control, which he stated meant the topic of birth control (i.e., condoms) was introduced by Appellant.[7] (R. at 717.)

[7] Appellant's brief, in his Statement of Facts section, states that SA SS brought up "oral sex and sexual intercourse by himself without Appellant introducing the concepts" and that SA SS "conced[ed] he brought up sexual intercourse for the first time." (App. Br. at 9, *citing* Pros. Ex. 6 at 10-11 and R. at 717.) However, a reading of both Prosecution Exhibit 6 and the transcript at page 715-17 show that is not the case.

Later in the same Facts section of his brief, Appellant claims, "On cross-examination, SA SS conceded there was 'absolutely no conversation in the chat about intercourse, penile, vaginal, penetration' until he brought it up to Appellant." (App. Br. at 15.) However, Appellant fails to provide SA SS's full answer to his defense counsel's question. That exchange went as follows:

> DC: Got it. Now, again, we can perhaps [sic] free agree to disagree on the introduction of the concept of oral sex, okay? But you'd agree that there was absolutely no conversations in the chat about intercourse, penile, vaginal, penetration?
>
> SA SS: No, correct.
>
> DC: Okay.
>
> SA SS: Well, the Planned Parenthood talks about intercourse.
>
> DC: Well, the Planned Parenthood is a direct reference to foreplay, that's what it's for. It appears to be a Google search for what is foreplay, is that correct?
>
> SA SS: Correct. But it -- throughout the course, it's talking about the purpose of foreplay and ----
>
> DC: Sure.
>
> SA SS: ---- Preparing the body for intercourse. So technically, intercourse is now introduced into the chat.

When questioned about why he asked "I won't be pregnant will I?," SA SS replied, "I was asking if I'd get pregnant if he did foreplay on me." When Appellant's trial defense counsel asked, "Well it's hard to get pregnant without sexual intercourse, is that correct?," SA SS replied, "I'm 13, I don't know that." (Id.)

Also on cross-examination, Appellant's trial defense counsel asked why SA SS did not do an "age confirmation that the target understands and believes that you are 13?" (R. at 669.) SA SS responded, "No, that not what we're trained to do. If I tell him I'm 13 and he continues to chat with me, it is not my job to be like 'Hey, don't forget, by the way I told you I was 13 and you've continued to chat with me.'" (R. at 669.) SA SS added that he told Appellant "my age and at the end of the day, he knew my age and he showed up at that location." (R. at 670.) Later, Appellant's counsel asked SA SS if the best practice would have been to "really drill down" as to whether Appellant believed BW was either 13 or 16. (R. at 676.) SA SS responded, "Didn't matter to me because at this point, I disclosed my age and he continues to talk to me."[8] (Id.)

> DC: But that was brought up in a definition of what is foreplay, is that correct?
>
> SA SS: Correct.
>
> DC: Okay.
>
> SA SS: That was introduced by [Appellant].

(R. at 715-16.)

[8] In his Statement of Facts section, Appellant states, "Confronted with this new information, SA SS still did not request an age confirmation because it 'didn't matter to him.'" (App. Br. at 13, *citing* R. at 675-76.) However, Appellant fails to cite the whole of SA SS's answer where SA SS provides context as to why it "didn't matter to him," namely because SA SS, as "BW," had "disclosed my age" and that Appellant "continues to talk to me." (R. at 676.)

On redirect examination, SA SS agreed that if Appellant had never contacted "BW" on Kik, there would have been no apprehension. (R. at 766.)

Appellant's interview with AFOSI was recorded and is at Prosecution Exhibit 11. (R. at 541-42.) The interview was also played before the members at Appellant's trial. (R. at 769-823.) In his interview, Appellant admitted to meeting BW about two weeks prior at the AFRC, stated that BW had a cast at the time, and admitted to adding her as a "quick add" on Snapchat. (R. at 771-72.) Appellant also admitted that BW had come to his dorm room, that they "cuddle[d]," and that BW left because DJ wanted her to leave. (R. at 775.) Appellant also admitted to kissing BW on the lips and leaving a hickey on her neck. (R. at 778.) Appellant stated that after the dorm interaction, BW "unadded me and blocked me and everything. And then a few days later she added me – Kik and then I don't know why I downloaded it and now we're here."[9] (R. at 780.)

When asked if he ever touching BW's breast, Appellant had the following conversation with SA SS:

> Appellant: I don't know. It may have slipped. It may have – in like moving and cuddling, it may have grazed by it but I really don't know.
>
> SA SS: I mean, it doesn't just slip.
>
> Appellant: I know.
>
> SS SA: You know what I mean?
>
> Appellant: I know.

[9] In his Statement of Facts section, Appellant claims that prior to SA SS beginning a conversation with Appellant on Snapchat as "BW," "Appellant 'unadded' BW from Snapchat, which means he deleted her as a contact." (App. Br. at 10.) However, this assertion contradicts Appellant's own admission to AFOSI that BW is the person who "unadded" Appellant. (R. at 780.)

SA SS: So did you grab her breast?

Appellant: Not like this but it may have, you know.

[Accused used his hand to show grasping and grazing.]

(R. at 797.) When asked if he possibly touched BW's breast under her shirt, Appellant replied, "Right." (R. at 798.) When asked again if he grabbed BW's breasts, Appellant replied, "Yes," and then said, "Both," when asked if the grab was over or under her shirt. (Id.) Appellant then detailed how their interaction in his dorm room took place, including describing how he grabbed BW's breast. (R. at 798-803, 808-11). At one point, Appellant stated the two "probably would have had sex but she kept saying she didn't have time because she had to meet up with [DJ]." (R. at 814.)

As to BW's bra during their interaction, the following exchanged took place between Appellant and AFOSI SAs:

SA CC: So you saw her bra when you were on top, right?

Appellant: Correct.

SA CC: Okay.

SA SS: And she never fully had her breasts exposed right?

Appellant: I think so.

SA SS: She did? Okay. At what point do you remember when that was? Was she -- was that when you were on top?

Appellant: Mhmm.

SA SS: Okay. Like did she like move the bra up? Did the bra end up going down?

Appellant: Down.

(R. at 815-16.)

Regarding age, SA SS asked, "How old did she tell you she was?" Appellant responded, "At first she told me she was like 15," adding that age was brought up "just like once on Snapchat." (R. at 780-81.) When asked if BW ever brought up her age again, Appellant responded, "Well, on Kik she actually said that she lied about her age and she was actually younger." (R. at 781.) When asked how old BW said she was, Appellant replied, "I think 14." (Id.)

Appellant later stated, "I will admit, it's probably going to look really bad, but there are condoms in the bag." (R. at 783.) However, Appellant stated, "I wasn't planning on having sex with her at all." (R. at 785.) However, when pressed about the condoms, Appellant stated, "So I will admit, at first yes, but after thinking about it, I wouldn't want to." (R. at 786.)

At another point, SA SS stated, "So the big elephant in the room, right, is that she's 13-years-old ---- . . . ." (R. at 784.) Appellant interrupted SA SS by saying, "Correct." (Id.)

Later, Appellant asked if the military had adopted Japanese laws. (R. at 788.) At that point, SA SS stated that under the UCMJ, the legal age of consent was 16. (Id.) Appellant then stated, "At the time, I thought she was older," adding, "Like 15-16 at the start." (R. at 789.) Appellant would later continue to change his story by saying, "But then again, I would have constantly had that thinking back -- because she told at first, I think she said 16. And then lied and said 15. And lied and said 14. So, keep pushing back, I really don't know her age ----." (R. at 793.)[10]

[10] While Appellant cites to this portion of Appellant's discussion of BW's age in his Statement of Facts section (*see* App. Br. at 17.), he omits mention of the earlier discussion during his AFOSI interview when he initially told agents that "[a]t first she told me she was like 15" and that, when asked again how old BW said she was, Appellant said, "I think 14." (R. at 780-81.)

Appellant that stated that he could not have had sex with BW that night even if he wanted to because "I beat my meat today," adding, "And once I beat my meat, it's really not going to get up for the rest of the day." (Id.)

Regarding explicit photos, Appellant initially denied sending explicit photos to BW. (R. at 794.) However, when asked a second time, Appellant responded, "Maybe," and then said it was "probably" three photos. (R. at 794-95.) He then said he send "maybe one" photo of his penis, adding that his penis may have been erect in the photo but that he did not remember. Appellant would also admit that he deleted Snapchat from his phone two days prior to his apprehension and that he did not save any photos. (R. at 795.)

Later, while sitting by himself in the interview room, Appellant began talking to himself. Appellant at one point stated, "Fuck dude, what am I doing? I've gotta stop thinking with my dick." (R. at 818.)

The panel convicted Appellant of the following four specifications:

- Charge I, Specification 1: Appellant did, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, commit a lewd act upon BW, a child who had not attained the age of 16 years, by touching the breast of BW with Appellant's hand, to wit: touching the breast of BW with Appellant's hand, with an intent to gratify the sexual desire of Appellant;

- Charge I, Specification 4: Appellant did, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, commit a lewd act upon BW, a child who had not attained the age of 16 years, by intentionally exposing his genitalia to BW, with an intent to gratify the sexual desire of Appellant;

- Charge II, Specification 1: Appellant did, at or near Misawa Air Base, Japan, on or about 16 August 2020, attempt to commit a sexual act upon BW, a person whom he believed to be a child

who had attained the age of 12 but had not attained the age of 16 years, to wit: penetrating BW's vulva with his penis; and

- Charge IV and its Specification: Appellant, who knew of his duties, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, was derelict in the performance of those duties in that he willfully failed to refrain from permitting [BW], a person under the age of 18 to enter his dormitory, as it was his duty to do.

(R. at 1071.)

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

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR SEXUAL ABUSE OF A CHILD ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is

"convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." United States v. Tunstall, 72 M.J. 191, 192 (C.A.A.F. 2013). A specification tried by court-martial will not pass constitutional scrutiny unless it both gives the accused notice of the charge he or she must defend against and shields him or her from being placed in double jeopardy. United States v. Turner, 79 M.J. 401, 404 (C.A.A.F. 2020) (citations omitted). The military is a notice-pleading jurisdiction. United States v. Gallo, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000). A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." Id.

Specification 1 of Charge I as charged under Article 120b, UCMJ, states that Appellant "did, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, commit a lewd act upon [BW], a child who had not attained the age of 16 years, by

touching the breast of [BW] with [Appellant's] hand, to wit: touching the breast of [BW] with [Appellant's] hand, with an intent to gratify the sexual desire of [Appellant]." (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 that between on or about 15 July 1 2020 and on or about 15 August 2020, at or near Misawa Air Base, Japan, the accused committed a lewd act upon [BW], by touching the breast of [BW] with the accused's hand, to wit: touching the breast of [BW] with the accused's hand, with an intent to gratify the sexual desire of the accused; and
>
> (2) That at the time of the lewd act [BW] had not attained the age of 16 years.

(R. at 916.)

Specification 4 of Charge I as charged under Article 120b, UCMJ, states that Appellant "did, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, commit a lewd act upon [BW], a child who had not attained the age of 16 years, by intentionally exposing his genitalia to [BW], with an intent to gratify the sexual desire of [Appellant]." (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 15 July 2020 and on or about 15 August 2020, at or near Misawa Air Base, Japan, the accused committed a lewd act upon [BW], by intentionally exposing his genitalia to [BW] , with an intent to gratify the sexual desire of the accused; and
>
> (2) That at the time of the lewd act [BW] had not attained the age of 16 years.

(R. at 917.)

The military judge instructed that a "lewd act" meant "any sexual contact with a child" and "intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person." (R. at 918.) The military judge also instructed that "sexual contact" meant "touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object." (R. at 919.) For these offenses, the military judge also instructed that "child" meant any person who has not attained the age 17 of 16 years. (Id.)

Also for these offenses, the military judge instructed that the "prosecution is not required to prove the accused knew the age of [BW] at the time the alleged lewd acts occurred," but that "an honest and reasonable mistake of fact as to [BW's] age is a defense to those charged offenses." (R. at 919-20.) The judge instructed as follows as to this defense and its burden on the Appellant:

> "Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct was at least 16 years old. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that [BW] was at least 16 years old. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The burden is on the defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A "preponderance" means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused was under

> a mistaken belief that [BW] was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that [BW] was at least 16 years old, if
>
> you are not convinced by preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused's mistake was reasonable, the defense does not exist.

(R. at 920-21.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual abuse of a child in both Specification 1 and Specification 4 of Charge I, 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 touched BW's breast and sent her a picture of his genitalia with an intent to gratify his sexual desire.***

The evidence is clear Appellant touched BW's breast and sent her a picture of his penis over Snapchat and that both were done to gratify his sexual desire. BW testified that Appellant touched her breast while in his dormitory room. (R. at 328-29.) Appellant admitted that he touched BW's breast while being interviewed by AFOSI. (R. at 531-32, 797-803, 815-16; Pros. Ex. 11.)

BW also testified that Appellant sent her pictures of his exposed penis over Snapchat. (R. at 309-10, 367-68.) Appellant also admitted to sending at least one picture of his penis to BW while being interviewed by AFOSI. Though Appellant initially denied sending explicit photos, he later responded, "Maybe," and then said it was "probably" three photos. (R. at 794-

95; Pros. Ex. 11.) He then said he sent "maybe one" photo of his penis, adding that his penis may have been erect in the photo but that he did not remember. (Id.)

During his interaction with BW in his dorm room as well as his conversations with BW on Snapchat, the subject of sex and sexual activity was ongoing and readily apparent, thus showing Appellant's clear intent to gratify his sexual desire when he touched BW's breast and sent her a picture of his genitalia.

- ***BW was under the age of 16.***

The evidence is equally clear that BW was 13-years-old at the time of these incidents. BW testified that she was 13 at the time and had just finished seventh grade. (R. at 286, 292.) SA SS also testified that he verified BW's age using Department of Defense dependent records. (R. at 891.)

- ***Appellant's supposed mistake of fact as to BW's age was neither honest nor reasonable.***

Still, Appellant claims his convictions are legally and factually insufficient. First, he believes that he, "by a preponderance of the evidence . . . established that he actually and reasonably believed BW was at least 16 years of age." (App. Br. at 22.) In doing so, Appellant makes the same arguments now that he did before the member panel at his court-martial. His efforts did not persuade the members there and should not persuade this Court now.

First, this Court need only look at Prosecution Exhibit 1, which depicts BW as she looked when she met Appellant in the summer of 2020. As BW testified, this photo was her retake school picture that was taken in the middle to end of the school year and that "she looked similar to this photo when she met Appellant." (R. at 291.) A reasonable and objective review of this photo shows BW as someone who was clearly under the age of 16.

Second, BW testified that she told Appellant during their first meeting that she was in middle school. (R. at 295.) Notably, while Appellant in his brief highlights that "BW never told Appellant her age" during this first meeting, he omits the fact that she told him she was in middle school during that first meeting. (*See* App. Br. at 24, *citing* R. at 24.)

Third, after Appellant sought BW out on Snapchat and "quick added" her, BW testified that "something about grade was brought up again" and she "remember[ed] mentioning that I was 14-years-old." (R. at 304.)

Fourth, BW recalled that Appellant responded to this information by asking if she had any older friends. (Id.)

Fifth, Appellant admitted to AFOSI agents that "[a]t first she told me she was like 15" during their conversations on Snapchat. (R. at 780-81; Pros. Ex. 11.) When asked again how old BW said she was, Appellant replied, "I think 14." (Id.) At another point, when SA SS stated, "So the big elephant in the room, right, is that she's 13-years-old ---- ," Appellant interrupted SA SS by saying, "Correct." (R. at 784; Pros. Ex. 11.)

Sixth, Appellant questioned AFOSI agents as to whether Japanese laws applied to the military. (R. at 788.) Notably, the Japanese age of consent was 13-years-old, the exact age of BW at the time.

Finally, prior to "BW" telling Appellant on Kik that she was 13, Appellant on Snapchat initially asked BW whether her parents were "going to do anything about like secfo or osi?" (Pros. Ex. 2 at 4.) Appellant's concern for law enforcement involvement further confirms Appellant's knowledge that she was underage as he was clearly concerned about AFOSI involvement, "get[ting] in trouble," "los[ing] his career," and "risk[ing] it." (*See* Pros. Ex. 2 at 5.)

Each of these reasons cuts clearly against Appellant's claimed mistake of fact claim regarding BW's age. Essentially, Appellant stakes this defense on his response to SA SS, as "BW," on Kik when he typed, "You told me 16 before." However, this message flies in the face of everything else both BW and Appellant himself have said in this case. BW repeatedly stated that she told Appellant on multiple occasions about her age and grade level. Appellant himself admitted that BW told him she was either 14 or 15 and, knowing she was underage, showed concern on Snapchat about AFOSI involvement, getting in trouble, and losing his career. In addition to these statements by both Appellant and BW, this Court has the picture of BW at Prosecution Exhibit 1 which clearly shows her to be under the age of 16. Appellant's discussion in his brief about BW hanging out with older kids and being "familiar with the concept of dating" are equally unimpressive in comparison to BW's testimony, Appellant's admissions, and the other factors discussed above.

Appellant next attempts to compare his case to this Court's recent opinion in United States v. Thompson, No. ACM 40019 (rem), 2023 CCA LEXIS 210 (A.F. Ct. Crim. App. 18 May 2023) (unpub. op.). However, as Appellant is forced to admit, this Court found that appellant's mistake of fact claim wanting as well. (App. Br. at 20.) Still, Appellant believes his case has "much more evidence demonstrating the reasonableness of any mistake on Appellant's part than existed in Thompson." (App. Br. at 25.) Appellant is incorrect.

First, in Thompson, the appellant argued mistake of fact because of "several adult behaviors [the victim] purported to Appellant that she engaged in, including drinking alcohol, using edible marijuana products, and engaging in sexual activity with other men. She claimed to be a college student, and she stated she was involved in international travel that could be unusual for an underage student during the school year. In addition, Appellant and VP discussed the

possibility of traveling to South Africa together, and of getting married in the future." Thompson, 2023 CCA LEXIS 210, *13-14.

None of these aspects, including alcohol and drug use, claiming to be a college student, international travel discussion, or talk about getting married, are present in this case. Further, in Appellant's own recitation of the case, he highlights that the appellant in Thompson met his victim on an 18+ chatting application. (App. Br. at 25.) Yet here, Appellant met BW in the base AFRC while BW was waiting for a ride, presumably because she was not old enough to drive. Moreover, during this first meeting, BW told Appellant she was in middle school. If anything, this Court's opinion in Thompson cuts much more *against* Appellant's case than it helps considering the victim in Thompson was claiming to be involved in many more "grown up" activities (drugs, alcohol, sex, and being in college) than anything BW ever discussed with Appellant. Yet this Court still found the appellant in Thompson had failed to show a reasonably mistake of fact as to that victim's age. This Court should come to the same conclusion here.

Unable to show a reasonable and honest mistake of fact, Appellant next turns to, once again, claiming BW was not a credible witness. (App. Br. at 26.) Again, Appellant simply repeats the same attacks against BW that he launched at trial. Appellant again centers his attack on BW by pointing to SA SS's testimony regarding BW not initially telling AFOSI about her interaction with Appellant in his dorm room. (Id. *citing* R. at 601.) Yet again, however, Appellant fails to provide the complete context of SA SS's testimony which explains in detail why a child would be expected to not be completely forthcoming on an initial interview and why establishing a proper setting and atmosphere results in children opening up more to the true events that took place. (*See* R. at 591, 754.) In fact, when this proper setting was made, BW was forthcoming about her interaction with Appellant in his dorm room. Furthermore, Appellant

admitted to everything that happened in the dorm room, therein undercutting his argument that she was somehow lying about it.

Next, Appellant claims BW had a motive to fabricate, but then provides nothing but innuendo as to why he believes BW would have lied about her interaction with Appellant. Appellant conjures conclusory statements such as "To a 13 year old during the onset of the pandemic, [losing social media privileges] can be the world." (App. Br. at 27.) Still, these reasons (rumors, mad parents, etc.) were all previously presented to the members, who had the privilege of seeing BW in person and on the stand and yet still convicted Appellant of sexual abuse of a child.

In sum, Appellant claim that he either actually or reasonably believed BW was at least 16-years-old is refuted by multiple pieces of evidence, testimony, and Appellant's own admissions. BW told Appellant on multiple occasions her age and that she was in middle school. Moreover, Appellant admitted that BW initially told him she was either 14 or 15. Finally, even if BW did constantly change what she told Appellant her age was, this constant changing from 13- to 14- to 15- to, allegedly, 16-years-old would have placed a reasonable person in a clear state of uncertainty as to whether BW was of age or not. The military judge instructed the members that "ignorance or mistake cannot be based on the negligent failure to discover the true facts," that "[n]egligence is the absence of due care, and that "[d]ue care is what a reasonably careful person would do under the same or similar circumstances." Here, at the very least, Appellant displayed a clear negligent regard for ascertaining BW's true age prior to grabbing her breast and sending her a picture of his exposed penis. Thus, as the military judge instructed, the defense of mistake of fact "does not exist." As the panel correctly found at his court-martial,

Appellant failed to established a reasonable and honest mistake of fact as to BW's age.[11] This Court should come to a similar conclusion and dismiss Appellant's claim.

- ***Charge I, Specification 1 was proven as charged.***

Next, Appellant, for the very first time, appears to make a due process and notice claim regarding Charge I, Specification 1 within his legal and factual sufficiency issue. (App. Br. at 21-22, 28-30.) Appellant contends, "The Government limited itself with its charge sheet and the Defense reasonably received its notice from that charging decision." (Id. at 29.) He then claims his conviction for Charge I, Specification 1 is legally and factually insufficient because the "specification alleged Appellant touched BW's breast, BW's actual anatomical body part, and not the clothing that covers it," and that "BW's testimony was that Appellant's hand touched the outside of her sports bra which covered her breast." (App. Br. at 28.) Appellant believes that since the specification did not state "though the clothing" that the evidence had to show Appellant actually and directly touched the flesh of BW's breast. (Id. at 28-29.)

Appellant is wrong on all counts. First, Appellant at the very least forfeited this issue by not raising any due process or notice issues at trial. Appellant had ample opportunity to file a motion regarding this issue, a bill of particulars, or simply raise the issue to the military judge at trial. Appellant also had the opportunity to raise the issue at his Article 32 hearing. Instead, neither Appellant nor his trial defense counsel ever objected as to whether Appellant was on notice regarding the specification, which supports that Appellant had notice and knew exactly what he needed to defend against at trial.

[11] Though SA SS, as "BW," would later definitively tell Appellant that BW was 13 years old during their Kik conversation, therein removing all doubt as to BW's age, that conversation occurred after the events in Appellant's dorm room.

Further, Appellant's trial defense counsel never stated that they were unprepared to defend against Appellant touching BW's breast through her clothing. Additionally, during his opening statement, Appellant's trial defense counsel plainly stated, "From there, that leads over to [Appellant] touching [BW's] breast over her bra . . . ." (R. at 269.) Finally, neither Appellant nor his trial defense counsel objected to the military judge's instruction that "sexual contact" meant "touching . . . either directly or through the clothing . . . ." (R. at 919.)

Still, Appellant seems to claim a notice issue as well as arguing his conviction is legally and factually insufficient because the specification did not state "through the clothing." Yet, Appellant provides no case law, precedent, or any other legal authority that requires an Article 120b sexual abuse of a child specification to specifically state whether "sexual contact" involves a "direct" touching of a body part versus a "through the clothing" touching. Instead, Appellant attempts to conflate his case with United States v. Reese, 76 M.J. 297 (C.A.A.F. 2017), a case that is vastly different.

In Reese, the Government sought to amend a specification from *licking* the victim's penis with the appellant's *tongue* to *touching* the victim's penis with the appellant's *hand*. Id., 76 M.J. at 299. In noting that the Government in that case styled the change as a "new charge that came up," our superior Court stated that it did not "believe that an allegation of sexual touching with a hand is fairly included in an offense akin (though not identical) to oral sodomy of a child." Id. at 301. The Court also noted that what was now being alleged, a "touching" charge, had an accident defense that could have been alleged, where the original "licking" charge did not. Our superior Court held this to be a major change and reversed.

Appellant's case is nothing like Reese. First, in Reese, the original charge stated the appellant licked the victim's penis with his tongue, the amended charge stated the appellant

touched the victim's penis with his hand. That is, the amended charge changed the way in which the appellant interacted with the victim's penis (licking versus touching) and changed the body part the appellant used to interact with the victim's penis (appellant's hand versus his tongue). Here, however, whether directly or through her clothes, the fact remained that Appellant touched the same body part of the victim (her breast) with his same body part (his hand).

Also completely in contrast to Reese, where notice and due process issues were raised at the trial level to the military judge by that appellant, neither Appellant nor his counsel ever raised any notice issues at Appellant's trial. As the record shows, including being mentioned in Appellant's own trial defense counsel's opening statement, both Appellant and his counsel knew exactly what they had to defend against – namely that Appellant had touched BW's breast above her sports bra.

Here, Appellant has failed to show that he was not on notice as to the Government's theory on how Appellant touched BW's breast. Had Appellant had any question as to whether the Government's theory was a direct touching or one through the clothing, he and his counsel had ample opportunity to ask for clarification. Yet they did not because, as shown by his counsel's opening statement, Appellant knew full well the Government's theory for the touching and was already defending against it.[12]

Moreover, the definition of "sexual act," which were the words used in the specification's language, allows for touching either directly or through the clothing. Finally, unlike in Reese, the Government never attempted to amend the specification against Appellant, let alone attempt to change, as was done in Reese, the way in which Appellant interacted with BW's breast (it was

[12] In the Government's closing argument, the trial counsel again made its theory clear when he stated, "She told you he did it. How he put his hand both under her shirt, but over the bra, touched her breast, basically a grasp. He also tells you that." (R. at 961.)

always touching) or what body part Appellant used to interact with her breast (it was always his hand).[13] Accordingly, Appellant's claim here must fail.

- ***Appellant was on notice for the offense alleged in Charge I, Specification 4.***

Next, and again for the very first time, Appellant argues a "problem of notice" with Charge I, Specification 4. (App. Br. at 30.) Appellant contends, "For this specification, the intentional exposure may have occurred in person or via communication technology," and that "the Government alleged neither; it merely alleged Appellant exposed himself to BW but did not allege how." (Id.) Appellant believes that since the "Government did not identify the method of exposure on its charging document" that there "is a problem of notice." (Id.)

Appellant is wrong again. First, as he did with Specification 1, Appellant at the very least forfeited this issue by not raising any due process or notice issues at trial. Like with Specification 1, Appellant had ample opportunity to file a motion regarding this issue, a bill of particulars, or simply raise the issue to the military judge at trial. Instead, neither Appellant nor his trial defense counsel ever objected as to whether Appellant was on notice regarding the specification, which supported that Appellant had notice and knew exactly what he needed to defend against at trial. Further, Appellant's trial defense counsel never stated that they were unprepared to defend against the Government's theory on how Appellant exposed his penis to BW.

Notably, Appellant admitted to AFOSI that he sent pictures of his exposed penis to BW. (R. at 794-95.) However, Appellant stated that in his dorm room, he never pulled his penis out from his shorts. (R. at 799.) When asked, Appellant stated that "it stayed in." (Id.)

[13] Notably, the sample specification in the Manual for Courts-Martial does not require specifying directly or through the clothing. *See* Manual for Courts-Martial, IV-95, ¶62(e)(3)(a).

Appellant also fails to note in his brief that the subject of this specification arose during his Article 32 Preliminary Hearing. Within the Probable Cause Examination of her report, the Preliminary Hearing Officer (PHO) wrote that the Government counsel "stated Specification 4 of Charge I alleges that the accused exposed his genitalia to [BW] when she sent [BW] a picture of his penis." (PHO Report at 13, ROT, Vol. 3.) When the PHO recommended language being inserted that the specification dealt with a photograph, the PHO wrote that the Government counsel stated he "did not believe this warranted reopening the Article 32 hearing and stated the defense counsel was put on notice that the offense charged sending a photograph of the accused's penis." (Id.) The PHO also wrote that Appellant's own trial defense counsel "also did not believe reopening the Art 32 hearing was warranted." (Id.)

Appellant also fails to mention in his brief where, in his own Motion to Compel an expert witness, Appellant's trial defense counsel wrote in the "Facts" section that "Charge I, Specification 4, alleges that [Appellant] electronically transmitted to the complainant nude photographs of his penis." (*See* App. Ex. VII at 2.)

Further, in the Government's opening statement, the trial counsel stated that Appellant "sent photos of his penis to [BW]." (R at 257.) The trial counsel made no statement or argument that Appellant exposed himself to BW while in-person in his dorm room. Then, during his opening statement, Appellant's trial defense counsel stated that any touching of Appellant's penis in his dorm room occurred "over his boxers." (R. at 269.)

All of this information, including Appellant's own defense counsel's statements that the specification involved the "electronically transmitted" photograph, shows both Appellant and his counsel were on notice of the charge and specification well before his trial. Still, Appellant claims a notice issue because the specification could have included either a "live" exposure while

in Appellant's dorm room or the exposure via "communication technology." (App. Br. at 31.) Such a statement flies in the face of his own counsel's concessions, both at his Article 32 hearing and in pretrial motions, that show both Appellant and his counsel had clear notice of the Government's theory in this case – one which plainly and squarely dealt with Appellant sending BW pictures of his exposed penis via Snapchat. Appellant also fails to answer why, if he was indeed not on notice of the charge and the Government's theory, neither he nor his trial defense counsel ever asked for clarification, either through a bill or particulars or otherwise, regarding the charge. Had Appellant had any question as to whether the Government's theory was a direct touching or one through the clothing, he and his counsel had ample opportunity to ask for clarification. Yet they did not because, as shown by the evidence and the Government's opening statement, Appellant knew full well the Government's theory that the exposure occurred when Appellant sent BW explicit photos over Snapchat. Here, even if Appellant did not outright waive this issue by never bringing up his notice issue prior to his appeal, Appellant has shown no plain error as he was clearly on notice of the charge and the Government's theory for the case.

- ***Appellant's conviction of Charge I, Specification 4 is factually and legally sufficient.***

Finally, Appellant claims his conviction for this specification was not factually or legally sufficient. (App. Br. at 31.) Appellant first argues, "No picture was ever found or introduced into evidence." Yet, Appellant's own trial defense counsel, in his opening statement, highlighted why this was the case when he stated, "Unfortunately, because of the way Snapchat works, all of [the chatting between Appellant and BW] are gone because none of those are saved." (R. at 265-66.)

Next, Appellant states that he "willingly consented to the search of his phone, unlocked it, and removed the passcode. If there was any physical evidence to support the charges in this

case, it is reasonable to conclude the Government would have offered it." (App. Br. at 31.) Yet, Appellant fails to point this Court to where he admitted to AFOSI that he "delete[d] Snapchat off my phone" two days prior to his AFOSI interview. (R. at 795.) Thus, while Appellant seemingly seeks to curry favor by offering that he consented to the search of his phone, Appellant already knew agents would find nothing since he had deleted any potential evidence from his phone days earlier.

Here, Appellant correctly notes that the evidence to substantiate this specification is BW's testimony and Appellant's admissions. (App. Br. at 32.) This evidence was previously discussed above. However, Appellant believes this evidence is lacking and then repeats the same attacks against BW and her credibility he used previously in this issue. Next, Appellant claims his admissions to AFOSI were made only due to "some commendable trickery from SA SS." (App. Br. at 32.) However, a review of Appellant's admissions to AFOSI, as displayed in Prosecution Exhibit 11, show no such "trickery" took place.

In sum, the evidence adduced at trial shows Appellant sexually abused BW by touching her breast and sending her a photo of his exposed penis. The record shows Appellant had no reasonable mistake of fact as to BW's age, was on notice of both specifications, and that both specifications are legally and factually sufficient. Here, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt and that Appellant was not mistaken as to BW's age. This Honorable Court should likewise be convinced that Appellant did not have a reasonable mistake of fact as to BW's age and 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.

II.

APPELLANT'S CONVICTION FOR ATTEMPTED SEXUAL ASSAULT OF A CHILD IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law related to factual and legal sufficiency are the same as that in Issue I.

Additionally, entrapment is an affirmative defense if "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." United States v. Hall, 56 M.J. 432, 436 (C.A.A.F. 2002) (quoting R.C.M. 916(g)). Initially, the burden of proof lies with the defense to show "a government agent originated the suggestion to commit the crime." Id. (*quoting* United States v. Whittle, 34 M.J. 206, 208 (C.M.A. 1992)). Once this burden has been met, the Government then has the burden "to prove beyond a reasonable doubt that [(1)] the criminal design did not originate with the Government; or [(2)] that the accused had a predisposition to commit the offense prior to first being approached by Government agents." Id. (internal quotations and citations omitted).

As a general matter, the government may use undercover agents to create opportunities or facilities for criminals to act upon. Jacobson v. United States, 503 U.S. 540, 548 (1992). However, the question is whether an appellant has been improperly induced. Hall, 56 M.J. at 436. CAAF explained that "the first element of entrapment is an inducement by government agents to commit the crime" and defined "inducement" as follows:

> Inducement is government conduct that "creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." . . . Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need,

> sympathy, or friendship." . . . Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.

Id. (*quoting* United States v. Howell, 36 M.J. 354, 359-60 (C.M.A. 1993)).

"The question of predisposition relates to a law-abiding citizen. 'A law-abiding person is one who resists the temptations, which abound in our society today, to commit crimes…. When a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved.'" Whittle, 34 M.J. at 208 (quoting citations omitted). The Government is not required to show an accused is generally predisposed to commit the crime, but only that the accused is predisposed to commit the specific crime as charged. Hall, 56 M.J. at 437.

Specification 1 of Charge II as charged under Article 80, UCMJ states that Appellant "did, at or near Misawa Air Base, Japan, on or about 16 August 2020, attempt to commit a sexual act upon [BW], a person whom he believed to be a child who had attained the age of 12 but had not attained the age of 16 years, to wit: penetrating [BW's] vulva with his penis. (Charge Sheet, ROT, Volume 1.)

The military judge provided various instructions on the elements of an attempt offense as well as the underlying Article 120, UCMJ, offense. (R. at 921-25.) The overt act instruction for this offense was Appellant "purchases condoms and driving to the location where he believed [BW] to be with those condoms in his possession." (R. at 921.) The elements of the attempted offenses were instructed as follows: (1) That on or about 16 August 2020 1 at or near Misawa Air Base, Japan, [Appellant] committed a sexual act upon [BW], by penetrating [BW's] vulva with his penis; and (2) That at the time of the sexual act [BW] had attained the age of 12 years, but had not attained the age of 16 years. (R. at 923.)

The military judge also provided definitions for the terms "preparation," "sexual act," and also instructed that the "prosecution is not required to prove the accused knew that [BW] had not attained the age of 16 years at the time the alleged sexual act occurred." (R. at 924.)

As to a mistake of fact as to BW's age, the military judge instructed, "If the accused at the time of the offenses was mistaken of the fact that [BW] was under the age of 16 years then he cannot be found guilty of the offenses of attempted sexual assault of a child or attempted sexual abuse of a child. The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that [BW] was the age of 16 years or older, you should consider the probability or improbability of the evidence presented on the matter. You should consider the accused's age, education, and experience along with the other evidence on this issue." (R. at 928-29.)

As to entrapment, the military judge instructed as follows:

> Entrapment is a defense when government agents, or people cooperating with them, cause an innocent person to commit a crime which otherwise would not have occurred. The accused cannot be convicted of the offenses of attempted sexual assault of a child and attempted sexual abuse of a child if he was entrapped.
>
> An "innocent person" is one who is not predisposed or inclined to readily accept the opportunity furnished by someone else to commit the offense charged. It means that the accused must have committed the offense charged only because of inducements, enticements, or urging by representatives of the government. You should carefully note that if a person has the predisposition, inclination, or intent to commit an offense or is already involved in unlawful activity which the government is trying to uncover, the fact that an agent provides opportunities or facilities or assists in the commission does not amount to entrapment. You should be aware that law enforcement agents can engage in trickery and provide opportunities for criminals to commit an offense, but they cannot create criminal intent in otherwise innocent persons and thereby cause criminal conduct.

> The defense of entrapment exists if the original suggestion and initiative to commit the offense originated with the government, not the accused, and the accused was not predisposed or inclined to commit the offenses of attempted sexual assault of a child and attempted sexual abuse of a child. Thus, you must balance the accused's resistance to temptation against the amount of government inducement. The focus is on the accused's latent predisposition, if any, to commit the offenses, which is triggered by the government inducement.
>
> In deciding whether the accused was entrapped you should consider all evidence presented on this matter.

(R. at 931.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of attempted sexual assault of a child, 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.

Still, Appellant finds fault because he maintains he "possessed an honestly held belief BW was at least 16 years old" and because "OSI entrapped Appellant." (App. Br. at 36.) Finally, Appellant argues he did not have the specific intent to penetrate BW's vulva with his penis. (App. Br. at 45.) Appellant is wrong on all counts. However, in limiting his claims to these three issues, it is important to note that Appellant does not contest the member's determinations that he committed an overt act (purchasing condoms and driving to the predetermined location where he thought BW would be) and that he took a substantial step towards committing the intended offense.

- ***Appellant had no mistake of fact as to BW's age at the time he attempted to commit a sexual assault upon BW.***

Here, Appellant uses the same arguments he did in Issue I to claim he was mistaken as to BW's age. (App. Br. at 37.) He also claims his mistake of fact defense for this issue is "far easier to satisfy" than in Issue I because "the reasonableness of the mistake is of no consequence." (Id.)

While Appellant may be correct in his assertion that his mistake no longer had to be reasonable for this specification, an additional fact present in this issue cements that he had no mistake of fact at all. Here, by the time Appellant went to purchase condoms and headed to the predetermined spot to meet up BW and have sex with her, Appellant definitively knew BW's age because he had plainly been told her age during his Kik conversation with who he believed to be BW. There, Appellant was plainly told that BW was "actually 13." (Pros. Ex. 5 at 7-8.)

Though Appellant responded by claiming BW had previously told him she was 16, his response does not change what he then knew – that BW was, in fact, 13 years old. As SA SS would later testify, he, as "BW," "disclosed my age and [Appellant] continues to talk to me." (R. at 676.) Stated another way, SA SS testified that Appellant was told BW's age and "at the end of the day, he knew my [BW's] age and he showed up at that location." (R. at 670.)

As shown in Issue I, Appellant's supposed mistake of fact as to BW's age was not reasonable prior to this Kik conversation for a multitude of reasons, including how she looked at the time they met (*see* Prosecution Exhibit 1), her telling him she was in middle school, her telling him she was 14, him asking her if she had any "older friends," his repeated admissions to AFOSI that she told him she was 14 or 15, and him asking AFOSI agents if the Japanese age of consent, which was 13, applied. Adding in this new fact that Appellant had definitively been

told on Kik that BW was 13 years old erased any and all possibilities of Appellant's supposed mistake as to BW's age.

Still, Appellant finds fault with SA SS by claiming that he and SA SS "had been chatting on Kik for an entire week without a single hard age disclosure." (App. Br. at 37.) Yet, in doing so, Appellant repeats the same incorrect information he previously stated in his Statement of Facts section. (*See* App. Br. at 12.) As shown by Prosecution Exhibit 5 and SA SS's testimony, Appellant and SA SS, as "BW," had not been "chatting . . . for an entire week" as Appellant insinuates. Instead, the record shows Appellant and "BW" spoke on 7 August 2020 and then would have not talked again until 12 August 2020. Thus, while the communications between the two did span over the course of a week, SA SS and Appellant were certainly not "chatting" the "entire week."[14]

Next, Appellant attacks SA SS by calling him "unethical" and "immoral" by stating SA SS "said it 'doesn't matter' if the target of the operation believes the age disclosure." (App. Br. at 37, *citing* R. at 565, 675-76.) However, Appellant fails to provide the full context of SA SS's answer where SA SS explained that it "didn't matter to him" because he "disclosed [BW's] age" and that Appellant "continues to talk to me." (R. at 676.)

Finally, Appellant claims he "challenged" the age disclosure when he responded that BW had previously told him she was 16 years old. (App. Br. at 38.) However, a review of that conversation shows that, if anything, Appellant was challenging what BW had supposedly previously told him (i.e., that she was 16), not what he had just been told (i.e., that she was, in fact, 13). That Appellant never readdressed BW's 13-year-old age disclosure on Kik shows he

[14] Notably, when the chat did resume on 12 August 2020 after almost one week passing without communication, it was Appellant, not SA SS, who reignited that conversation, therein cutting sharply against his entrapment claim detailed below.

willingly accepted her 13-year-old age as fact. Adding further credence to this assertion is his later reliance on the Japanese age of consent, which happened to exactly match BW's age disclosure of 13, when he later spoke with AFOSI.

In sum, the evidence already showed from Issue I that Appellant's knew BW's age prior to his conversation with "BW" on Kik. However, once Appellant was definitively told BW was 13 years old during the Kik conversation and then relied on Japan's 13-year-old age of consent law to justify his actions, this Court should be convinced that Appellant had absolutely no mistake of fact as to BW's age when he bought condoms and arrived at the predetermined meeting place to have sex with BW. The members were convinced as such when they convicted him at trial despite Appellant making the same arguments he currently makes to this Court. This Court should come to the same conclusion and dismiss Appellant's claim.

- ***Appellant was not entrapped.***

Appellant's convictions are legal and factually sufficient because he was not entrapped. Even if this Court assumes the defense met their initial burden at trial, the prosecution introduced sufficient evidence to prove that the criminal design did not originate with the government, and Appellant had the predisposition to commit the offense prior to being contacted by SA SS.

- *Conversation Initiation and Reinitiation*

Here, conversations, including ones of a sexual nature, between Appellant and BW occurred well SA SS became involved in this case. Additionally, the record shows BW broke off communications with Appellant prior to SA SS becoming involved in the case.[15]

[15] While Appellant argues in his brief that he "specifically disconnected from (the real) BW on Snapchat" by "unadding" her, Appellant's own admission that BW was the person who "unadded him" show that is incorrect. (App. Br. at 40, *but see* R. at 780.)

While SA SS may have reinitiated the initial conversation on Snapchat, such a fact is "not enough to establish persuasion in the mind of an innocent individual." Whittle, 34 M.J. at 208. Further, as shown by the record and based on his prior actions, including sending BW a picture of his exposed penis, Appellant never had an initial innocent mind to persuade.

Still, Appellant highlights that he told SA SS, as "BW," that he was "just gonna call it quits" and argues that SA SS "persisted to communicate on Snapchat." (App. Br. at 40.) However, Appellant fails to reveal the full timeline of events and how it was he, not SA SS, who continued the conversation with BW on Snapchat nearly a week after communication between the two had ceased.

As shown in Prosecution Exhibit 2, Appellant did state, "I'm just gonna call it quits here." (Pros. Ex. 2 at 5.) However, Appellant fails to detail in his brief that SA SS replied by providing a Kik username and stating, "Im deleting snap..if you wanna add me cool…if not then whatever." (Id. at 7-8, R. at 502.) Here, SA SS ceased communication with Appellant and, therein, provided Appellant a clear opportunity to walk away from the entire conversation.

For the next five days, there was no contact between Appellant and SA SS. There is zero indication during this time that SA SS, as "BW," made any communication with Appellant. Again, Appellant had a clear opportunity to actually cease contact with BW.

Instead, after five days of no communication and unprompted by any law enforcement action, Appellant reinitiated the conversation on Snapchat by sending the message "What are you doing." (R. at 761-63, Def. Ex. E.) Thus, the record shows Appellant, after five days of no communication with BW, actively sought BW out on his own and unsolicited.

Next, Appellant argues that "SA SS persevered to bring Appellant over to a conversation on Kik" by "send[ing] Appellant multiple invite links to Kik." (App. Br. at 41.) Yet again,

Appellant fails to note that Appellant told BW that he did not remember her Kik username and specifically requested that BW resend the link to him. (Def. Ex. E. at 8, 15-16.) Yet again, while Appellant wishes to insinuate that SA SS was inducing Appellant, all of SA's actions were, in fact, merely in response to Appellant either reinitiated conversations or specifically requesting SA SS send him information.[16]

Moreover, Appellant sent BW the first message on Kik. Again, just like he had on Snapchat prior to him reinitiating that chat after five days, Appellant also could have simply not started chatting with BW on a separate chatting platform. Instead, Appellant took the willful step to download the Kik application and sent BW the first message on that platform. As SA agreed during his testimony, if Appellant has never contacted BW on Kik, there would have been no apprehension. (R. at 766.)

Overall, Appellant initiated conversations with BW, including sexual-related ones, well before SA SS became involved in this case. Further, even though SA SS initiated the conversation with Appellant on Snapchat on 7 August 2020, the conversation ceased for a period of five days with no communication or inducement from SA SS during that time. During that time, Appellant had ample opportunity to walk away from anything involving BW. Instead, five days later, it was Appellant who reinitiated the conversation with SA SS, and it was Appellant who requested that SA SS resend "BW's" Kik username.

[16] Also on page 41 of his brief, Appellant again claims that he "un-added" BW from Snapchat and that this was an indication by him that he "wanted nothing else to do with BW." Again, however, Appellant fails to note that he had previously admitted that BW was the person who "un-added" him. Appellant also again fails to note that he, not SA SS, was the person who re-initiated their conversation on 12 August 2020 after five days of zero communication between the two. Finally, while Appellant claims now that he was "wanting nothing else to do with BW," he fails to highlight that on 14 August 2020, two days into their Snapchat conversation, Appellant told BW, "I miss you." (Pros. Ex. 2.)

- *The criminal design did not originate with the government, and Appellant was predisposed to commit the offense.*

To begin, well before SA SS became involved in this case, Appellant showed a predisposition to commit the offense. First, after meeting BW at the AFRC, Appellant found BW on Snapchat and "quick added" her. Then, during their conversations, Appellant sent BW a picture of his exposed penis and the two spoke about BW's sexual experiences. (R. at 306-10, 314-15, 367-68.) During another conversation, Appellant invited BW to his dorm room and promised to "make it worth [her] while." (R. at 318.)

Further, during the incident in his dorm room, Appellant touched BW's breast and admitted that the two "probably would have had sex" that evening if BW did not have to leave. (R. at 814.) Put simply, Appellant was predisposed to have sex with a minor well before SA SS became involved in this case. The Kik conversations between Appellant and "BW" only confirm Appellant's predisposition.

Still, Appellant finds fault by claiming "SA SS brought up going to Appellant's dorm room for the first time." (App. Br. at 41.) However, this was not an initial introduction into the mind of Appellant by law enforcement as the record shows Appellant and the actual BW had previously discussed meeting up in his dorm room and that BW had actually previously been in Appellant's dorm room. Appellant readily admitted all of this to AFOSI during his interview.

Next, Appellant claims "SA SS brought up oral sex and sexual intercourse by himself without Appellant introducing the concepts" and then claims SA SS "agreed he introduced the concept of sexual intercourse, a surprising concession indeed." (App. Br. at 41, 43, *citing* R. t 708.) However, SA SS never conceded that he introduced either the concept of oral sex or sexual intercourse to Appellant. (*See* R. at 708-10.) While SA SS did state that this would be true *if the only interactions* between Appellant and BW had been the online Snapchat and Kik

conversations and SA SS's persona as "BW" was only an "online persona," SA SS denied introducing these topics because Appellant and BW had previously spoken about both. (R. at 708.) Because BW was a live victim and had a history of conversations with Appellant that included sexual conversations, SA SS testified that "our boundaries and our guidance . . . is a little bit different" because "now we consider the interactions that they had in person." (Id.) Indeed, as SA SS testified, sexual conversations between Appellant and BW "had already been previously brought up in their conversation. And as you can see the response, it clearly had been brought up." (Id.)

Here, evidence shows Appellant had previously talked to BW about both oral sex and sexual intercourse and even admitted to AFOSI agents that he would have had sex with BW in his dorm room.[17] All of this occurred well before SA SS became involved in the case. Thus, SA SS was not the first person to bring up sexual conversation between Appellant and BW and SA SS certainly did not "concede" that he introduced the concept of sexual intercourse as Appellant alleges. Moreover, as SA SS testified and Prosecution Exhibit 6 shows, Appellant sent BW information on foreplay, which included talk about "prepar[ing] the body for sexual intercourse." As SA SS testified, "That was introduced by [Appellant]." (R. at 716.)

Yet even if SA SS had been the first one to bring up sexual innuendo in their conversation, this would still not be enough to show Appellant was wrongly induced. *See* Howell, 36 M.J. at 360 (explaining an agent's repeated requests for drugs "do not in and of themselves constitute the required inducement"). The fact that Appellant later made unprompted

[17] While Appellant in his brief here again attacks BW's credibility, he does not discuss his admission that he had previously touched BW's breast, sent her pictures of his exposed penis, and had wanted to have sex with BW in his dorm room, all of which occurred prior to SA SS's involvement in the case. (*See* App. Br. at 42.)

sexual comments to "BW," such as telling her that she was making him feel "special and warm inside," shows he was not an innocent individual, especially in consideration of his prior history of making sexual comments to the actual BW, touching her breast, and sending her pictures of his exposed penis. In short, the record is devoid of any evidence of extraordinary inducements. *See* Hall, 56 M.J. at 436. SA SS certainly did not hound Appellant to meet for sex. Rather, SA SS simply afforded Appellant "the opportunity to commit the offense." Id. (internal quotations and citation omitted).

However, even if this Court finds that the criminal design originated with the Government, there is ample evidence, as previously disused, that proves beyond a reasonable doubt that Appellant was predisposed to commit the charged offenses. Simply put, Appellant's argument that the evidence showed that he was not predisposed to commit the charged acts does not comport with the record. (App. Br. at 44.)

Appellant's position ignores significant evidence that proved his latent predisposition. Indeed, Appellant's own actions demonstrated this fact. If Appellant "had no predisposition to commit the offense [he] could have done many things, including just telling [BW] no." Whittle, 34 M.J. at 208. Indeed, Appellant had ample opportunity to walk away from his online conversation with "BW" on Snapchat Kik. Instead, Appellant reinitiated the conversation after a five-day break and then reinitiated the conversation the following day. Moreover, Appellant did not avoid engaging in sexual conversations with BW even after he had been specifically told she was 13 years old. Instead, within minutes of being definitely told that she was 13, Appellant asked BW, "So what you wanna do on Sunday?" (Pros. Ex. 6 at 8.) Appellant also talked to BW about fingering herself, how "your pussy expands when you're horny," and asked BW if she

"sucked dick." (Pros. Ex. 5 at 10.) He also told BW that she should shave her vagina before they met. (Id. at 11-12.)

Although "BW" told Appellant that she was 13 years old, he still continued to make numerous sexually vulgar comments to her. Appellant was equally undeterred by BW's reminders that her young age could cause trouble, such as her being grounded. The evidence shows that he was ready and willing to commit the offenses upon BW. *See* Howell, 36 M.J. at 360 (giving weight to "appellant's immediate and repeated agreement to provide drugs" in finding no inducement). Appellant's behavior was not that of an otherwise law-abiding citizen who had no predisposition to commit the charged acts. As a result, he was not entrapped.

In sum, the prosecution proved beyond a reasonable doubt Appellant's was not entrapped. Appellant was not an "unwary innocent" induced by the Government. Howell, 36 M.J. at 358. SA SS's tactics did not include pressure, persuasion, threats, coercion, harassments, or promises of an award, or any other actions that constitute inducement. Id. at 359-60. The record does not show that Appellant was an unfortunate "law-abiding person" who was overcome by "extraordinary inducements." Whittle, 34 M.J. at 208. Rather, Appellant displayed his predisposition to commit the charged offenses and took the initiative on several occasions. Therefore, after "considering the evidence in the light most favorable the prosecution," this Court should find that "a reasonable fact finder could have found" that Appellant was not entrapped. United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006). Similarly, "after weighing all of the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court should also be convinced Appellant was not entrapped due to the evidence proving his "guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000).

- ***Appellant has the specific intent to penetrate BW's vulva with his penis.***

Finally, Appellant claims the Government did not prove beyond a reasonable doubt that he had the "specific intent to penetrate BW's vulva with his penis." (App. Br. at 44-45.) Appellant bases his argument completely on the fact that he wrote in his AFOSI statement that he and BW would "potentially have sex if she wanted it." (Pros. Ex. 9.) However, Appellant omits the fact that he possessed condoms when he was apprehended. Further, even though he initially denied intending to have sex with BW, Appellant would admit his true intent during the following exchange:

> SA SS: You had the intention ----
>
> Appellant: At first.
>
> SA SS: To have sex with her?
>
> Appellant: Yes, at first.
>
> SA SS: Okay.
>
> Appellnat: But after ----
>
> SA SS: And again ----
>
> Appellant: [Unintelligible].
>
> SA SS: Daniel, that's what I'm trying to say. Daniel, it's fine if you did.
>
> Appellant: So I will admit, at first yes, but after thinking about it, I wouldn't want to.

(R. at 785-86.)

Moreover, in his statement, Appellant wrote, "As for tonight I went to meet with her to watch movies and catch up and potentially have sex if she wanted it." (Pros. Ex. 9.) Here, looking at the context of his written statement, Appellant wrote the word "potentially" in the

context of "if she wanted it." (Pros. Ex. 9.) In other words, Appellant fully intended to have sex with BW – the only question as to whether they would "potentially" have sex was dependent only on if "she wanted it."

Finally, Appellant fails to account for him sending BW information on foreplay, which also spoke about sexual intercourse, or that he told BW he "would use a condom if she wanted him to." (Pros. Ex. 6.)

In sum, the evidence adduced at trial shows Appellant attempted to commit sexual abuse upon BW by inserting his penis into her vulva. The record shows Appellant committed an overt act by buying condoms and going to the predetermined place to meet BW, that he took a substantial step in his attempt by doing both of those acts, and that he had the specific intent to commit the sexual abuse upon BW. As Appellant told himself while sitting alone at the AFOSI building, "Fuck dude, what am I doing? I've gotta stop thinking with my dick." (R. at 818.)

The evidence also shows Appellant had no mistake about BW's age when he went to meet her and that he was not entrapped in any fashion by SA SS. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of Specification 1 of Charge II against Appellant was met, that Appellant was not mistaken as to BW's age, and that Appellant was not entrapped. This Honorable Court should likewise be convinced that a reasonable factfinder could have found all the essential elements of the offense 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.

APPELLANT'S CONVICTION FOR DERELICTION OF DUTY IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law related to factual and legal sufficiency are the same as that in Issue I.

The Specification of Charge IV as charged under Article 92, UCMJ, states that Appellant "who knew of his duties, at or near Misawa Air Base, Japan, between on or about 15 July 1 2020 and on or about 15 August 2020, was derelict in the performance of those duties in that he willfully failed to refrain from permitting [BW], a person under the age of 18 to enter his dormitory, as it was his duty to do." (Charge Sheet, ROT, Volume I.)

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

> (1) That [Appellant] had a certain duty, that is: to refrain from permitting [BW], a person under the age of 18, to enter his dormitory;
>
> (2) That [Appellant] knew of the duty; and
>
> (3) That between on or about 15 July 1 2020 and on or about 15 August 2020 at or near Misawa Air Base, Japan, the [Appellant] was willfully derelict in the performance of that duty, by willfully failing to refrain from permitting [BW], a person under the age of 18, to enter his dormitory.

(R. at 934.) The military judge also instructed that member that they must find Appellant "knew that he had a duty to refrain from permitting [BW], a person under the age of 18, to enter his dormitory" and that this "knowledge, like any other fact, may be proved by circumstantial evidence." (R. at 936.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of dereliction of duty, 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.

Here, MSgt WC, the Superintendent of Unaccompanied Housing at Misawa Air Base, testified of the numerous ways in which dormitory residents, including Appellant, knew that persons under the age of 18 were not allowed in the dormitory. MSgt WC stated that Air Force Instruction 32-6000, a 35th Fighter Wing NOTAM, a trifold dorm pamphlet, and a sign posted as the entrance to the dorm all stated that no one under the age of 18 was authorized in the dormitory. (R. at 449.) MSgt WC also stated that all new Airmen attend an in-processing brief where they receive the dorm standards at Prosecution Exhibit 4, which includes going over the standards page by page. The first page of the memorandum, in bold and underlined font, reads, "**Guests under the age of 18 are not permitted.**" (Pros. Ex. 4 at 1.) MSgt WC said each Airman then signs an acknowledgement statement stating that they received the standards and understood them. (R. at 450.) Prosecution Exhibit 5 is Appellant's signature page acknowledging the standards.

The evidence, both direct and circumstantial, overwhelmingly shows Appellant knew of his duty to not bring persons under the age of 18 into the dormitory. Still, Appellant finds fault, arguing that he did not actually "know" of this duty. Appellant first claims there was no evidence that he "actually received or read" the trifold pamphlet at Prosecution Exhibit 3. (R. at 48.) However, MSgt WC testified that the pamphlet "is handed out to each dorm resident when

they in-process our campus." (R. at 451.) Appellant fails to explain in his brief why MSgt WC's testimony should not be trusted or why, seemingly, Appellant would not have received this pamphlet just like every other resident of the dorm.

Next, Appellant takes issue with Prosecution Exhibits 4 and 5, saying that the two are not part of one document and that "nothing marries these documents together." (App. Br. at 49, *quoting* R. at 462, where his trial defense counsel made this statement.) He argues that since the "Government did not retain a full 7-page copy of the document Appellant received, read, and signed," the signature page at Prosecution Exhibit 5 "could be acknowledging receipt for anything." (Id.)

Appellant's arguments are lacking in the face of MSgt WC's testimony regarding the dormitory standards memorandum at Prosecution Exhibit 4 and Appellant's signature page at Prosecution Exhibit 5. First, MSgt WC testified that he had "extensive experience" with the dorm standards memorandum at Prosecution Exhibit 4, and that this memorandum was "provided to all of the dorm residents in their welcoming packet." (R. at 453-54.) MSgt WC testified that, aside from the signature block being changed from a prior dormitory chief, the memorandum at Prosecution Exhibit 4 is what was provided to Appellant when he in-processed during the summer of 2020. (R. at 454.)

The last page of Prosecution Exhibit 4 is a blank acknowledgment form with the heading "1st Ind, Dorm Resident" and the sentence, "I acknowledge receipt and understanding of the dormitory Standards of Conduct, Fire Prevention, and Fire Evacuation procedures." (Pros. Ex. 4 at 7.) This statement is followed by blocks for a resident's printed name, signature, building number, room number and date. A simple look at Prosecution Exhibit 5, which is signed by

Appellant, shows the document is a mirrored copy with the same heading, sentence, and the same five blocks as the form in Prosecution Exhibit 4.

MSgt WC explained that this page was an acknowledgement of receipt and understanding of the dormitory standards of conduct, fire prevention, and fire evacuation procedures. (R. at 471.) MSgt WC testified that this page was completed "[u]pon successfully in-processing our dormitory campus, which again is conducted every Tuesday at 1500 hours at Building 671." (R. at 472.) When asked if this in-processing briefing was routine, MSgt WC answered, "Yes, sir. It is routine every Tuesday. The only exception to that would be if there is a down day, Wing goal day, something to that effect, in which case it would be rescheduled for the following week." (Id.)

MSgt WC also explained that each resident's acknowledgement form was maintained in an individual record for each room. (Id.) MSgt testified that he retrieved Prosecution Exhibit 5 "from the folder labeled Building 671, 211, which was assigned to [Appellant]." (R. at 473.)

Here, MSgt WC testified that the standards at Prosecution Exhibit 4 were the same standards briefed to Appellant when he in-processed (save for a different signature block), that standard practice was that each new resident attended an in-processing briefing where these standards were explained page-by-page, and that, only after the completion of that briefing would a resident sign the acknowledgement form. Based on this information and considering that language of the acknowledgement form in Prosecution Exhibit 5 is completely identical to the acknowledgement form in Prosecution Exhibit 4, Appellant's argument that Prosecution 5

"could be acknowledging receipt of anything" is unsupported and should be discounted by this Court.[18]

Next, Appellant alleges that the dormitory policy may have changed during the summer of 2020 because of COVID-19 and contends that "in-person briefings were rare." (App. Br. at 49.) However, again, MSgt WC stated that the standards in place during the summer of 2020 are those contained in Prosecution Exhibit 4 and that in-processing briefings were routine on every Tuesday when Appellant in-processed. Further, there is absolutely no evidence in the record that the in-processing briefings or the dormitory standards were impacted by COVID-19. While he certainly had the opportunity, Appellant's trial defense counsel did not address any of these issues with MSgt WC during cross-examination or question MSgt WC. (*See* R. at 475-79.) In fact, Appellant's counsel did not cross-examine MSgt WC at all as it related to Prosecution Exhibits 4 or 5.

Combining Appellant's acknowledge of the dorm standard memorandum that boldly stated that no one under 18 was allowed in the dorms with evidence that Appellant received the trifold pamphlet and that he passed by a sign in the dormitory entrance that no one under 18 was allowed on a daily basis, this Court should be convinced that Appellant, both by direct and circumstantial evidence, knew of his duty to not bring visitors to his dormitory room who were under the age of 18. In addition to his actual knowledge of this duty, the record shows the duty was in place and that Appellant willfully refrained from following that duty when he led BW up to his room and eventually sexually abused her. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of this offense was met. This Honorable

[18] Notably, Appellant's trial defense counsel did not object to the admission of Prosecution Exhibit 5 at trial. (R. at 474.)

Court should likewise be convinced that Appellant was willfully derelict in a duty known to him and that a reasonable factfinder could have found all the essential elements of the offense 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.

CONCLUSION

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

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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Air Force Legal Operations Agency
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CERTIFICATE OF FILING AND SERVICE

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DANIEL O. GAUSE-RADKE
Airman Basic (E-1),
United States Air Force,
Appellant.

No. ACM 40343

REPLY BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 2
Airman Basic (E-1), **DANIEL O. GAUSE-RADKE,** United States Air Force, *Appellant*.	)	No. ACM 40343
	)	Filed on: 14 July 2023

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

COMES NOW, Appellant, Airman Basic (AB) Daniel O. Gause-Radke (Appellant), by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and files this reply to Appellee's Answer [hereinafter Gov. Ans.], filed on 7 July 2023. This Court granted a Government Motion to Exceed the page limit on 12 July 2023. *See* A.F. CT. CRIM. APP. R. 17.3 (discussing timeliness for responsive filings when opposing counsel has filed a Motion to Exceed). Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant [hereinafter App. Br.], filed on 7 June 2023, but submits the following additional matters for this Court's consideration.

Argument Applicable to the Entire Appeal

"The factual conclusion completely dictates the legal conclusion." J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. Rev. 483, 491 n. 32 (1985) (referencing *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982)).

It will be readily apparent to the appellate judges who review Appellant's case that his Opening Brief and the Government's Answer tell a different story. The facts this Court utilizes in its legal analysis may very well change the outcome of this appeal. To a large extent—except with regards to a few points below—the legal framework for legal and factual sufficiency, mistake of

fact, and entrapment are not in dispute. The facts driving the analysis are the source of disagreement.

Appellant and his counsel are confident that when this Court undertakes its fresh, impartial review of the evidence in accordance with Article 66(d)(1), Uniform Code of Military Justice (UCMJ), it will make appropriate factual conclusions grounded in the record of trial.

Specific Arguments in Rebuttal to the Government Answer

1. *The standard of review.*

All three of Appellant's assignments of error are styled in terms of legal and factual sufficiency. Certainly, the first two assigned errors have various subsections, arguing the findings are insufficient for different reasons; but, at bottom, all arguments are ones of sufficiency.

There is no question that questions of legal and factual sufficiency are reviewed *de novo*; all three primary aspects of Article 66(d), UCMJ, are. *See United States v. McAlhaney*, 83 M.J. 164, 2023 CAAF LEXIS 165, at *5 (C.A.A.F. 24 Mar. 2023) ("Under Article 66(d), UCMJ, the Court of Criminal Appeals conducts a *de novo* review of the record for legal sufficiency, factual sufficiency, and sentence appropriateness." (citing *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006))).

Yet on multiple occasions, the Government recommends this Court use a plain error standard of review because particular aspects of the legal/factual sufficiency arguments were not flushed out as primary defenses at trial. *See*, *e.g.*, Gov. Ans. at 34, 37, 39. That is not how Article 66 legal and factual sufficiency works. Perhaps, *had* these arguments been made at trial, there would be no convictions for this Court to review. This Court must resist the Government's request to apply plain error and, instead, apply a *de novo* standard to the sufficiency arguments. Doing so will ensure that Appellant's substantial right to an Article 66 review is meaningful and complete,

such that the Court of Appeals for the Armed Forces will not vacate this Court's opinion and remand for a new Article 66 review. *See McAlhaney*, 2022 CAAF LEXIS 165 at *9.

2. *Notice*.

The Government misconstrues the notice arguments involved in the first assignment of error related to the sufficiency of the convictions for Charge I. There are two convictions under that Charge: Specification 1 (touching the "breast") and Specification 4 (intentionally exposing genitalia). The concept of "notice" applies differently as to each specification. The notice argument for Specification 4 of Charge I is that the specification did not indicate whether the exposure occurred in person or via communication technology; therefore, Appellant was not on notice of the Government's theory of liability. *See* App. Br. at 30-33. Both prospects are legally permissible; the problem is the Government did not plead the mechanism of the exposure, and because notice comes from the charge sheet,[1] there is a notice problem. The Government does not get to leave the theory of liability ambiguous and then have all theories available for the factfinder; it must choose one and pursue it, or charge in the alternative. *Cf. United States v. Sager*, 76 M.J. 158, 161-62 (C.A.A.F. 2017) (reasoning under Article 120(b)(2), the words "asleep, unconscious, or otherwise unaware" constitute three alternate theories of liability under which an accused can be found guilty; they are not examples of one theory, nor are they separate elements); *United States v. Elespuru*, 73 M.J. 326, 330 (C.A.A.F. 2014) ("[C]harging in the alternative [is] an unexceptional and often prudent decision.").

For Specification 1 of Charge I, the notice problem takes a different form. There, the Government scoped the specification by using the language "touching the breast." That is the notice the Defense received via the charge sheet. The evidence only indicates Appellant at least

[1] *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018).

touched BW's breast area under the shirt but over the bra;[2] it does not demonstrate he touched the skin of the breast.[3] If the Government wanted to take advantage of the legal permissibility to obtain a conviction of touching through the clothing, it could have done so. But it did not charge the specification that way and cannot obtain a conviction that way. Therefore, the evidence does not align with the specification as charged and the finding is both legally and factually insufficient.

This Court should disregard the Government's arguments that Appellant received notice via the Article 32, UCMJ hearing, and the report of the preliminary hearing officer. Gov. Ans. at 38. The Government tried and failed to make this same argument to the Court of Appeals for the Armed Forces in *United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022). There, again, recognizing longstanding precedent, the CAAF reaffirmed the notion that notice comes from the charge sheet and the charge sheet alone. *Id*. at 140 (citing *Dunn v. United States*, 442 U.S. 100, 106 (1979); *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017)).

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

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[2] Prosecution Exhibit 9 at 3; Record at 328-29, 798.

[3] *See United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Crim. App. 17 Mar. 2022) (unpub. op.) as it relates the sufficiency of the evidence for touching the victim's "groin" with the appellant's hand. The majority opinion extensively evaluated the testimony and relevant law, concluding the conviction was sufficient. *Id*. at *21-25. Judge Meginley would have found the specification factually insufficient. *Id*. at *104-105 (Meginley, J., dissenting in part and in the result).

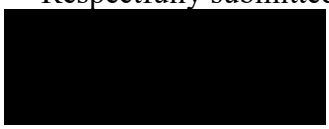
Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 July 2023.

Respectfully submitted,



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[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40343**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Daniel O. GAUSE-RADKE	)	
Airman Basic (E-1)	)	
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 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal