IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	21 April 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **30 June 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 50 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]N, 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 21 April 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

22 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 22 April 2022.

[redacted]

Appellate Government Counsel, 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 (SECOND)**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	23 June 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 July 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] R. at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a 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.

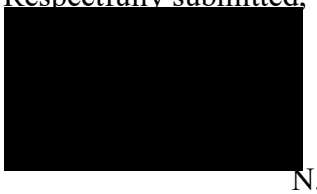
Respectfully submitted,

[redacted]N, 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 Government Trial and Appellate Division on 23 June 2022.

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

24 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 24 June 2022.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	22 July 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 August 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] R. at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a 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]N, 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 Government Trial and Appellate Division on 22 July 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

26 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]
THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 26 July 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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*	)	**NOTICE OF APPEARANCE**
v.	)	Before Panel No. 1
Specialist 3 (E-3) **DEVIN W. JOHNSON,** United States Space Force *Appellant*	)	No. ACM 40257 22 August 2022

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

Comes now the undersigned counsel and hereby enters his appearance in this case.

Respectfully submitted,

[redacted]

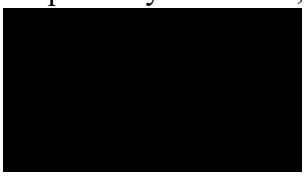
WILLIAM E. CASSARA

[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 Government Trial and Appellate Division on 22 August 2022.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
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. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	22 August 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 September 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel, who filed a notice of appearance contemporaneously with this filing, has an active docket of 43 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Federal Court of Claims. Military appellate counsel is currently assigned 18 cases; seven cases are pending initial AOEs before this Court. Military counsel has one case pending petition/supplement to the Court of Appeals for the Armed Forces. Through no fault of Appellant, Appellant's civilian counsel and military counsel have been working on other assigned matters and have not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Military Appellate Counsel has three cases that have priority over the present case:

1. *United States v. Schauer*, ACM 40203 – In accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, UCMJ. R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. ROT, Vol. 1, Convening Authority Decision on Action, 4 October 2021. The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84

pages. Appellant is confined. Counsel has reviewed the entire case file, including sealed materials, and is finalizing the AOE for submission to this Court.

2. *United States v. Lopez*, ACM S32720 – Consistent with his plea, Appellant was convicted at a special court martial at Vandenberg Space Force Base, California of one specification of drug use in violation of Article 112a, UCMJ, by wrongfully consuming a Schedule I drug. ROT, Vol. 1, Entry of Judgment; R. at 251, 776. Contrary to his plea, Appellant was convicted of a separate specification of drug use in violation of Article 112a, UCMJ, for wrongfully consuming a Schedule I substance. ROT, Vol. 1, Entry of Judgment; R. at 251, 776. On 1 October 2021, panel members sentenced Appellant to be discharged from the service with a bad conduct discharge, to be reduced to the rank of E-1, to perform hard labor without confinement for two months, to be restricted to Vandenberg Space Force Base cantonment area for two months, and to be reprimanded. ROT, Vol. 1, Entry of Judgment; R. at 829. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action. The Record of Trial consists of 24 prosecution exhibits, seven defense exhibits, and 38 appellate exhibits. The transcript is 830 pages and the Appellant is not confined. Counsel has not yet started his review of this case.

3. *United States v. Odagiri*, ACM 40276 – Consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, UCMJ. R. at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence.

ROT, Vol. 1, Convening Authority Decision on Action, 28 January 2022. The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 pages. The Appellant is confined. Counsel has not yet started his review of the case.

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

Respectfully submitted,

[redacted]N, 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 Government Trial and Appellate Division on 22 August 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 23 August 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 (FIFTH)**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	12 September 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 October 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 194 days have elapsed. On the date requested, 240 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel has an active docket of 20 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Federal Court of Claims. Military appellate counsel is currently assigned 19 cases; eight cases are pending initial AOEs before this Court. Military counsel has two cases pending petition/supplement to the Court of Appeals for the Armed Forces. Through no fault of Appellant, Appellant's civilian counsel and military counsel have been working on other assigned matters and have not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Military Appellate Counsel has two cases that have priority over the present case:[2]

1. *United States v. Lopez*, ACM S32720 – Consistent with his plea, Appellant was convicted at a special court martial at Vandenberg Space Force Base, California of one specification of drug use in violation of Article 112a, UCMJ, by wrongfully consuming a Schedule I drug. ROT, Vol. 1, Entry of Judgment; R. at 251, 776. Contrary to his plea, Appellant was convicted of a separate specification of drug use in violation of Article 112a, UCMJ, for wrongfully consuming a Schedule I substance. ROT, Vol. 1, Entry of Judgment; R. at 251, 776.

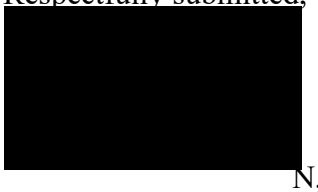
[2] Since the last request for an EOT, undersigned counsel has filed the AOE for *United States v. Schauer* with this Court, drafted a CAAF Petition and Supplement, and has been preparing a CAAF Brief (*United States v. Lattin*) which the CAAF granted on 26 August 2022. Counsel is filing this EOT early because he has eight days of pre-planned leave without internet or email access.

On 1 October 2021, panel members sentenced Appellant to be discharged from the service with a bad conduct discharge, to be reduced to the rank of E-1, to perform hard labor without confinement for two months, to be restricted to Vandenberg Space Force Base cantonment area for two months, and to be reprimanded. ROT, Vol. 1, Entry of Judgment; R. at 829. The Convening Authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action. The Record of Trial consists of 24 prosecution exhibits, seven defense exhibits, and 38 appellate exhibits. The transcript is 830 pages and the Appellant is not confined. Counsel has started reviewing this case.

2. *United States v. Odagiri*, ACM 40276 – Consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, UCMJ. R. at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action, 28 January 2022. The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 pages. The Appellant is confined. Counsel has not yet started his review of the case.

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

Respectfully submitted,



N, 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 Government Trial and Appellate Division on 12 September 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

14 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 14 September 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40257**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Devin W. JOHNSON	)	
Specialist 3 (E-3)	)	
U.S. Space Force	)	
Appellant	)	**Panel 1**

On 12 September 2022, 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 16th day of September, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 October 2022**.

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

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, 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. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	21 October 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 November 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel has an active docket of 48 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, the Federal Court of Claims, and various habeas corpus cases. Military appellate counsel is currently assigned 18 cases; nine cases are pending initial AOEs before this Court. Military counsel has one case pending petition/supplement to the Court of Appeals for the Armed Forces and one case pending a Reply Brief. Through no fault of Appellant, his civilian counsel and military counsel have been working on other assigned matters and have not yet started a review of his case. Accordingly, an enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Military Appellate Counsel has two cases that have priority over the present case:[2]

1. *United States v. Odagiri*, ACM 40276 – Consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, UCMJ. R. at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence.

[2] Since the last request for an EOT, undersigned counsel reviewed and disposed of *United States v. Lopez*, ACM S32720 (Motion to Withdraw from Appellate Review Granted) and filed a CAAF Petition and Supplement.

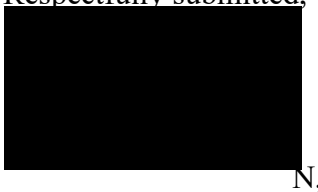
ROT, Vol. 1, Convening Authority Decision on Action, 28 January 2022. The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 pages. The Appellant is confined. Counsel has reviewed the entirety of the unsealed case file and filed a Motion to Examine Sealed Materials on 13 October 2022. This Court has not yet issued a decision on that motion.

2. *United States v. Fernandez*, ACM 40290[3] - Contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant of one charge of wrongfully distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has reviewed all exhibits, allied papers, and is approximately halfway through the transcript.

[3] Undersigned counsel originally prioritized this case below *United States v. Johnson*. However, counsel is attending the 2022 Appellate Advocacy Training in Chapel Hill, NC from 26-28 October 2022. To participate, attendees need to have reviewed a current case on appeal that they can work at the training. *United States v. Johnson* did not fit the case criteria; *United States v. Fernandez* did, so counsel prioritized it before *United States v. Johnson*.

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

Respectfully submitted,



N, 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 Government Trial and Appellate Division on 21 October 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

24 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

[redacted]

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 the Air Force Appellate Defense Division on 24 October 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 (SEVENTH)**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	18 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 December 2022**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel has an active docket of 44 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, the Federal Court of Claims, and various habeas corpus cases. Military appellate counsel is currently assigned 19 cases; 10 cases are pending initial AOEs before this Court. Military counsel has one case pending a supplement to the Court of Appeals for the Armed Forces (CAAF) and oral argument scheduled at CAAF for 6 December 2022.

Through no fault of Appellant, his civilian counsel and military counsel have been working on other assigned matters and have not yet completed a review of his case. Accordingly, an enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors. Counsel filed a Motion to Examine Sealed Materials in this case contemporaneously with this motion for an enlargement of time. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Military Appellate Counsel has one case that has priority over the present case:

1. *United States v. Odagiri*, ACM 40276 – Consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, UCMJ. R. at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence.

ROT, Vol. 1, Convening Authority Decision on Action, 28 January 2022. The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 pages. The Appellant is confined. Counsel has reviewed the entirety of the case file, including sealed materials. Counsel is finalizing the brief.

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

Respectfully submitted,

[redacted]N, 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 Government Trial and Appellate Division on 18 November 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

21 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

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

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

[redacted]
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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 21 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,* v. Specialist 3 (E-3) **DEVIN W. JOHNSON,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 1 Case No. ACM 40257 Filed on: 18 November 2022

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully moves to examine sealed materials in Appellant's record of trial:

1. Transcript pages: 19-24
    a. These pages are a verbatim accounting of a closed session held pursuant to Mil. R. Evid. 412. Record (R.) at 18.
2. Transcript pages: 48-53
    a. These pages are a verbatim accounting of a closed session held pursuant to Mil. R. Evid. 412. R. at 47.
3. Transcript pages: 889-892
    a. A closed hearing pursuant to Mil. R. Evid. 412. R. at 888.
4. Transcript pages: 901-910
    a. A closed hearing pursuant to Mil. R. Evid. 412. R. at 900.
5. Appellate Exhibit I: Defense Motion to Admit Evidence Under Mil. R. Evid. 412, dated 7 July, w/attachment (1 CD) (7 pages)
6. Appellate Exhibit II: Government Response to Defense Motion to Admit Evidence under Mil. R. Evid. 412, dated 14 July 2021, w/attachments (10 pages)
7. Appellate Exhibit III: SVC Motion to Deny Evidence under Mil. R. Evid. 412, dated 14 July 2021, w/attachments (10 pages)

If the Military Judge issued a sealed ruling on Appellate Exhibits I through III, undersigned counsel requests to view that ruling as well (although counsel could not find such a ruling—sealed or otherwise—listed or mentioned). The Military Judge did not issue an order to have the above items sealed; rather he orally mandated that they would be sealed. R. at 26. Trial Counsel, Defense

Counsel, and the Military Judge either presented the above-captioned items at trial or reviewed them during trial.

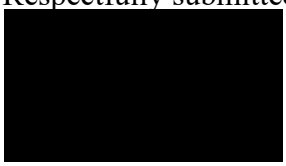
Pursuant to R.C.M. 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed…may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation. *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and to see whether there is a Mil. R. Evid 412 issue.

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

Respectfully submitted,

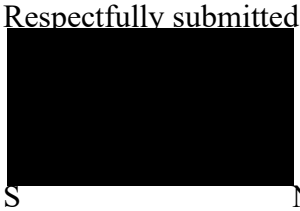


SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial Appellate Division on 18 November 2022.

Respectfully submitted,



S N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force


21 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, USSF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40257 Panel No. 1

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

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

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

Appellant's motion also indicates that a sealed ruling by the military judge may be missing from the record of trial. If this Court determines this sealed ruling to be missing from the original record, the United States respectfully requests this Court to remand this case for correction under R.C.M. 1112(f).

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
[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 21 November 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40257**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Devin W. JOHNSON	)	
Specialist 3 (E-3)	)	
U.S. Space Force	)	
Appellant	)	**Panel 1**

On 18 November 2022, Appellant's counsel submitted a Motion to Examine Sealed Material, specifically: transcript pages 19–24, 48–53, 889–892, and 901–910, and Appellate Exhibits I–III.

The motion states, "Trial Counsel, Defense Counsel, and the Military Judge either presented the above-captioned items at trial or reviewed them during trial" and that examination of these sealed materials is reasonably necessary to fulfill appellate counsel's responsibilities. The Government does not oppose the motion, as long as the materials were viewed by both counsel at trial and Government counsel can also examine the sealed materials.

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

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

Accordingly, it is by the court on this 22d day of November, 2022,

ORDERED:

Appellant's Motion to Examine Sealed Material is **GRANTED.** Appellate defense counsel and appellate government counsel are authorized to examine **transcript pages 19–24, 48–53, 889–892, and 901–910, and Appellate Exhibits I–III**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	20 December 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 January 2023**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel has an active docket of 45 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, the Federal Court of Claims, and various habeas corpus cases. Military appellate counsel is currently assigned 19 cases; nine cases are pending initial AOEs before this Court. Military counsel has two pending supplements to the Court of Appeals for the Armed Forces (CAAF) and one brief for two granted issues.

Through no fault of Appellant, his civilian counsel and military counsel have been working on other assigned matters and have not yet finished drafting his AOE. Both counsel have reviewed the case file, including military appellate counsel having reviewed the sealed materials. Accordingly, an enlargement of time is necessary to allow counsel to continue drafting the AOE. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Military appellate counsel has no Air Force Court cases that take precedent over this case.

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

Respectfully submitted,

[redacted]N, 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 Government Trial and Appellate Division on 20 December 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

20 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40257 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed nearly 60 percent of the 18-month standard for this Court to issue a decision, which leaves leaving time for the United States and this Court to perform their separate statutory responsibilities.

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

[redacted]

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

[redacted]

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40257**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Devin W. JOHNSON	)	
Specialist 3 (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 20 December 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 21st day of December, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **26 January 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DEVIN W. JOHNSON,
Specialist 3 (E-3),
United States Space Force,
Appellant.

No. ACM 40257

BRIEF ON BEHALF OF APPELLANT

WILLIAM E. CASSARA, Esq.
[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

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Other Authorities

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	) **BRIEF ON BEHALF OF APPELLANT**))
v.	) Before Panel No. 1)
Specialist 3 (E-3) **DEVIN W. JOHNSON** United States Space Force *Appellant*	) No. ACM 40257))) 26 January 2023))

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

Assignments of Error[1]

I.

WHETHER APPELLANT WAS CONVICTED OF AN OFFENSE OF WHICH HE WAS NOT ON NOTICE AND WAS NOT CHARGED?

II.

WHETHER THE MILITARY JUDGE VIOLATED THE CANON AGAINST SURPLUSAGE AND APPELLANT'S DUE PROCESS RIGHTS WHEN HE ALLOWED THE GOVERNMENT TO ARGUE A DIFFERENT THEORY OF LIABILITY THAN CHARGED?

III.

WHETHER THE GUILTY FINDING AS TO SPECIFICATION 1 OF THE CHARGE IS AMBIGUOUS AS IT IS NOT CLEAR WHICH INCIDENT THE MEMBERS DETERMINED MET THE ELEMENTS OF THE OFFENSE?

IV.

WHETHER THE GUILTY FINDING TO SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT?

[1] Specialist 3 Johnson raises two issues in Appendix A pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

V.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING G.H.'S VICTIM IMPACT STATEMENT TO BE ADMITTED AT TRIAL?

Statement of the Case

On 30 October 2021, in a general court-martial at Schriever Space Force Base, CO, a panel of officer members convicted Specialist 3 Johnson, contrary to his pleas, of one specification of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019). The members sentenced him to a reprimand, six months confinement, reduction to E-1, and a bad conduct discharge from the United States Air Force. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

Statement of Facts

G.H. enlisted in the U.S. Air Force in February 2020. (R. at 416). She was selected for the Space Force and assigned to Vandenberg Air Force Base for technical school. (R. at 417). While there, she met Specialist 3 Johnson, who was also attending the school, but in a different class. (R. at 417-18). Specialist 3 Johnson made a comment to G.H. that he thought she was "hot." (R. at 418). G.H. took offense and reported the incident to her chain of command. *Id*. Specialist 3 Johnson apologized. *Id*.

In August 2020, G.H. was assigned to Schriever Space Force Base, Colorado. (R. at 419). Johnson had already been assigned to Schriever SFB as well. *Id*. She and Specialist 3 Johnson were both assigned as students to the S. *Id*.

On 16 September 2020, G.H. and Specialist 3 Johnson went shopping for a dining room table for her apartment. (R. at 422). They went to a restaurant, ate, and then went to a furniture store looking for a table. (R. at 422-23, 627). While they were together,

G.H. said something about wanting fish and rice. (R. at 627). Specialist 3 Johnson offered to cook it for her. *Id*.

On 18 September 2020, the pair got together at her apartment and made dinner. (R. at 432). While making dinner, G.H. bent over to put the cookies in the oven. (R. at 436). She felt something touch her buttocks but did not know if it was Specialist 3 Johnson's hand or some other part of him as he walked past in the small kitchen. *Id*. He apologized and said that it was accidental. *Id*.

After dinner, the two sat on G.H.'s air mattress and watched a movie. (R. 441). Eventually both of them fell asleep on the air mattress. *Id.* Specialist 3 Johnson woke up when G.H. turned the light on and touched his shoulder. (R. 629). She told him that he had been touching her while she slept, had digitally penetrated her, and had "dry humped" her. *Id*. She kicked him out of the apartment. *Id*.

The following day, G.H. reported her allegations to the chain of command and an investigation ensued. (R. at 452). Specialist 3 Johnson was charged with three specifications under Article 120, UCMJ. (Charge Sheet). At trial, he was convicted of Specification 1, an allegation that he touched G.H.'s buttocks with his hand without her consent and with the intent to gratify his sexual desire. (R. at 1111).

Argument

I.

APPELLANT WAS CONVICTED OF AN OFFENSE OF WHICH HE WAS NOT ON NOTICE AND WAS NOT CHARGED.

Additional Facts

On 18 September 2020, G.H. awoke Specialist 3 Johnson and accused him of digitally penetrating her vagina while she was sleeping. (R. at 629). She kicked him out of her apartment and he left. *Id*. She called a friend and then the next morning she called her chain of

command to report the incident. (R. at 452-53). G.H. met with OSI on 19 September 2020 and then on 20 September 2020, she went to the hospital for a sexual assault forensic examination. (R. 453-61).

During the examination, G.H. told the forensic nurse examiner that when she was putting cookies in the oven, Specialist 3 Johnson brushed by her and she felt his hand brush her buttocks. (Pros. Ex. 1 at 12). She also told the nurse that when she woke up she could feel something long and warm on her right side and on her buttocks. *Id*. She also said that Specialist 3 Johnson's hand was in her underwear and feeling her vagina. *Id*.

Specialist 3 Johnson was charged with three specifications of violating Article 120, UCMJ. (Charge Sheet). The first specification alleged that Specialist 3 Johnson touched G.H.'s buttocks with his hand with an intent to gratify his sexual desire and without her consent. (Charge Sheet). Specifications 2 and 3 alleged that Specialist 3 Johnson caused G.H. to touch his penis with her torso, buttocks, and leg with an intent to gratify his sexual desire and that he penetrated her vulva with his finger with an intent to gratify his sexual desire, both when he knew or reasonably should have known she was asleep. (Charge Sheet).

Following the preferral of charges, an Article 32, UCMJ, hearing was conducted. (Preliminary Hearing Officer's Report). The Preliminary Hearing Officer (PHO) reviewed videos of the AFOSI interviews of G.H. as well as the AFOSI interrogation of Specialist 3 Johnson. *Id*. at 3. The PHO also included a synopsis of the facts, stating that G.H. was preparing to put cookies in the oven when she felt what she believed to be Specialist 3 Johnson's open palm on her buttocks. *Id*. at 4. She told Specialist 3 Johnson to "watch what he is doing" and he apologized and said that it was an accident. *Id*. After the pair ate dinner, they sat to watch a movie on an air mattress. *Id*. at 5. When G.H. woke up, she felt a finger penetrating her vulva and rubbing her vagina and a penis up against her and "dry-humping" her from behind. *Id*.

In her discussion of the charged offenses, the PHO discussed Specification 1 of the Charge in the context of Specialist 3 Johnson's touching G.H.'s buttocks in the kitchen. *Id*. at 10. The PHO found no evidence to support the specific intent element of Specification 1 since Specialist 3 Johnson immediately said that it was accidental and no other evidence supports that the touching was done with the intent to gratify his sexual desire. *Id*. The PHO then discussed Specifications 2 and 3 in the context of what was alleged to have occurred on the air mattress. *Id*. at 10-12.

Ultimately, the PHO did not find probable cause existed to believe that Specialist 3 Johnson committed the offense charged in Specification 1. *Id*. at 14. She recommended that the specification not be referred to trial by general court-martial. *Id*. In his pretrial advice, the Staff Judge Advocate noted that the PHO did not find probable cause to believe that Specialist 3 Johnson committed the offense charged in Specification 1. (Pretrial Advice at 1). He stated, without further explanation, that he disagreed. *Id*. The Convening Authority referred all three Specifications under the Charge to general court-martial. (Charge Sheet).

At the beginning of trial, Defense Counsel presented an opening statement. She began with the first specification, telling the members that this specification is alleged to have happened with Specialist 3 Johnson and G.H. were cooking dinner in the kitchen. (R. at 411). She told them that when G.H. was making dessert and putting cookies in the oven, she bent over and felt something brush her buttocks. *Id*. Specialist 3 Johnson then apologized and said that it was an accident. *Id*. Defense Counsel told the members: "And that's what the government has charged as abusive sexual contact." *Id*. The Defense Counsel then continued her opening statement, turning to the events on the air mattress in discussing Specifications 2 and 3, when G.H. was alleged to have been asleep. (R. at 412).

G.H. was called to testify. (R. at 415). She testified that as she and Specialist 3 Johnson were cooking dinner, she opened the oven and bent down to put the cookies in. (R. at

436). She testified that she felt a brush against her buttocks. *Id*. G.H. stated that she did not know if it was his hand or if he was walking by, but she told him that he needed to watch himself. *Id*. She testified that he said he was sorry, that it was a small kitchen, and that he was walking by and did not mean to touch her. *Id*.

G.H. continued to recount her testimony concerning the allegations and stated that after they laid down on the air mattress to watch a movie, that she fell asleep. (R. at 441). She awoke around 11 pm and realized that his hand was in her underwear and he was fingering the entrance of her vagina. (R. at 444). She testified that she felt his finger penetrate her vagina and that she also felt his penis on her right buttocks. (R. at 444-45). The Circuit Trial Counsel clarified with G.H. that she could feel the "warmth and pressure" of Specialist 3 Johnson's penis on her buttocks, torso, and upper thigh. (R. at 446). At that point, G.H. testified that she got up from the air mattress and went to the bathroom. *Id*. When she returned, she woke up Specialist 3 Johnson and confronted him. (R. at 447-50). Specialist 3 Johnson soon left her apartment. (R. at 450).

At the conclusion of her testimony, Circuit Trial Counsel asked G.H.: "when you were in your apartment, putting cookies into the oven and Specialist Johnson touched your buttocks, did you consent to that?" (R. at 471). G.H. responded: "No, sir." *Id*. Circuit Trial Counsel then asked:

> Later, after you had gone to sleep, after you had had a sort of a groggy half—being half awake for a few minutes, and then going back to sleep again, when you woke up to his hand reaching in through the back of your waistband and touching you on your vagina, did you consent to that?

Id. G.H. replied: "No, sir." *Id*. Finally, Circuit Trial Counsel asked G.H. "Did you consent to him dry humping you with his erect penis on your thigh, buttocks, and leg?" *Id*. Again, G.H. responded: "No, sir." *Id*.

At the conclusion of the introduction of evidence, the Military Judge instructed the members on the law applicable to the charge and specifications. (R. at 993). His instruction on "consent" stated that:

> [T]o find the accused guilty of the offense or offenses as alleged, you must be convinced beyond a reasonable doubt that [G.H.] did not consent to the charged sexual conduct in Specification 1, and that she was "incapable of consenting" to the charged sexual conduct in Specifications 2 and 3 because she was asleep.
>
> Let me explain that a little bit. So there's two ways in which the law says there can be a lack of consent in a case. Way one is someone who is awake and alert and just says—does not express, does not give consent. Okay? Way two [is] incapable of consenting. Pertinent to this case, the question a sleeping person cannot give consent. The question that you have [to] resolve is whether she was asleep as alleged, and the government has the burden to prove that beyond a reasonable doubt for Specifications 2 and 3. For Specification 1, where it's alleged she was awake, the government has to prove that she did not give consent.

(R. at 997).

The Military Judge also gave instructions on the defense of mistake of fact as to consent. He told the members that this was a potential defense to Specification 1; "that specification being that he touched her buttocks without her consent while awake." (R. at 998).

Following the Military Judge's instructions, the members had several questions about the law. (R. at 1013). One member asked whether Specification 1 referred only to the event in the kitchen or if it could include contact while on the air mattress. (R. at 1016, App. Ex. XLIX). The Government counsel stated his belief that it could reasonably apply to both instances "*per se*." *Id*. He stated that if the members did not find an intent for touching at the oven, that they should consider the touching on the air mattress. He stated that the Government's argument was going to be that the specification "primarily" refers to the conduct on the air mattress. *Id*. The Military Judge appeared surprised by this comment, stating: "Conduct on the air mattress. Okay. So this was not the oven touching—the cookie incident for lack of a better term?" *Id*. Circuit Trial Counsel asserted his belief that "it reasonably applies to both." *Id*. He also stated his intent to argue that the members could find him guilty of either conduct. *Id*. The Military Judge clarified: "So the

government, your theory of the case on Specification 1 is that it could apply to the oven or it could apply to buttocks touching in the course of the accused committing Specification 3, essentially." (R. at 1017). Circuit Trial Counsel replied: "That is correct. Again, with emphasis that it occurred on the air mattress." *Id*.

Circuit Defense Counsel objected to having the Military Judge instruct the members on the Government's theory of the case. He questioned the propriety of having some members find Specialist 3 Johnson guilty for the kitchen incident and others find him guilty of the conduct on the air mattress. *Id*. The Military Judge analogized the issue to when a specification alleges multiple theories of liability and found that it would be appropriate to allow the members to reach a guilty finding even if the required number did not reach that finding on the same conduct. (R. at 1017-18). Circuit Defense Counsel again asked the Military Judge not to instruct the members that they can choose either incident. (R. at 1018). The Military Judge instructed the members that they were to determine whether "at any time on 18 September 2020, those three elements occurred: that there was a touching of the buttocks, by the accused; that it was with the intent to gratify sexual desire; and that it was without consent." (R. at 1031-32). He continued: "So, your duty is to determine whether in your judgment, those three elements occurred at any time, during the course of the 18th." (R. at 1032).

During his closing argument, Circuit Trial Counsel argued that the members could consider the evidence of Specialist 3 Johnson touching G.H.'s buttocks when she put the cookies in the oven. (R. at 1040). He then went on to tell the members that the "main thrust" of the government's argument focused on the conduct on the air mattress. *Id*. He stated that Specification 1 refers to that "terrible move" that Specialist 3 Johnson described in his interrogation. *Id*.

> But if you are for whatever reason unconvinced, you can consider the accused's own confession that shortly before he committed this charged act, just hours earlier, in [G.H.]'s kitchen, where he would have no—absolutely no reason to believe she was sexually interested in him, where there [had] been no kissing, cuddling, fondling, not even any hanging out on the air mattress. When he touched her butt by his own admission, you can consider that as well.

Id. Circuit Trial Counsel went on to argue that all of the charged acts occurred when G.H. was not awake. (R. at 1044). Towards the end of his closing, Circuit Trial Counsel again returned to the kitchen allegation, referencing Specialist 3 Johnson's statement in his interrogation that he may have poked or "booped" G.H.'s buttocks with his finger or a spatula while in the kitchen. (R. at 1054). Circuit Trial Counsel argued that the only credible thing Specialist 3 Johnson said was that he admitted he touched her buttocks and that G.H. had testified that she felt a hand grab her buttocks or a palm touch her buttocks. *Id*.

Standard of Review

A claim that an appellant was tried and convicted on a theory not charged is, in effect, a claim of variance between what was pleaded and what was proved. *United States v. Treat*, 73 M.J. 331, 335 (C.A.A.F. 2014). This question of law is reviewed *de novo*. *Id*.

Law and Argument

The Due Process Clause of the Fifth Amendment "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). This due process principle of fair notice also mandates that an accused has a right to know what offense and under what legal theory he will be convicted. *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)). It is a violation of the Due Process Clause to convict an accused of an offense with which he has not been charged. *Id*.

Specialist 3 Johnson, his defense counsel, and everyone else involved in the court-martial believed that Specification 1 alleged a nonconsensual touching of G.H.'s buttocks while bending over in the kitchen to put cookies into the oven. The only mention by

G.H. in any statement or testimony at trial of him touching her buttocks was in reference to the kitchen. (Pros. Ex. 1, R. at 436). The PHO believed Specification 1 was about the kitchen. (Preliminary Hearing Officer's Report). The Defense Counsel believed Specification 1 was about the kitchen. (R. at 411). Circuit Trial Counsel believed Specification 1 was about the kitchen at least through the direct examination of Specialist 3 G.H. (R. at 471). The Military Judge believed Specification 1 was about the kitchen incident when he crafted and delivered his instructions to the members emphasizing that Specification 1 dealt with G.H. when she was awake. (R. at 997-98). He was clearly surprised when the Circuit Trial Counsel announced, in response to a member question and just prior to his closing arguments, that he was going to be arguing that Specification 1 "primarily" referred to the conduct on the air mattress. (R. at 1016).

The Defense Counsel objected to an instruction to the members that they could use any conduct that satisfied the elements to convict Specialist 3 Johnson. (R. at 1017-18). Over this objection, the Military Judge advised the members that so long as the conduct occurred on 18 September 2020, it was possible for the members to use any conduct to convict. (R. 1031-32).

It is unclear whether the members actually used the conduct on the air mattress to find Specialist 3 Johnson guilty, as they were told that they could use either the kitchen incident or conduct on the air mattress to reach their finding. To the extent that the guilty finding was the result of members applying the elements to the conduct on the air mattress, Specialist 3 Johnson was convicted of an offense of which he was never charged. This conviction is in violation of his Fifth Amendment right to Due Process.

The Government charged its case based upon the statements given by G.H. According to her statements to AFOSI and the SANE nurse, Specialist 3 Johnson touched her buttocks in the kitchen without her consent. It charged the offenses that were alleged to have occurred while G.H. was sleeping on the air mattress as offenses occurring while she was asleep. If the Government had intended for Specification 1 to cover the conduct on the air

mattress while G.H. was sleeping, it would have charged it in the same manner as Specifications 2 and 3.

At trial, G.H. was much more equivocal about the contact in the kitchen. (R. at 415). On cross-examination, G.H. reiterated that the kitchen was a tight space, that Specialist 3 Johnson said that touching her buttocks was accidental, and that she let the incident go. (R. at 485). At this point, Specification 1 was facing the exact issue that the PHO foresaw, a lack of evidence on the required specific intent element. The Government decided then to salvage its case by making Specification 1 something it was never charged as, an offense committed while G.H. was asleep.

This bait and switch deprived Specialist 3 Johnson of fair notice and convicted him of an offense of which he had not been charged. He was prejudiced by this lack of notice in that the evidence was already admitted, the members were instructed, and closing arguments were about to begin. The Government was able to make its arguments for Specification 1 on two separate sets of facts, while depriving the defense of the ability to defend the conduct on the air mattress. This resulted in a conviction for Specification 1, in violation of Specialist 3 Johnson's right to Due Process.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding and dismiss with prejudice.

II.

THE MILITARY JUDGE VIOLATED THE CANON AGAINST SURPLUSAGE AND APPELLANT'S DUE PROCESS RIGHTS WHEN HE ALLOWED THE GOVERNMENT TO ARGUE A DIFFERENT THEORY OF LIABILITY THAN CHARGED.

Additional Facts

Following the Military Judge's instruction to the members, several members submitted questions on the law. (R. at 1013). One of the questions was whether the element of consent alleged

in Specification 1 must come from a capable absence of consent or if it could come from incapacity to consent. (R. at 1020; App. Ex. LI).

Circuit Trial Counsel stated that he believed that the specification as charged, without consent, would include a sleeping or unconscious person. (R. at 1021). He asserted that when the Government charges an offense as without consent that it incorporates all of the aspects of the consent definition, all of the theories of liability for withholding consent, and incapacity to consent. *Id*. The defense disagreed. (R. at 1022).

The Military Judge referenced this Court's decision in *United States v. Williams*, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. Mar. 12, 2021) (unpub. op.). He pointed out this Court's holding that inability to consent could be part of the surrounding circumstances as to whether the person did consent. (R. at 1022).

Circuit Defense Counsel argued that this interpretation would run afoul of the surplusage doctrine and allow the Government to charge every case as "without consent" no matter the actual theory of liability. (R. at 1024). The Defense further argued that the issue became more complex because the two different instances the Government now claimed were charged under Specification 1 operated under different theories of liability. If the Government argued that the contact in the kitchen was the conduct alleged in Specification 1, then the theory of liability was withholding of consent, as written in the Specification. (R. at 1026). If the Government argued instead that the conduct on the air mattress supported a conviction for Specification 1, then the theory must be that she was asleep and incapable of consenting. *Id*.

The Military Judge ruled that the Government could argue that G.H. was asleep as a surrounding circumstance indicating her lack of consent. (R. at 1028).

The Circuit Trial Counsel spent much of the closing argument arguing that G.H. was asleep for the conduct underlying all three charged specifications. Right away he played a clip of Specialist 3 Johnson hypothesizing about having touched her buttocks on the air mattress.

(R. at 1036-37). Circuit Trial Counsel argued that he did this while G.H. "lay in bed next to him asleep." (R. at 1037). He described a butt massage that culminates in touching her buttocks under her clothing and digitally penetrating her vagina "while she slept face down." (R. at 1038). Next, Circuit Trial Counsel discussed Specialist 3 Johnson's statements to AFOSI, pointing out that "not once during that interview did he ever say she was awake…." (R. at 1039). He pointed to Specialist 3 Johnson's final statements, saying that Specialist 3 Johnson "did it because he wanted to be with a woman, in any sort of way; including one who was sleeping." (R. at 1040).

Circuit Trial Counsel discussed the specifications individually. While he encouraged the members to also consider the evidence from the kitchen, the "main thrust" of the argument was the conduct on the air mattress. *Id*. He described it as an hour and a half after G.H. had any kind of half-asleep memory. *Id*.

The timeline the Government displayed and explained to the members took great pains to separate any type of half-asleep moment for G.H. from the time of the alleged offenses. (R. at 1042). This timeline "sets the stage and explains, and cuts against any suggestion that she was awake, even—even a little tiny bit by the time the accused performed the charged acts." *Id*. Each step on the timeline demonstrated just how asleep G.H. was for all three charged offenses. (R. at 1042-43). He argued again that all charged conduct, "his squeezing, his fingering, his dry humping" began before she woke up. (R. at 1044).

At the end of his closing, Circuit Trial Counsel circled back to the basic tenet of his argument, that G.H. was asleep. He argued that "once she fell asleep, the boundaries were pressed further." (R. at 1055). He again described Specialist 3 Johnson's actions as while she was asleep, noting that his statement had not a "single description of awareness, of consciousness, of participation, of consent." *Id*. He emphasized to the members that throughout the interview,

Specialist 3 Johnson attributed her to being asleep the entire time. *Id*. He argued, "That is not consent. That is not Specialist 3 [G.H.] was awake, so I began touching her body." (R. at 1056).

Standard of Review

Appellate courts review questions of statutory interpretation *de novo*. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

Law and Argument

"Statutory construction begins with a look at the plain language of a rule." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). The canon against surplusage requires that, when interpreting a statute, "if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Sager*, 76 M.J. at 161. "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme. *Id*.

This Court has decided the cases of *United States v. Williams*, 2021 CCA LEXIS 109 and *United States v. Horne*, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. May 27, 2021) (unpub. op.) on the issue of alternate theories of liability in Article 120, UCMJ cases. In both cases, this Court has affirmed where the Government argued facts relevant to a different theory of liability than that charged. In *Horne*, the appellant was charged with sexual assault by bodily harm. *Horne*, 2021 CCA LEXIS 261 at *61. The Government introduced evidence of the alleged victim's intoxication and referenced this intoxication in its arguments. *Id*. at *62-66. This Court found that the evidence and argument were used to explain why the alleged victim demonstrated a lack of consent and why her memory contained significant gaps. *Id*. at *66. This Court determined that there was no due process violation as appellant was convicted of sexual assault by bodily harm and not of an uncharged offense.

In *Williams*, the appellant was again charged with the offense of sexual assault by bodily harm. *Williams*, 2021 CCA LEXIS 109 at *50. This Court determined that the three theories of liability under Article 120, UCMJ are distinct, especially where the element of nonconsent was expressly alleged in the specification. *Id*. at *52. The Government counsel argued to the members that the offense was committed while the alleged victim was unconscious as a result of intoxication. *Id*. at *53-54. This argument was used to prove that the alleged victim did not consent by presenting the improbability that she consented when apparently non-responsive. *Id*. at *55.

This Court noted that arguing that members should draw inferences from circumstantial evidence is a common aspect of court-martial practice. *Id*. The Court also based its decision on the entire context of the Government case and argument, finding that the overall weight of his argument centered on the premise that the alleged victim had not actually consented to sexual conduct with the appellant. *Id*. at 56.

Circuit Trial Counsel's argument differs in a material respect from those found to be acceptable in *Williams* and *Horne*. The overall weight of his argument was not that G.H. did not consent, but that she was asleep. He pinned all three charged acts together and emphasized repeatedly that G.H. was asleep for all of them. His painstaking timeline was not intended to demonstrate lack of consent, but to demonstrate sleep.

The doctrine of surplusage tells us that each offense under Article 120, UCMJ exists on its own as a separate offense and that the words in each separate offense have meaning. If the Government could simply charge all offenses as without consent and be able to argue any inability to consent, incapacity to consent, or unawareness of the charged misconduct as Circuit Trial Counsel claimed, the other portions of the statute would have no effect.

The offense of abusive sexual contact without consent must stand on its own. While *Williams* and *Horne* allow discussion of the circumstances that establish evidence of the lack of consent, the Government cannot simply switch horses midstream as it did here. The Government's

argument allowed Specialist 3 Johnson to be convicted of an offense different than the one with which he was charged, in violation of his Due Process rights.

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

III.

THE GUILTY FINDING AS TO SPECIFICATION 1 OF THE CHARGE IS AMBIGUOUS AS IT IS NOT CLEAR WHICH INCIDENT THE MEMBERS DETERMINED MET THE ELEMENTS OF THE OFFENSE.

Additional Facts

When the member asked whether Specification 1 was to be strictly applied to the incident in the kitchen or could encompass conduct on the air mattress, the Military Judge and counsel discussed the issue. (R. at 1017-18). Circuit Defense Counsel raised a concern that a number of members short of the required number for conviction might find that the evidence of the kitchen incident proved the offense beyond a reasonable doubt while another number, also short of that required for conviction might find that the evidence of the conduct on the air mattress proved the offense beyond a reasonable doubt. (R. at 1017).

The Military Judge stated that this situation was known as the general verdict rule and that:

> [W]hen there are two legally cognizable theories of liability—more than one legally cognizable theory of liability, and we're not talking about a divers specification case, that the general verdict rule says they do not pierce—that one member could have thought that it was the oven and one member could have thought that it was the air mattress, that under the general verdict rule that so long as there's proof beyond a reasonable doubt to establish both of those on appeals, that that verdict is not disturbed.

Id. He continued, telling Circuit Defense Counsel that if three members found it was the air mattress and three members found it was the oven, that the six members who conclude beyond a reasonable doubt that there was a nonconsensual touching of the buttocks allows for a guilty finding. (R. at 1017-18). He further clarified that if the members found beyond a reasonable doubt that on 18 September 2020, Specialist 3 Johnson touched G.H.'s buttocks without

consent, they can disagree about when that was so long as the necessary quorum finds it. (R. at 1018).

Circuit Trial Counsel encouraged the members to apply the law to either incident during his closing argument. (R. at 1040). Although he argued that the "main thrust" of the government's argument focused on the conduct on the air mattress, he also argued that the members could consider the evidence of Specialist 3 Johnson touching G.H.'s buttocks when she put the cookies in the oven. *Id*. He stated that Specification 1 refers to that "terrible move" that Specialist 3 Johnson described in his interrogation, but that if unconvinced, the members could simply find that the incident in the kitchen met the elements as well. *Id*. Again, Circuit Trial Counsel argued that all of three of the charged acts occurred when G.H. was not awake. (R. at 1044). But then looped around again to argue that Specialist 3 Johnson's statement about "booping" G.H. in the kitchen was a confession to Specification 1. (R. at 1054).

Standard of Review

Whether a verdict is ambiguous and thus precludes a CCA from performing a factual sufficiency review is a question of law reviewed *de novo*. *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008).

Law and Argument

When a charge alleges an offense "on divers occasions" and the factfinder excepts the "divers occasions" language without specifying the occasion for which the accused has been found guilty, the findings are ambiguous and a service court of appeals is unable to conduct its factual sufficiency review. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010). While this case does not involve divers occasions, the finding here is sufficiently ambiguous that this Court cannot adequately review it.

The law governing general verdicts allows for a guilty verdict to stand even when members do not specify which theory of liability is the basis for the finding. *United States v. Brown*, 65 M.J.

356, 359 (C.A.A.F. 2007). This rule is based on the presumption that the verdict attaches to each of the several alternative theories charged. *Turner v. United States*, 396 U.S. 398, 420 (1970). Because the verdict attaches to all theories, the verdict may stand if evidence of any of the theories is sufficient. *Griffin v. United States*, 502 U.S. 46, 49 (1991).

However, this case was not charged alleging the violation of several theories. Specialist 3 Johnson was not on notice that more than one instance of conduct or more than one theory of liability was in play. Specification 1 was charged as one event, with one theory of guilt—without consent. It was not until closing arguments that the Government moved the goal posts and incorporated not only another instance of conduct, but another theory of liability as well. The ambiguity in the findings here comes from this Court's inability to determine whether the members convicted Specialist 3 Johnson for the offense of which he was on notice, or the offense that was alleged only during closing arguments in violation of Specialist 3 Johnson's right to Due Process. Without the ability to determine which instance and what theory Specialist 3 Johnson was convicted of, this Court is unable to appropriately analyze the Due Process and surplusage arguments that surround the Government's decision to change its tack entirely after both sides have concluded their presentations of evidence.

Confusion over the conduct which the Government alleges satisfies the elements of a criminal offense causes an accused difficulty in preparing his defense, potentially exposes him to double jeopardy, and may deprive him of his right to jury concurrence concerning the commission of the crime. *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987). This potential for harm is all the more exacerbated when the Government does not disclose the alternate event and theory until the evidence has been submitted and the members instructed. Despite these pitfalls, the Courts have not required the Government to elect a single theory or event to support a specification when the offenses are so closely connected in time as to constitute a single transaction. *Id*. Here, however, the events did not constitute a single transaction. One was an accidental touching while

the pair made dinner in small kitchen. The other was alleged to have occurred several hours later, on an air mattress, under the clothing and while G.H. slept. Where the two incidents do not constitute a single transaction, the Government must identify the charged conduct before trial. Without such clarity, the resultant ambiguity clouds the appellate review process.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding and dismiss with prejudice.

IV.

THE GUILTY FINDING TO SPECIFICATION 1 OF THE CHARGE IS NEITHER LEGALLY NOR FACTUALLY SUFFICIENT.

Additional Facts

A. G.H.'s testimony at trial.

G.H. testified she was in a computer lab frequented by students of the 50th OSS on 16 September 2020 when she mentioned to Specialist 3 Johnson that she planned to go shopping for a dining room table after work. (R. at 422). Specialist 3 Johnson offered to help her. *Id*. She testified that he showed up at her apartment but she did not let him in. *Id*. She said that he wanted to eat at a ramen restaurant so they went there for dinner and then to a furniture store. (R. at 422-23). She did not find a table she wanted and so they went back to the apartment and went their separate ways. (R. at 423).

G.H. testified that she had plans to eat dinner at Specialist T.L.'s home on that Friday night, 18 September 2020. (R. at 425). She testified that Specialist T.L. had to cancel the dinner and that Specialist 3 Johnson overheard the conversation and offered to come over to her apartment and cook her dinner. *Id*. She testified that when he arrived, she told him that she had received some clothes she had ordered in the mail earlier and had tried them on. (R. at 427). Specialist 3 Johnson brought a rice cooker with him. (R. at 431). G.H. testified that

Specialist 3 Johnson immediately started making rice in the rice cooker. (R. at 432). She testified that while the rice was cooking, the pair went to Target to buy cookies for dessert. *Id*.

While at Target, G.H. testified that Specialist Johnson picked up a six-pack of Mike's Hard Lemonade as well as a 12-pack of Mike's Harder. (R. at 433). She testified that he asked if she wanted anything to drink and that she told him "no." *Id*. She also testified that she told him not to drink so much that he could not drive home. *Id*. G.H. testified that she normally drank Malibu rum and Sprite and that she had recently purchased some. (R. at 434). She testified that she did not intend to drink that evening because she did not know him well and did not want to drink around him. (R. at 435). G.H. testified that Specialist 3 Johnson paid for the Target purchases of cookie dough, a cookie sheet, his six-pack, his 12-pack, and a package of menstrual pads. *Id*.

G.H. testified that they went back to the apartment after Target and finished cooking the rice and fish. *Id*. She testified that when she bent to put the cookies in the oven she "felt a brush against my butt." (R. at 436). She testified that she did not know if it was his hand or if he was just walking by. *Id*. She told him to watch himself and he apologized and said that it was an accident and that he was walking by her in the small kitchen and did not mean to touch her. *Id*. Based upon the size of her kitchen, she did not think it unreasonable for him to accidentally brush up against her. *Id*.

Once dinner was ready, G.H. testified that they sat on the floor to eat. *Id*. She then put a movie on her laptop that was plugged in by her air mattress and they started watching it while they ate. *Id*. After they finished eating, they went back to the air mattress and continued to watch the movie. (R. at 439-40). Shortly after that, G.H. testified that she fell asleep. (R. at 440).

G.H. testified that while she was sleeping she felt her arm being tugged and that she rolled over to her back and brought her hand over to what felt like Specialist 3 Johnson's

chest and fell back asleep. (R. at 442). She testified that she woke up at 11 p.m. laying on her right side with her arms under her pillow and her right leg straight and her left leg bent. (R. at 443). She testified that she felt a weight on her backside and a hand in her underwear. *Id*. G.H. stated that she felt a fingering motion on her vagina and a warmth that felt like a penis on her buttocks. (R. at 443-45). She testified that she felt Specialist 3 Johnson's finger penetrate her vagina. (R. at 444). She also testified that her pants were slightly pulled down. (R. at 445). She testified that this reminded her of being molested by her stepfather from the ages of 12-15 when she would wake up at night feeling him touching her and having his penis out. *Id*. When she was a child her stepfather would touch her while she was sleeping and put his hand down her pants and touch her vagina. (R. at 503).

G.H. testified that she got up and went to the bathroom. (R. at 446). When she was in the bathroom, she said that she saw that her bra was unclasped and her pants were unbuttoned and unzipped. (R. at 446, 501). She testified that she did not know when Specialist 3 Johnson would have been able to unbutton and unzip her pants, but she did not wake up for that. (R. at 501). When she came out of the bathroom, she testified that she turned the light on and woke up Specialist 3 Johnson who asked what was going on. (R. at 447). She testified that she asked why her bra was undone and that he said that he did it in order to rub her back while she was laying on his chest. (R. at 449). She testified that when he stood up to leave, she could see that Specialist 3 Johnson had an erection. *Id*. G.H. testified that she confronted him about touching her in her sleep. (R. at 450).

After Specialist 3 Johnson left, G.H. called her friend J.T. and spoke to him for several hours. (R. at 451). The next morning, she reported the incident to her sponsor, Staff Sergeant J.T. and called Specialist T.L. to tell her. (R. at 452). She eventually met with AFOSI and then accompanied them to her apartment for a search. (R. at 454). She provided AFOSI with

the clothes she claimed to be wearing, a black t-shirt, a pair of jeans, her bra and underwear, and the menstrual pad she had been wearing. *Id*.

B. Changes to G.H.'s story.

When G.H. spoke with her friend J.T. that evening, she told him that Specialist 3 Johnson touched her breasts and that she woke up to it. (R. at 495). When she spoke to her sponsor, Staff Sergeant J.T. the next morning, she told him that she went to bed and woke up to Specialist 3 Johnson on top of her completely naked. (R. at 850). She also told him that she was wearing only a shirt and underwear and that she pushed him off of her and told him to leave. *Id*.

When G.H. spoke to AFOSI on 19 September 2020, she told the agents that Specialist 3 Johnson had arrived at her apartment with the alcohol. (R. at 483). After her first interview with AFOSI, G.H. went back to speak with then again a month later. (R. at 490). On this occasion, she told the agents that Specialist 3 Johnson had had his hand down her shirt and under her bra. (R. at 491). She also told AFOSI in this second interview that she was having bad dreams related to her abuse when she was a child. (R. at 502). She told them that she remembered putting her head on his chest. (R. at 492). She told them that she thought she was in bed with her ex-husband at the time. *Id*. She also told them that she remembered Specialist 3 Johnson removing his shirt. (R. at 496). By the time she testified in court, she no longer remembered putting her head on his chest, no longer believed that she thought he was her husband, and no longer remembered him removing his shirt. (R. at 492-94, 496). When she spoke to the Government counsel in advance of trial she stated that she had no memory of Specialist 3 Johnson pulling her arm. (R. at 488).

C. Specialist 3 Johnson's story.

G.H. testified that she participated in a pretext conversation with Specialist 3 Johnson over SnapChat with AFOSI supervision. (R. at 464). In that conversation, Specialist 3 Johnson maintained that he was asleep although he did recall waking up with her on his chest and

rubbing her back and undoing her bra. (R. at 467). Eventually, AFOSI asked G.H. to ask him to speak over the phone. (R. at 469). She did and they had a conversation. *Id*. This call was not recorded. (R. at 575).

On 22 September 2020, AFOSI interviewed Specialist 3 Johnson. (R. at 568). He was with the agents for approximately seven hours. (R. at 575). He told the agents that he was sleeping and did not remember touching G.H. (R. at 626). His description of the evening with G.H. was very different from hers. On Wednesday, 16 September 2020, he had gone with G.H. to look at furniture stores for a table. (R. at 627). While they were out, she said something about wanting fish and rice. *Id*. Specialist 3 Johnson offered to make it for her and the two made plans for Friday, 18 September 2020. On the 18th, Specialist 3 Johnson showed up at G.H.'s apartment and she was trying on new clothes. (R. at 636). He saw her bra and underwear while she was changing into her different new outfits. (R. 752-53). She told him she did not care if he saw her because she had a bra and tights on. (R. at 754). She changed into sweatpants and a sweatshirt and the two left the apartment. (R. at 674). Specialist 3 Johnson and G.H. went back out looking for furniture. (R. at 627). They went to Wal-Mart and Home Depot and a thrift store where G.H. found one she liked that was going to be on sale the next day. *Id*. The two made plans to go back the next day to get the table on sale. *Id*. Before returning to her apartment, Specialist 3 Johnson asked G.H. if she wanted to drink. (R. at 637). She said yes and pointed out a liquor store. *Id*. He purchased a 6-pack of Mike's bottles and an 8-pack of Mike's Harder cans for himself. *Id*. He asked if she wanted anything and G.H. said she liked Malibu and Sprite, so he bought them for her. (R. at 637-38).

The two went back to G.H.'s apartment and Specialist 3 Johnson started cooking. Once the rice was cooking, they decided to go to Target to get cookies and a cookie sheet. (R. at 627). When they came back, they cooked the fish and rice. *Id*. Specialist 3 Johnson told the agents that he may have "booped" her buttocks when she bent over to put the cookies in the oven.

(R. at 759). He did not know if it was with his hand or his spatula or his knee. *Id*. They both laughed about it. (R. at 760). They ate dinner and drank a little. (R. at 627).

After dinner, the pair started to watch a movie while lying on her air mattress. (R. at 628). Before the movie played, G.H. changed into the clothes she wore to bed, gray shorts and a t-shirt with a wizard cat. (R. at 674-75). He recognized them from when she changed into them on 16 September 2020 after he brought her back from ramen and furniture shopping. (R. at 750). Although she had earlier told him she would prefer he not stay over, he had asked her if it would be okay if he stayed if he was drinking. (R. at 642). She said that it was okay if he was drinking. *Id*. G.H. said she was tired and wanted to go to bed. (R. at 628). Specialist 3 Johnson asked if she wanted him to turn off the movie and she said yes. *Id*. Then the two laid down and fell asleep. *Id*. Specialist 3 Johnson figured that if she did not say anything about him staying over that she was okay with it. (R. at 642). G.H. reminded him to set an alarm because he was leaving early to drive a friend to the airport. (R. at 643). As she fell asleep, she was cuddling up to him and draped over him. (R. at 628). Her arm was across him and her hand on his chest. (R. at 641). Specialist 3 Johnson began rubbing her back and unhooked her bra to make it easier to rub her back. (R. 628-29). Eventually, he fell asleep. (R. at 629). He woke up to the light on and G.H. touching his shoulder. *Id*. She told him that he did things to her in her sleep and was fingering her. *Id*. He did not remember doing it and was asleep. *Id*.

When he left her apartment, Specialist 3 Johnson looked at his hands and smelled them. He did not see, smell, or feel anything that led him to believe he had digitally penetrated her vagina. (R. at 676).

Specialist 3 Johnson repeatedly told the agents that he had no memory of the allegations against him and that he did not think it was something he would do. (R. at 630, 666, 677, 678, 687, 689, 696, 699, 701). He said that he trusted G.H. and has to trust her word on it if she had a memory and he did not. *Id*. He worried that it would be rude to say that he did not believe

her. (R. at 678, 685). After several hours of the agents telling him that they do not believe him, Specialist 3 Johnson said that maybe he was not asleep, but was not conscious completely because he had no memory of the things she alleged. (R. at 704). He continued to say that he had no memory of these events. (R. at 706). He said that as he talked to G.H. in the pretext phone call they went into more and more detail, and he began to form pictures of what could have potentially happened. (R. at 707). They were not memories, but pictures in his head. (R. at 707). He continued to stress that he had no actual recollection of her allegations, but was forming images in his head of how it might have occurred. (R. at 722). He said that he had a very vivid imagination and after discussing the details with G.H. and the agents so many times, he was starting to see random images. *Id*. He said that he could see being half-asleep and not all there and putting his hand down her shorts or grabbing her butt or something. (R. at 723). While he could see the image, it did not feel real to him. *Id*. He said that he did not know if the things he saw in his head were the truth. *Id*. Specialist 3 Johnson again said that he did not think he was awake because he has a decent memory but does not have a memory of these events. (R. at 726).

When the agents ask him to close his eyes and describe the images he sees, he agrees in order to help G.H. get better. (R. at 727). He said he could see himself waking up but not fully and adjusting on the air mattress and hugging her. (R. at 728). He said he then fell asleep and was maybe rubbing her leg a little bit and thought he touched her butt. (R. at 729). He said he could see himself doing a leg or butt massage and then putting his hand in her pants. *Id*. He called it a terrible move. *Id*. He did not think he would do that with someone who was not a significant other though. *Id*. He said he thought he could kind of see himself putting his hand down her pants but not penetrating her or pulling his penis out. *Id*. He said that he did not think he would do that even if he was not fully conscious because he still did not think that he was. (R. at 731). Even though he thought that saying it felt real, the images were still foggy and shadowy, and he did not even know if he was 50 percent sure that it was real. *Id*. He said it was not a memory. (R. at 732).

Eventually, the agents convinced Specialist 3 Johnson to refer to these images as recollections, but he still stated that he did not know what happened entirely and that he did not believe that he penetrated her or had his penis exposed. (R. at 736, 742). He told the agents that the "recollection" was very short and that he did not think he was trying to perform any sort of foreplay. (R. at 738). He said that after a very short time he took his hand out of her pants, wrapped it back over her and fell back to sleep. *Id*. Specialist 3 Johnson told the agents that he was not trying to engage in foreplay or to turn her on. (R. at 765). He believed he woke up groggy and half-awake and not there mentally and just subconsciously enjoyed cuddling with a woman without meaning anything sexual. *Id*. He did not actually recall thinking those things, but thought it was probably what was going through his subconscious. (R. at 766).

At no time during his description of these "images" in his head did Specialist 3 Johnson include the fact that G.H. was on her period and wearing a menstrual pad. He did not mention feeling it when he allegedly put his hand down her pants.

D. G.H.'s character for untruthfulness.

Specialist T.L. testified at trial as well. (R. at 882). She testified that she and G.H. never had a date set for her to come over for dinner. (R. at 894). She testified that when G.H. called her on 19 September 2020 she said that she had been drinking when Specialist 3 Johnson was there. (R. at 895). She also testified that G.H. had a character for untruthfulness. *Id*.

Specialist C.R. also testified at trial. (R. at 925). He knew G.H. from technical school. (R. at 926). They interacted daily for a period of time and spent quite a bit of time together. (R. 926-28). He also testified that G.H. had a character for untruthfulness. (R. at 928).

Standard of Review

In accordance with Article 66(c), UCMJ, this Court reviews questions of factual and legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

In evaluating the factual sufficiency of a guilty finding, this Court takes a "fresh, impartial look" at the evidence presented at trial, "giving no deference to the decision of the trial court on factual sufficiency" beyond the requirement in Article 66, UCMJ, to take into account that the trial court saw and heard the witnesses. *Id.* The test for factual sufficiency is "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [the Court is] convinced of [Appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 27 M.J. 324, 325 (C.M.A. 1987). The Government's burden is to present evidence that proves guilt to "an evidentiary certainty" and that must "exclude every fair and reasonable hypothesis of the evidence except that of guilt." (Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-5 (28 Feb 2020)).

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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

This Court's legal and factual sufficiency review should be constrained to the conduct originally charged in Specification 1, that which occurred in the kitchen. The Government's last-minute switch to a different moment with a theory not intended to be incorporated into the charged theory of liability should lead this Court to set aside any consideration of the conduct on the air mattress in conducting its review. However, should this Court decide otherwise, both instances of conduct alleged to violate Specification 1 are legally and factually insufficient and Specialist 3 Johnson asks this Court to set it aside.

A. <u>The alleged contact in the kitchen is factually insufficient</u>.

G.H. testified that when she bent down to put the cookies in the oven she felt something touch her buttocks. (R. at 436). She did not know if it was his hand or some other part

of his body that brushed by her as he walked in the kitchen. *Id*. When she asked him about it, he said that it was an accident because the kitchen was small. *Id*.

Specialist 3 Johnson told the agents about a "boop" to G.H.'s buttocks as she bent over. (R. at 759). He said that he did not know if he did it with his hand or a spatula or his knee. *Id*. Both of them laughed about it afterwards. (R. at 760).

With these facts, this Court cannot be convinced beyond a reasonable doubt that Specialist 3 Johnson's hand ever contacted G.H.'s buttocks in the kitchen.

B. The alleged contact in the kitchen is legally insufficient.

Even if this Court could be convinced that Specialist 3 Johnson touched G.H.'s buttocks with his hand and without her consent, the specification is legally insufficient because there is no evidence that the contact was made with the specific intent to gratify Specialist 3 Johnson's sexual desire.

In G.H.'s version, it was an accident caused by two people working in tight quarters. In Specialist 3 Johnson's version, it was a funny poke of a friend's rear end. Even when viewed in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

C. The alleged contact on the air mattress is factually insufficient.

There is simply no reliable evidence that Specialist 3 Johnson touched G.H.'s butt. She did not testify that he did. She testified that he had his hand down her pants to the point where he was rubbing her vaginal entry and then penetrating her vagina. She testified that it was his penis that was pressed against her buttocks and that is what she felt there.

Specialist 3 Johnson created images and fantasies after hours of discussion with G.H. and the AFOSI agents asking him for details and convincing him he needed to admit to it. Specialist 3 Johnson is clearly susceptible to suggestion and describes himself as having a very vivid imagination. Despite the images he created and described, he still maintained that they were

not memories, but things that could have happened. His statements to AFOSI demonstrated his discomfort with disbelieving someone who claimed to be a victim of sexual assault, but they did not ever appear to be admissions that he did in fact reach into G.H.'s underwear. His ignorance of her menstrual pad sitting in her underwear and any menstrual blood show that his "images" were hypotheticals and not memory.

Even if this Court believes beyond a reasonable doubt that Specialist 3 Johnson actually touched G.H.'s buttocks on the air mattress, there is no evidence that he intentionally did so. Beyond the requirement that he possess the specific intent to gratify his sexual desires, the contact itself had to be intentional in order to establish the mens rea for an offense. *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993). If he was making contact while asleep or moving subconsciously, he did not make intentional contact with G.H.'s buttocks and the proof must therefore fail.

Additionally, any testimony by G.H. must be read in the context of the great disparities in accounts of that evening, inconsistencies in her story, troubling history of sexual molestation while sleeping, and character for untruthfulness. This Court cannot even be certain beyond a reasonable doubt: 1) that G.H. did not drink alcohol that night; 2) that she wore jeans to sleep; 3) that Specialist 3 Johnson bought alcohol at Target; 4) when she tried her new clothes on; 5) whether Specialist 3 Johnson came into her apartment on 16 September 2020; or 6) how their plans for Friday were made. If the Court cannot be certain of these portions of her story, it cannot be certain beyond a reasonable doubt that Specialist 3 Johnson made contact with her buttocks or any other part of her body inside of her underwear.

D. <u>The alleged contact on the air mattress is legally insufficient</u>.

Again, the Government presented no evidence at trial that, if Specialist 3 Johnson did touch G.H.'s buttocks on the air mattress, and if he did it intentionally, that he did it with the specific intent to gratify his sexual desires. He told the AFOSI agents that he did not have romantic

or sexual feelings towards G.H. He did not believe that, if he did touch her, that it was intended to be sexual or to be foreplay. He guessed that his subconscious wanted to cuddle up with a woman, but this was purely a guess and not an admission or other evidence of actual intent.

Even when viewed in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding and dismiss with prejudice.

V.

THE MILITARY JUDGE ERRED IN ALLOWING G.H.'S VICTIM IMPACT STATEMENT TO BE ADMITTED AT TRIAL.

Additional Facts

The Special Victim's Counsel informed the Military Judge that G.H. intended to provide a written and an oral unsworn statement to the members during presentencing. (R. at 1130). The defense objected to several portions of the written unsworn statement as referencing offenses of which Specialist 3 Johnson had been acquitted. (R. at 1132, 1141). The Military Judge ruled that G.H. would be able to discuss the impact of the offenses of which Specialist 3 Johnson had been acquitted and that he would then instruct the members not to consider this information. (App. Ex. LVII).

During presentencing, G.H. read her unsworn statement to the members and provided it in writing. (R. at 1175, Ct. Ex. B). G.H. stated that Specialist 3 Johnson "violated her" and caused her to feel "disgusted and violated and physically gross." *Id*. She also stated that "the displeasing feeling of his hand and his penis felt vile and the undesired and unwelcome feeling of being used and abused just came pouring through." *Id*. G.H. went on to describe the sexual assault forensic examination process in graphic terms. (R. at 1176, Ct. Ex. B).

During its sentencing argument, the Trial Counsel argued for a sentence of three months confinement, reduction to E-1, and a bad conduct discharge. (R. at 1212). Specialist 3 Johnson was sentenced to a reprimand, six months confinement, reduction to E-1, and a bad conduct discharge. (R. at 1250).

Standard of Review

When Appellant preserves an error with a timely objection, this Court reviews the Military Judge's decision to admit evidence for an abuse of discretion. *United States v. Lopez*, 76 M.J. 151, 155 (C.A.A.F. 2017). Although the Court of Appeals for the Armed Forces (C.A.A.F.) held that unsworn victim impact statements are not evidence, abuse of discretion is still the proper standard of review for determining whether a military judge erroneously admitted an unsworn victim statement. *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022). When there is error regarding the presentation of victim statements, "the test for prejudice is whether the error substantially influenced the adjudged sentence." *United States v. Da Silva*, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020) (unpub. op.) (internal citations omitted).

Law and Argument

"[A] crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense." R.C.M. 1001(c)(1). This individual may make a written or oral unsworn statement concerning the impact of the offense. R.C.M. 1001(c)(5). The admissible victim impact evidence "includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

Procedurally, the right of a victim to make an unsworn statement is akin to an accused's right to make an unsworn statement. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). "Like an accused, a victim may, personally or through counsel, make an unsworn statement orally, in writing, or both, and may not be cross-examined or examined by the court upon it." *Id*. Although

an unsworn victim statement is not subject to the Military Rules of Evidence, the military judge is not powerless to restrict its contents. *Id*. The rule allowing a victim's unsworn statement is "not a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence." *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). A military judge has an obligation to ensure the content of a victim's unsworn statement comports with the parameters of victim impact as set out in Rule for Courts-Martial 1001. *Tyler*, 81 M.J. at 112.

In 2020, this Court decided *United States v. Da Silva*, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020). This case predates the C.A.A.F. decision in *Tyler*. In *Da Silva*, this court stated that in situations where a victim's proposed impact statement references conduct for which an accused has been acquitted, the "preferable course of action for military judges should be to tailor the unsworn statement instruction. This preserves a crime victim's right to be reasonably heard while ensuring court members do not wrongly interpret victim impact information that they 'must consider.'" *Da Silva*, 2020 CCA LEXIS 213 at *54.

The Military Judge relied upon this language in *Da Silva* in allowing G.H. to discuss the impact of the offenses of which Specialist 3 Johnson was acquitted. Despite finding that this information was outside the meaning of R.C.M. 1001(c) and that both *Tyler* and *Hamilton* cautioned military judges that a victim's unsworn statement should not exceed that permitted under R.C.M. 1001(c), the Military Judge determined that the victim and accused's allocution rights are intended to be "substantially co-extensive" and allowed the entire unsworn statement to be read and admitted. In applying the dicta from *Da Silva* in this case, the Military Judge overlooked C.A.A.F.'s admonition in *Tyler*, that military judges are responsible for keeping the victim impact statement within the bounds of the Rule for Courts-Martial. He instead applied language stating the similar *procedural* footings of victim and accused unsworn statements to the *substance* of such statements. Such an application is not part of C.A.A.F.'s holdings in *Tyler* or *Hamilton*.

The substantive rights of an accused to provide an unsworn statement are valuable and have long been recognized by military custom. *United States v. Rosato*, 32 M.J. 93, 96 (C.A.A.F. 1991). Moreover, this is a right that has been generally considered unrestricted. *Id*. C.A.A.F. recognized the well-established right to raise collateral consequences of convictions and sentences in an accused's unsworn statement in *United States v. Talkington*, 73 M.J. 212, 213 (C.A.A.F. 2014). The *Talkington* instruction informs members that references to collateral consequences would be inadmissible "outside the context of an unsworn statement." *Id*. at 214. The instruction further notifies the members that an unsworn statement is the proper means to bring such information to their attention and instructs them to give it appropriate consideration. *Id*. Finally, the members are told that the consideration and weight they give to such a reference is up to them. *Id*.

This substantive right for an accused to introduce collateral consequences through an unsworn statement does not allow a victim to exceed the bounds of the Rules for Courts-Martial in her own unsworn statement. The Military Judge instructed the members that the rules for victim allocution are broad and that they permitted G.H. to reference the conduct of which Specialist 3 Johnson was acquitted in her unsworn statement. (R. at 1179, 1208). This is simply not in line with the law. The Military Judge abused his discretion in applying dicta from *Da Silva* despite a more recent C.A.A.F. opinion reaffirming his duty to keep the victim unsworn statement within the scope of the Rule.

This abuse of discretion was to the prejudice of Specialist 3 Johnson. G.H.'s unsworn statement, provided to the members both orally and in writing, described the impact of the offenses for which Specialist 3 Johnson was acquitted. More than just a reference to his penis, the description of being violated, of feeling "disgusted and violated and physically gross" and the detailed description of the sexual assault forensic examination were not the result of a nonconsensual touch of her buttocks, but were clearly her feelings surrounding the penetrative

attack she testified to. The prejudice in allowing G.H. to testify in such a manner is demonstrated by the fact that the members sentenced Specialist Johnson even more harshly than the Government recommended.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the adjudged sentence and order a rehearing on sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 26 January 2023.

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Specialist 3 Devin Johnson, through Appellate Defense Counsel, personally requests that this Court consider the following matters:

I.

WHETHER SPECIALIST 3 JOHNSON'S SENTENCE WAS INAPPROPRIATELY SEVERE?

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted). In this case, the nature and seriousness of the offense for which Specialist 3 Johnson was convicted does not merit a bad conduct discharge or six months confinement. This is on top of the federal conviction that will follow him for the rest of his life. The offense for which Specialist 3 Johnson was charged and convicted—an over the clothing buttocks touch—was an Article 15 level offense. It stands to reason that his punishment should be concordant with a crime comitted in that forum. For that reason, an exposition of this "particular appellant" and his "record of service" is not necessary.

WHEREFORE, Specialist Johnson requests that this Honorable Court not approve his bad conduct discharge nor his six months of confinement.

II.

WHETHER THE CONVENING AUTHORITY INCLUDED LANGUAGE IN THE REPRIMAND THAT DIRECTLY REFERENCED AN OFFENSE THAT RESULTED IN AN ACQUITTAL IN VIOLATION OF *UNITED STATES V. HAWES*, 51 M.J. 258 (C.A.A.F. 1999)?

In *United States v. McAlhaney*, this Court said, "A convening authority cannot include language in a reprimand that directly references an offense that has been dismissed or resulted in an acquittal." 2022 CCA LEXIS 135, at *13 (A.F. Ct. Crim. App. Feb. 28, 2022) (unpub. op.) (citing *United States v. Hawes*, 51 M.J. 258, 261 (C.A.A.F. 1999), *pet. granted*, 82 M.J. 419

(2022). Here, Specialist 3 Johnson was convicted of "abusive sexual contact" not "sexual assault." R. at 10-11. However, the Convening Authority reprimanded him for "sexual assault"—an offense of which the members acquitted Specialist 3 Johnson. ROT, Vol. 1, Convening Authority Decision on Action, 10 December 2021. Given this Court's declaration that it is "important to recognize that a convening authority does not issue a reprimand without assistance from a trained legal professional," it is troubling that neither the Convening Authority nor his "trained legal professional" caught this error which was plain and obvious from the Entry of Judgment and the transcript of the proceedings. Furthermore, this error substantially prejudiced Specialist 3 Johnson: His Record of Trial, including the reprimand, is visible on The Judge Advocate's Corps Department of the Air Force Docket. This is highly prejudicial to Specialist 3 Johnson since *anyone* with internet access can review his Record of Trial. A reasonable person will presume that "sexual assault" is a much more serious offense than the one for which Specialist 3 Johnson was convicted.

WHEREFORE, Specialist 3 Johnson requests that this Court order the Government to strike the reference to "sexual assault" in the reprimand and order the Government to publish a corrected copy of his Record of Trial.

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40257
Specialist 3 (E-3) DEVIN W. JOHNSON, USSF *Appellant.*	)	Panel No. 1

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 41-page Assignments of Error brief. Appellant raises a total of 7 issues that require in-depth discussion of the facts, witness testimonies, and rulings from the military judge.

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
United States Air Force
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 27 February 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
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27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	ACM 40257
Specialist 3 (E-3) DEVIN W. JOHNSON, USSF *Appellant.*	)	Panel No. 1

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40257
Spc3 (E-3)	)	
DEVIN W. JOHNSON, USSF	)	Panel No. 1
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER APPELLANT WAS CONVICTED OF AN OFFENSE OF WHICH HE WAS NOT ON NOTICE AND WAS NOT CHARGED?

II.

WHETHER THE MILITARY JUDGE VIOLATED THE CANON AGAINST SURPLUSAGE AND APPELLANT'S DUE PROCESS RIGHTS WHEN HE ALLOWED THE GOVERNMENT TO ARGUE A DIFFERENT THEORY OF LIABILITY THAN CHARGED?

III.

WHETHER THE GUILTY FINDING AS TO SPECIFICATION 1 OF THE CHARGE IS AMBIGUOUS AS IT IS NOT CLEAR WHICH INCIDENT THE MEMBERS DETERMINED MET THE ELEMENTS OF THE OFFENSE?

IV.

WHETHER THE GUILTY FINDING TO SPECIFICATION 1 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT?

V.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING G.H.'S VICTIM IMPACT STATEMENT TO BE ADMITTED AT TRIAL?

VI.[1]

WHETHER SPC3 JOHNSON'S SENTENCE WAS INAPPROPRIATELY SEVERE?

VII.[2]

WHETHER THE CONVENING AUTHORITY INCLUDED LANGUAGE IN THE REPRIMAND THAT DIRECTLY REFERENCED AN OFFENSE THAT RESULTED IN AN ACQUITTAL IN VIOLATION OF UNITED STATES V. HAWES, 51 M.J. 258 (C.A.A.F. 1999)?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

GH joined the Space Force in February 2020. (R. at 416.) She attended technical school at Vandenberg Air Force Base. There, she met Appellant for the first time. (R. at 417.) Their interactions were very limited. They were not in the same class and only briefly spoke about being a linguist. (R. at 418.)

On one occasion, Appellant told GH that she was "hot and nice to look at." (Id.) GH testified that she thought this was very inappropriate and reported the comment to her MTLs. Appellant later apologized to her.

Later, both Appellant and GH were stationed at Schiever Space Force Base. (Id.) GH arrived in August 2020 but was quarantined so she did not begin work until the second

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

or third week of September. (R. at 419.) In mid-September, GH saw Appellant at a computer lab. Appellant apologized again to GH and said he "hoped it would be water under the bridge." (R. at 418, 420.) GH said Appellant seemed genuine in his apology so she accepted it.

Appellant offered to help GH get situated as she settled at Schiever. Because GH's household goods would not be arriving until October, she mentioned to Appellant that she planned to go look for a dining room table. (R. at 421.) Appellant offered to help her and she accepted.

That evening, which was a Wednesday, Appellant picked up GH from her apartment, and they went to eat. (R. at 422.) They went to a furniture store but the table GH looked at was too expensive. Appellant offered to buy the table for her for, but GH refused. (R. at 424.)

Appellant dropped off GH at her apartment, and they went their separate way. (R. at 423.) GH said they were at the restaurant for approximately 30 minutes, that it was not a date, there was no hand holding or hugging, and that she thought Appellant as only a friend. (Id.)

Two days later, on Friday, 18 September 2020, GH had plans for dinner with a friend, Spc TL. (R. at 425.) However, that day in the computer lab, Spc TL told GH that she needed to cancel because she had sick children. Appellant overheard the interaction and offered to come to GH's apartment and cook her dinner. (R. at 425.) GH "felt it was friendly" but made sure to tell Appellant that her accepting was just "as friends."

Appellant arrived at GH's apartment around 1900. (R. at 426.) Prosecution Exhibit 4 consists of photographs from GH's apartment. (R. at 429-30.) GH testified that the photographs show the condition of her apartment on the evening of 18 September 2020.

When Appellant arrived, GH was on her phone sitting in the living room on an air mattress. (R. at 431.) Appellant was carrying a rice cooker. When she let him in, GH did not hug or touch him. (R. at 432.) Appellant began cooking, and the two talked about Spc3 GH receiving a box of clothes. While the rice was cooking, the two went to Target to get cookies. (R. at 432-33.)

While there, Appellant also bought a twelve-pack of Mikes Hard Lemonade alcohol. GH told him he "would not be getting drunk enough to where he would be staying the night" and that she "did not want to end up driving him back to the dorms on Peterson." (R. at 433.) She testified, "I did not want him thinking that he would be able to just crash at my place if he would get drunk." GH testified that she did not plan on drinking that night because "I didn't want to drink with him around. I didn't want to drink by myself either, and I didn't know him that well, so I didn't want anything to come of that." (R. at 435.) GH also purchased menstrual pads at Target because she was on her period. (R. at 435, 447.)

When they got back to the apartment, Appellant finished cooking the rice and fish and they ate. While cooking the cookies, GH stated, "I went to put the cookies into the oven after I had laid them on the baking sheet, opened the oven and bent down to put the cookies in, and I felt a brush against my butt. At that point, I didn't know if it was his hand or if he was walking by, but to be on the safe side I told him that he needed to watch himself. To this he replied with 'I'm sorry. This is a small kitchen. I was walking by and I did not mean to.'" (R. at 436.) GH said she did not know if it was intentional or unintentional.

GH said the two ate on the air mattress because she had turned on a movie on her laptop, which was plugged in near her air mattress. (Id.) Using page 4 of Prosecution Exhibit 4, GH said Appellant was sitting on the right side of the air mattress, and she was sitting on the left. (R. at 438.)

After they were done eating, GH got the cookies out of the oven and the two continued watching the movie. Appellant had begun drinking his second drink. Using page 14 of Prosecution Exhibit 4, GH said she was now on the right side of the air mattress and he was on the left. There was space between the two, and they were not touching. (R. at 440.) It was nearly 2100 when GH said she fell asleep. (R. at 441.) GH explained that she did not mean to fall asleep. (R. at 512.) After dinner, she expected that she and Appellant would finish watching the movie, and he would go home. GH stated she had been up since 0500 that morning and was pretty tired, but did not intend to fall asleep.

When she fell asleep, GH said no hugging, touching, cuddling or kissing of any kind had occurred. The only physical touching that had occurred was when Appellant touched her butt in the kitchen. (R. at 441.)

While she was asleep, GH said she faintly remembers laying on her right side and "being tugged, like my left arm was being tugged." (R. at 442.) She said she rolled onto her back and "brought my hand over to what felt like his chest, and ended up falling back asleep."

Later, GH would be fully awoken. She explained:

> I was laying on my right side, half on my stomach, I guess. I had my arms under my pillow, and I had my right leg straight out and my left leg kind of bent up. I felt this pressure and like this heat on my back that was making me feel hot, and being on the air mattress was uncomfortable. So I initially woke up to move around and realized that I could not move around because I felt this weight on my backside. I felt his hand in my pants, in my underwear. I felt

> this fingering motion, and I felt this warmth that felt like a penis on my back right end.

(R. at 443.)

GH said Appellant's left hand was entering her underwear from the back of her pants (R. at 444.) She said Appellant's fingers were at the entrance of her vagina and entered her vagina. (Id.) GH also said she felt warmed and pressure on her body, adding, "It was on my right buttocks. My pants were slightly pulled down so that he would be able to have his hand inside of my pants." (R. at 445.) When asked if she felt Appellant's penis, GH said, "Yes." (R. at 446.) When asked if that she felt the warmth and pressure on her buttocks, torso and upper thigh was Appellant's penis, she replied, "Yes, sir."[3]

GH detailed how this experience mirrored times when she was 12 to 15 years old, and would sexually abuse her in the same fashion. (R. at 445.) She stated that occasionally the man would "have his penis out and against me and he would be dry-humping me." (R. at 446.)

GH said she immediately got up and went to the bathroom. She noted this was the same thing she would do when she was younger and would wake up to these things happening. (Id.) When she got into the bathroom, she realized her bra was unclasped in the back and that her pants were unbuttoned. GH also realized her vagina was naturally lubricated, which confirmed to her that Appellant had been "feeling up on me in my sleep." (R. at 448.)

GH said she got very upset, went outside, turned the light on. (R. at 447.) GH said Appellant was pretending to sleep when she entered the room. GH said she sternly

[3] Appellant was acquitted of Specifications 2 and 3, which charged that Appellant touched GH's torso, buttocks and leg with his penis while GH was asleep (Specification 2) and that Appellant penetrating GH's vulva with his finger while GH was asleep. [While she was asleep?]

asked, "Why is my bra undone," to which Appellant replied, "I had undone your bra in your sleep. You were laying on my chest, and I was rubbing your back, and I thought that you would be okay with it." (R. at 449.)

At this point, GH also realized Appellant had no shirt on. She testified, "I told him that that was not okay with me. I was sleeping and that he shouldn't have just assumed that something like that was okay, and that he needed to get up, take his things and get out." (Id.) As Appellant got up and was gathering his things, GH testified she could see that Appellant had an erection.

When asked if she remained calm or ever had to the elevate the tone of her voice, GH explained as follows:

> I had to elevate. I started to get very upset and panicked. I was crying. I told him that he simply needed to take his things and leave. At one point I said, 'I'm sorry, I don't want to be that person to kick you out and make you drive home when you have been drinking but this is not okay. And that I needed him to leave.' He kept saying that we can talk about this, that we can figure out what happened and that we can still be friends.
> . . .
> As I was crying and yelling at this point, I said that I knew what he was doing in my sleep, and that that was not okay. And that I have been through this before and I'm basically not going to let it keep going.

(R. at 450.) At one point, she told Appellant if he did not leave that she would call the police. (R. at 453.) GH estimated about 20 minutes passed from when she initially confronted Appellant to when he actually left. (R. at 450.) She said Appellant grabbed his alcohol but left the rice cooker.

Once Appellant was gone, GH cried for a bit and then called her friend Mr. JT. (R at 451.) She spoke with Mr. JT for about two hours and then decided to clean up, adding "I felt gross and wanted to go take a shower." (Id.) She eventually went to sleep around 0400 hours.

When she woke up a few hours later, around 0700 or 0800 on Saturday morning, she called SSgt JT, her sponsor, and told him what happened the night before. (R. at 452.) Spc3 GH said she did not call the First Sergeant because she did not have the First Sergeant's contact information. GH said she wanted to contact the First Sergeant to report the incident. SSgt T then had the First Sergeant, SMSgt K, call Spc3 GH.

Appellant also contacted GH that morning. (R. at 463.) GH said Appellant apologized for what happened and said he had "no reason to not believe you when you say that this happened, but I don't think that I am that type of person." (R. at 463-64.)

GH eventually spoke with the Air Force Office of Special Investigations (AFOSI) that evening. (R. at 453.) AFOSI agents came to her apartment, took pictures, and gathered the shirt, jeans, bra, underwear, and menstrual pad that she was wearing the night before. (R. at 454.) Those items are depicted in Prosecution Exhibit 5.

On Sunday, GH went to have a medical exam performed on her. (R. at 461.) Part of that exam entailed the probing of her vagina and breasts. (R. at 462.)

GH also had a pretext SnapChat conversation with Appellant. (R. at 464.) Prosecution Exhibit 6 displays the conversation between GH and Appellant. (R. at 465-67.) When asked during direct examination, "So, through these text message conversations, ma'am; at any point did he tell you, wait a second, you were awake and participating?", GH responded, "No, sir." (R. at 469.) At the end of the text conversation, Appellant and GH spoke on the phone. (Id.) When asked if Appellant ever told her that he thought she was awake and participating, GH responded, "No, sir." (R. at 470.)

When asked specifically about consent on direct examination, GH denied consenting to Appellant touching her buttocks while in the kitchen, denied consenting to Appellant touching her vagina, and denied consenting to Appellant dry humping her with his erect penis on her thing, buttocks and leg. (R. at 471.) GH stated that "one, it was unwanted. I had stated that we were just friends. Two, I was sleeping. And three, it was just inappropriate. I don't see him that way." (Id.)

On cross-examination, Appellant's trial defense counsel noted that GH initially told AFOSI agents that Appellant originally showed up at her apartment with alcohol, not that the alcohol had been bought later at Target. (R. at 483.) GH acknowledged that she misspoke, adding, "The whole situation had just happened. Then from the trauma and the stress of everything that had just happened, I understand that things at the time were jumbled up, which is why I went for that second interview to try to clear some things up." (Id.)

Also on cross-examination, GH acknowledged that she told AFOSI that she at one point had her head on his chest. However, GH testified that she misspoke and meant to tell them that she recalled having her hand on his chest. (R. at 492.)

GH was also questioned about when she first realized Appellant had his shirt off and whether she remembered him taking his shirt off. (R. at 496.) When asked by a court member to further explain her memories, GH stated, "So, ma'am, from my memory that I have now, after a little over a year, I just remember waking up and experiencing what was going on and going back into the living room, seeing him half covered with the blanket and his shirt off, but I did state in my second OSI statement that I faintly remember being briefly awake and seeing him sit up to take his shirt off. I would probably say my memory then is more accurate than it is now." (R. at 514.)

Mr. JT and GH have been best friends since high school. (R. at 519.) Mr. JT described the phone call he received GH in the early morning hours of 20 September 2020:

> She was just crying, like hysterically. She would not -- like, I have never heard her cry like that before, and pretty much I tried to like get some words out of her, but it took me like a good 20 minutes. So the first part of the conversation was just me trying to get something out of her, to respond in some sort of way instead of crying. And at that beginning part, I couldn't get anything until she calmed down a little bit. So it was once she calmed down a little bit, she started telling me what happened.

(R. at 522-23.)

Mr. JT explained that GH told him that she and Appellant had been hanging out, that she fell asleep, and that "she woke up to pretty much having her bra unclasped and having her breasts touched and having a hand in her panties" and rubbing her vagina. (R. at 524.) Mr. JT said GH told him she "woke up face down and she had her bra unclasped, feeling up on the breast, and he had a hand in her panties rubbing her vagina." (R. at 542.) When asked on cross-examination whether GH told him about Appellant touching her butt earlier in the night or rubbing his penis against her, Mr. JT responded, "Not to my knowledge." However, in response to a court member question, Mr. JT explained that while he wanted to get full details from GH, "I'm guess[ing] she did not want to explain the whole thing at the moment since she probably was trying to keep calm to explain the key points of it." (R. at 547.)

One court member asked Mr. JT about GH's sleeping patterns and whether she had even fallen asleep in front of him. (R. at 547.) Mr. JT responded, "So, it's very odd, but sometimes we'd go riding bikes or we'd be watching movies, and she's to that point of exhaustion and she is calm, like no more adrenaline from like bike riding, or is just tired, she would just fall asleep. Like there would be no warning to it. She would just be awake, you would look next to you, and she is already asleep." (Id.)

The menstrual pad collected from GH's apartment was sent to USACIL for testing. (R. at 565.) Because there was a high level of female DNA found on the pad and a low level of male DNA, Dr. DW, a forensic biologist, conducted Y-STR DNA testing. (R. at 790.) Dr. DW was able to generate a partial profile and "that profile was consistent with the profile that was obtained from [Appellant]." (R. at 791.) Dr. DW then compared that profile to a database to see how common or rare that profile was in the U.S. population. The probability of obtaining the same partial profile at random in the U.S. was approximately 1 in 3,199. Dr. DW also said the profile found would be shared by Appellant and any of his paternal male relatives. (Id.)

Ms. MM was recognized as an expert in the field of forensic nursing. (R. at 829.) She performed a medical forensic exam on GH that lasted approximately two hours. (R. at 831, 837.) Her report is at Prosecution Exhibit 11.

Appellant's interview with AFOSI is at Prosecution Exhibit 3. During the interview, Appellant claimed that the two went shopping earlier in the afternoon, went to a liquor store, and ended up at GH's apartment to cook rice and fish. (R. at 627, 637-38.) He also said they went to Target to get cookies. Appellant claimed they both were drinking and that they started watching the movie after they ate. (R. at 627, 638.) Appellant also claimed GH was wearing a sweatshirt and sweatpants that evening, but then changed into "booty shorts" and a t-shirt when they started to watch the movie. (R. at 674.)

Appellant claimed that GH said she was tired and went to sleep a little before him. (R. at 628, 640.) At one point, Appellant told investigations that he did not like the movie GH picked and "was kind of ticked off that she got tired and didn't want to watch it." (R. at 640.) Appellant claimed GH actually turned the movie off before she went to sleep and that they were "just laying there." (R. at 641.) He added, "And like if she didn't want me to stay

the night or to lay on the bed or whatever, she would have told me right then and there. Like hey, like sober up and get out of her, like hey go sleep in the corner on the floor. Like I didn't care. But since she didn't say anything, I was just laying down with her. And then shortly after that, she kind of fell asleep . . .." (Id.)

Appellant said GH "rolled around [and] put her arm across me, and as I said, hand on my chest and that's when everything started." (Id.) Appellant also claimed that GH had no issue with him spending then night, stating that when he asked if she was cool with him staying over, GH responded, "Yeah, if you're drinking." (R. at 642.)

Though he claimed to have no bad intentions, Appellant admitted to unhooking GH's bra and rubbing her back while GH was asleep. (R. at 628-29, 643.) Appellant claimed he rubbed her back for a little bit, kissed her on the top of her head, and then said he fell asleep. (R. at 629, 648-49.) Appellant attempted to explain, stating, "I was just saying like -- like a goodnight. It was like just completely innocent. I wasn't thinking of it like in any sort of way. I just -- I have a different way of thinking than most people." (R. at 649.) He later said, "So like I just kissed her on the forehead. I think I probably like mumbled like good night or something. I don't know." (R. at 661.) He then added, "Like I don't really remember too much I'll tell you." (Id.)

Appellant then told AFOSI agents that he regularly gets hot when he sleeps and "I want to totally take my shirt off whenever I sleep." (R. at 664.) He added, "But I probably got hot while I was sleeping."

Appellant said he was then awoken when GH turned on the light and said he was groping and fingering her. (R. at 629, 649, 651-52, 665.) Appellant claimed, "I don't want to

believe that it happened, but if it did happen, I wasn't really conscious. I wasn't there for it." (R. at 629.) He claimed, "I was asleep, and I was really confused." (R. at 665.)

At one point during the interview, when asked about whether he and Spc3 GH had planned on having dinner together, Appellant stated, "Well, we were tentatively planning on having dinner -- I think it may have been Thursday because -- I couldn't tell you. I have a terrible memory with those [inaudible] like plans detail things." (R. at 652.)

When asked if he had an opinion on what happened while he was sleeping, Appellant said, "I mean, I don't even know." He again stated what GH had said he had done, but then added, with regard to touching her vagina, "It normally puts like some sort of smell or residue on your hand after you finger someone. So whenever I got to my car, I gave my hands a sniff. I looked at them. I felt them. I didn't anything. So not saying I don't believe her or anything, but like I just -- I didn't feel anything so I was very confused a little." (R. at 676.) Appellant also attempted to explain away having an erection, stating, "I'm not saying that it happens every time, but most of the time whenever a man wakes, even if it's from a nap, he can have like a semi-erect to fully erect penis. It just happens, and you got to like wait a couple minutes and it goes away." (R. at 677.)

Later, Appellant states that he is "all about consent." (R. at 686.) When confronted with him unclasping GH's bra while she was sleeping, Appellant said, "Yea, so consent towards like actual like sexual acts." When asked if unclasping someone's bra was sexual, Appellant responded, "In that context like with what I was meaning, not really. I wasn't really thinking of it sexually at the time, but I did say after I did it, I did it kind of like -- like halfway regret it. I was like, well, I probably shouldn't have unhooked her bra and everything. And if I was good

enough, I probably would've hooked it right back, but like I couldn't do that with one hand." (Id.)

Appellant would again deny having any sexual intent towards GH and continue to claim that he was not awake. (R. at 688.) He stated that him unhooking GH's bra was not him trying to "put moves on her," but instead was just "doing it to rub her back as a friend." (Id.)

Later, however, Appellant began to recall what happened between when he said he fell asleep and when GH woke him up. Appellant started by stating the following:

> And that's one of the main reasons why I'm confused, and I don't want to say like -- I don't want to say like "Yes, I fingered her, and my dick was out, and I was dry humping her, and like I unhooked her bra, and I was up on her and everything," I don't want to say that because it doesn't seem actually real to me, but I can also see it happening.
>
> . . .
>
> Like maybe like -- it's maybe like a weird like image in your head with like a random like -- like a random-like smell or something. Like -- like it's not quite a memory. It's just like random images. It's kind of like that. Like I don't -- I mean, I don't know if it's just my imagination, which is why I didn't want to bring it up because I have a very vivid imagination. So, if we're talking about a person doing things to another person, my brain automatically will like kind of realize it and like a movie format in a way. But like, I can see it happening. Like with what she's told me, I could see like me being like up against her being like half-asleep, half-awake kind of thing, like not really all there. And like putting my hand down her shorts or something, like grabbing her butt or something, I don't know. I could see it happen, but I like it just doesn't feel real to me. But I don't know, like that's why I -- that's one of the main reasons why I said like I could believe it, and why like I'm not just saying like no, she is totally wrong because I could see it happening, but I -- it just -- it still doesn't feel real to me.
>
> . . .

> That's why I had -- I don't want to say that I did it because I don't know exactly what happened. And I feel like if I -- if I say the things that I see in my head, then like it's just -- it's like I'm -- like I'm not lying, but I just don't know if what I'm saying is the truth.

(R. at 722-23.)

Appellant would later say, "I still don't think that I was awake because I have a decent memory," and, "Like maybe I was awake like you said, but I -- I don't think I was fully awake, conscious, there mentally." (R. at 726.)

But then Appellant said the following:

> I don't know what to like call it. But just because I can't actually fully remember these things that -- I mean, I -- like I just said, I can -- I can see myself being up against her, and like -- like potentially have my hand down her shorts or something, but I still don't think that I could like -- like full-on do that. Like I don't think that was -- was in my mind at all that night.

(R. at 726.) Appellant then closed his eyes to try and better remember. Appellant then detailed what he saw, including the following statements:

- And like I think I like hugged her maybe, or like just like wrapped my arm around her a little bit.
- So then I tried to get comfy again, and feel up to like to really fall back asleep. And I think I kind of did because I was asleep, and I was like up against her, and I think like maybe I was aroused a little bit because her behind was like close to my front.
- I don't really know, like I think at that point I was just like rubbing her leg for a little bit, and then I think I -- I touched her butt.
- And then sometime after that I could kind of see myself like -- oh, it's -- it's a terrible move, but a move that I know that I've pulled with significant others in the past. So like if you go into a little leg or butt massage or whatever, and then you like put your hand in their pants or whatever.
- But I could -- I think after that I -- I put my hand down her shorts, and I don't know if I actually fingered her or not, but my hand was probably near there.

- I still don't think I fingered her, but I don't think that I'd be that coordinated, I guess is the word. But I think like I could kind of see myself put my hand down her pants, and just like kind of leaving it there.

(R. at 726-30.) Appellant said, "But like I don't know, I -- it's not a one hundred percent for me in any means. I don't even know if it's 50 percent for me, but saying it out loud kind of felt real so…if that means anything." (R. at 731.)

When an AFOSI SA asked "these aren't just things you just made up are they?," Appellant responded, "No. I can -- like I can really see it in a way, but like I don't -- I don't know if it's like my brain just doesn't want it to be real or something, and it's just like doesn't want it to be a legit memory, but it -- it seemed real." (R. at 732.)

Appellant then said the following:

> I mean, it's a very short memory, I guess, as a short recollection [inaudible]. That may have just like a couple minutes at most. Like I don't really think I was like -- I don't think I was trying to like perform any sort of like foreplay or something for a while. I think it was just kind of -- I don't want to say random, but spontaneous or something. I don't know, things just like happened. And then like I wasn't really like meaning much by it. And then I remember like cuddling up against her for a little bit more and then kind of just like falling back asleep completely. And then like that's when everything just kind of like went dark, and then I saw the light turn on, and her kind push on my shoulder a little bit.
>
> . . .
>
> Like it -- whenever I'm picturing it right now, it just seems like it like -- like it barely happened, and then like -- like because I don't think I was like trying to do anything. Like remember when I said earlier like I don't think I was like trying to any sort of like foreplay into something else. I think I was just like doing that maybe, and then that's all I was like -- like even thinking of. And then after that, I just like took my hand out, wrapped it back like over her or whatever, and then kind of cuddled up and then fell back to sleep.

(R. at 738.) When asked to clarify whether he put his hands down her pants or both her pants and underwear, Appellant answered, "It was also her underwear because honestly, I don't if like -- I feel skin."

Appellant still maintained he did not finger her, but added that his hand was near where her butt and vagina meet, adding, "I feel like I may have like squeezed her butt for a little bit . . .." (R. at 739-40.) He later said, "I know for a fact that I was like squeezing her and I was like kind of like rubbing her butt a little bit. So since I was down there, like it seems like it could've happened to me that I was also rubbing her vagina. But I don't have like an exact like hundred percent feeling of it. But it makes sense to me. I'm like at like 80 percent right now . . .." (R. at 742.)

When asked about touching GH in the kitchen while making cookies, Appellant said that he may have "booped" her butt, adding, "I don't know if it was like with my hand, or like a spatula, or like my knee, or - - I remember that though." (R. at 759.) He added, "I was just being like playful. I wasn't meaning anything by it. But I figured just -- I think I literally said 'boop.' You know, like you like boop someone's nose or something." (R. at 760.) While he said he did not grab her butt at this time, Appellant said, "I just poked it real quick." (Id.)

Later, when asking again about placing his finger into GH's vagina, Appellant responded, "I don't actually remember it, but I mean, it's a possibility." (R. at 762.) He added the following:

> I mean, I -- I think it's a huge possibility that like I could have been inside of her vagina for even like a second because I was -- like my hand was moving up and down a little bit like down towards there or whatever. So like I could have thought that like maybe I was just like grabbing her like -- like her inner thigh or like her lower butt or

> something, but it could've been like inside of her or something. I -- I don't know if I did because I can't actually remember that.

(R. at 763.)

When asked why he thought this happened, Appellant replied as follows:

> I think I -- I woke up-ish, like kind of groggy, half awake, and then like, not really even there mentally. And then like I think I was just, probably just like subconsciously enjoying like cuddling with a woman and being near someone like that. I think like maybe I was just like kind of aroused and wanted to touch her butt or something. I'm not too sure. It seems like that's just like probably what was possibly going through my head, but like I don't actually recall actually thinking those things, but that's probably what was going through like my subconscious or something. It felt like -- like something like this is nice or whatever kind of feeling. And then I -- I like had put my hand down there and everything. I don't think I was like meaning to do anything like sexual or whatever. I think I was meaning just to like just to have that like feeling of comfort and like -- not like the feeling of like love or whatever, just like the feeling of like just like being with someone in any sort of way I think. I don't think it was like sexual or whatever. I don't think it was like that. I think it was just like being like with someone, I think. I'm not too sure though.

(R. at 766.)

In Appellant's case-in-chief, an excerpt from GH's AFOSI interview was played. (R. at 845.) That interview is at Defense Exhibit A. The portion played by the defense is when GH told agents that she was "usually a light sleeper." (R. at 845.)

Appellant called SSgt JT who testified about his phone call with GH. (R. at 858.) SSgt JT testified that GH told him that she woke up with Appellant on top of her with his hand down in her underwear. (R. at 865.) SSgt JT recalled GH telling him that when she woke up, Appellant was on top of her naked, she was clothed in a shirt and underwear, and Appellant was rubbing his penis on her. (R. at 859.)

Spc TL was also called by Appellant. She knew both GH and Appellant from tech school. (R. at 883.) Spc TL said she and GH were friends from April 2020 until September 2020. (R. at 923.) Spc TL stated that she and GH had tried to set something up for dinner, but that they never set a date. (R. at 894.)

The morning after the incident, Spc TL testified that GH called her and told her the following:

> She said that she had invited him over, that he was going to make her dinner. She had had a drink, and they had watched a movie after they had finished eating, and then she -- she said she was going to go to bed, and that she had told him to -- that he couldn't spend the night, but she left him where he was and she -- she went to sleep and that when she woke up in the middle of the night that he was -- he was pressed up against her.

(R. at 895.) Spc TL said GH made no mention of being fingered or of Appellant touching her butt.

On cross-examination, Spc TL admitted that she was driving to and arriving at the hospital while she was on the phone with GH. (R. at 896.) Spc TL's daughter was there being treated for rashes. When asked if the call with GH was interrupted because she was dealing with things going on with her daughter at the time, Spc TL responded, "Yes." (R. at 896-97.)

Spc TL also admitted that GH sounded very scared and upset on the phone and that GH told her that she was "freaked out." (R. at 897.) Spc TL also admitted that GH told her she had run to the restroom when she woke up, that she yelled at Appellant, and told him to leave.

When asked if she had an opinion on GH's character for untruthfulness, Spc TL said that "she is untruthful." (R. at 894) However, on cross-examination, Spc TL admitted to

confronting GH in a bathroom and telling her that she should watch how she acts and behaves around men. (R. at 912.) Spc TL admitted she decided to stop being GH's friend when GH reported Spc TL's comment to her First Sergeant. (R. at 913.)

Spc CR was also called as a witness by Appellant. Spc CR knew GH from tech school. (R. at 926.) He said they were together roughly 10 hours a day during tech school and had approximately 40-50 conversations with her. Spc CR said he believed GH to be a "very untruthful person." (R. at 928.)

On cross-examination, Spc CR admitted that he had no contact with GH either before or after tech school and his knowledge of her was strictly based on her interaction with her at tech school. (R. at 929.) Specialist CR also admitted that GH reported him for sexual harassment during tech school, that he received an adverse personnel action, and that the action had disrupted his career. (Id.)

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

ARGUMENT

I.

APPELLANT WAIVED ANY DUE PROCESS CLAIMS RELATED TO NOTICE AT TRIAL AND WAS ON NOTICE OF THE CHARGE FOR WHICH HE WAS CONVICTED.

Standard of Review

While there is a "presumption against the waiver of constitutional rights," an appellant may waive the right to raise such issue on appeal provided it is "clearly established that there was 'an intentional relinquishment or abandonment of a known right.'?" United States v. Harcrow, 66 M.J. 154, 157 (C.A.A.F. 2008) (*quoting* Brookhart v. Janis, 384 U.S. 1, 4, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)).

If waiver is not applied, this Court should review Appellant's claim only for plain error. *See* United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Plain error requires that an appellant establish an error which is "clear and obvious under current law" that affected his substantial rights. *See* United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011).

Law

"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.

Additional Facts[4]

On 19 September 2020, GH provided AFOSI an oral statement that she felt Appellant's hand touch her buttocks while making cookies. (ROT, Vol. III, AFOSI Report of Investigation (ROI).) In that same interview, she told agents that she woke up later with Appellant's hand down her pants and underwear. These statements are contained in the AFOSI ROI that was provided to Appellant prior to his trial.

[4] These additional facts are also pertinent to Issue II below.

On 20 September 2020 during her sexual assault examination, GH told Ms. MM that she woke up with Appellant's hand in her underwear. (Pros. Ex. 1.) This statement is contained in Ms. MM's report of the examination that was provided to Appellant prior to trial and admitted during his trial as Prosecution Exhibit 1 without objection. (R. at 46.)

On 22 September 2020, Appellant was interviewed by AFOSI. Appellant stated that after GH went to sleep, he also fell asleep but woke up feeling aroused and began to touch her legs and buttocks. These statements are contained in the AFOSI ROI that was provided to Appellant prior to his trial. A recording of this statement was also admitted during Appellant's trial as Prosecution Exhibit 3 without objection. (R. at 554.)

The audio from this interview would later be played at trial. Quotes from Appellant regarding touching GH's buttocks while she slept include the following:

1. Like with what she's told me, I could see like me being like up against her being like half-asleep, half-awake kind of thing, like not really all there. And like putting my hand down her shorts or something, like grabbing her butt or something, I don't know. I could see it happen, but I like it just doesn't feel real to me. (R. at 723.)

2. And then I don't really like -- it's kind of like where I said, like I think like maybe I was like rubbing her leg a little bit or something, and then I think like -- I don't really know, like I think at that point I was just like rubbing her leg for a little bit, and then I think I -- I touched her butt. (R. at 729.)

3. And then sometime after that I could kind of see myself like -- oh, it's -- it's a terrible move, but a move that I know that I've pulled with significant others in the past. So like if you go into a little leg or butt massage or whatever, and then you like put your hand in their pants or whatever. It's -- it's a god-awful move, but I guess it's -- I don't want to say it works because that seems rude. (Id.)

4. And then I think I moved like up towards her butt or something. And then I think I went like -- I think I like -- maybe like squeezed her butt a little bit and like -- that seems like something. (R. at 737.)

5. I think my hand was like near where like the butt and the vagina meet, that area. But I don't -- I don't think I like -- like so that I feel like I may have like squeezed her butt for a little bit, but I don't think it was near there. I think it was just like squeezing her butt in general. (R. at 739.)

6. But like. I mean, I think it was mainly like squeezing her butt. (R. at 740.)

7. I know for a fact that I was like squeezing her and I was like kind of like rubbing her butt a little bit. (R. at 742.)

8. That's kind of just [inaudible] the butt. It was kind of like just general 1 like closing the hand. (R. at 743.)

9. It was be like -- at first whenever I went into her pants, I think it was just on butt cheek. And then like I was kind of massaging going like up and down a little bit. (R. at 744.)

10. Whenever we were laying down. (R. at 760, when asked by AFOSI when he grabbed her butt for the first time.)

11. At that point I guess it was more like -- like I was just like touching her butt or like -- like having like massaging near there. (R. at 765.)

12. I think like maybe I was just like kind of aroused and wanted to touch her butt or something. (Id.)

On 5 April 2021, one charge and three specifications were preferred against Appellant. Specification 1 of the Charge read that Appellant "did, at or near Colorado Springs, Colorado, on or about 18 September 2020, touch [GH's] buttocks with his hand, with an intent to gratify his sexual desire, without her consent." (ROT, Vol. III.)

On 19 July 2021, Appellant was arraigned and the general nature of Specification 1 was announced, specifically that Appellant "touched the named victim's buttocks with his hand." (R. at 11.) Appellant also waived the full reading of the specifications. (R. at 15.)

On 25 October 2021, the general nature of Specification 1 was again announced. (R. at 87.) Appellant also again waived the full reading of the specifications. (R. at 33.)

At the start of Appellant's trial, the trial counsel began his opening statement by quoting Appellant's admission to AFOSI that he touched GH's buttocks while she slept. The trial counsel stated, "It's a terrible move, but it's a move that I know that I have pulled with significant others in the past, where like you get like a little bit of a leg or a butt massage, or whatever, and then like you put your hand in their pants." (R. at 406.) The trial counsel later stated, "The next thing GH] is waking up, and she's waking up to the accused's hand in her pants. She could feel him rubbing her buttocks, leg and thigh." (R. at 408.) In the opening statement, the trial counsel never referred to the touching incident in kitchen.

During her testimony, GH stated that Appellant's arm and hand were down the back of her pants when she woke up, adding, "He used his left hand to go into the back of my pants and into my underwear." (R. at 444.)

After receiving findings instructions, a panel member recognized there was evidence of Appellant touching GH's buttocks both in the kitchen and on the air mattress and asked whether Specification 1 included only the event in the kitchen or did it encompass any time that evening. (R. at 1016; App. Ex. XLIX.) When asked this question, the trial counsel responded:

> I believe that it could reasonably apply to both instances per se. If they don't find an intent for the touching at the oven, that they should consider the touching on the air mattress. But the government's -- the gist of the government's argument and our theory is that that primarily refers to the conduct on the air mattress.
>
> . . .
>
> Again, I believe it reasonably applies to both. Government's argument will -- will suggest the possibility that they could find him guilty of that conduct to either conduct.

(R. at 1016.) Later, the trial counsel again stated the emphasis of the Government's argument would be the activity that occurred on the air mattress. (R. at 1017.)

Appellant's trial defense counsel made no objection on any notice or due process basis. Appellant's trial defense counsel also never stated they were not prepared to defense against Appellant touching GH's buttocks on the air mattress without consent. Instead, Appellant's trial defense counsel only took issue with whether it was "proper for the judge to instruct on the government's theory of the case." (Id.) Appellant's counsel further stated, "I'm not sure if it's a legal issue if they go back and three of the members find him guilty of the oven and three of them find him guilty of the bed."

After the military judge gave a brief synopsis of his understanding of the general verdict rule, Appellant's trial defense counsel stated, "I don't think that we need any other additional time for research at this point. If that's the court's understanding of the general verdict rule, but just that we would leave it to the members to decide rather than getting an instruction from the judge that it can be either one . . .." (R. at 1018.)

The military judge then proposed the following instruction to respond to the member question: "I would allow the parties to describe their theories of when and how that may have happened, your job is to consider whether those three events happened on this date." Appellant's trial defense counsel responded, "I think that -- even with that language, it's even clearer. That's perfect, Your Honor." (R. at 1019.)

The military judge later instructed the members that the specification "asks you to determine whether, in your judgement, at any time on 18 September 2020, those three elements occurred: that there was a touching of the buttocks, by the accused; that it was with the intent to gratify sexual desire; and, that it was without consent. So, your duty is to determine whether in your judgement, those three elements occurred at any time, during the course of the 18th. Whether or not it did is ultimately up to you." (R. at 1031-32.)

Another member question asked if, with regards to Specification 1, "must the element of consent come from capable, absence of consent, or can it come from incapacity to consent." (R. at 1020.) The trial counsel responded, "So with respect to Specification 1, we would believe, because it's without consent that would include incapacity that would include a sleeping or unconscious person." (R. at 1021.) A discussion then followed regarding this Court's recent decision in United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. Mar. 12, 2021). (R. at 1021-24.) Appellant's trial defense counsel raised the surplusage doctrine, adding that the "if the legal determination is that if you charge without consent and you can argue all three theories, then I don't see why the government would ever charge anything as asleep or unconscious." (R. at 1024.)

The trial counsel, citing to Williams and United States v. Horne, No. ACM 39717, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. May 27, 2021), argued that whether GH withheld consent or was asleep where "all permissible considerations within the surrounding circumstances for the members' consideration in determining whether a person gave consent." (R. at 1026.) The military judge ultimately allowed the trial counsel to argue that all the surrounding circumstances could be considered for lack of consent. (R at 1028.) As to the member's question, the military judge told the members as follows:

> So, on that -- on Specification 1, I'd refer -- I'd, again, refer you to my instructions on the definition of consent, being that "consent" means a freely-given agreement to the conduct at issue by a competent person. The definitions that I've given you to what that entails still apply here. It's for both parties to argue whether or not they think those circumstances are here under the facts of this case. Ultimately, all the surrounding circumstances are to be considered in determining whether a person gave consent.

(R. at 1033.) Appellant's trial defense counsel made no objection to the instruction.

Appellant at no time, including during his trial, raised a due process or notice claim regarding Specification 1. Appellant also never filed a Bill of Particulars requesting additional specificity on Specification 1.

Argument

For the first time on appeal, Appellant now claims he was convicted of an offense for which he was not on notice and not charged. (App. Br. at 3). He claims that he, his defense counsel, and "everyone else involved in the court-martial believed that Specification 1 alleged a nonconsensual touching of GH's buttocks while bending over in the kitchen to put cookies into the oven." (Id .at 9.) For the first time, he claims the inclusion of him grabbing GH's buttocks in her sleep within Specification 1 was a "bait and switch" that deprived him of fair notice. (Id. at 11.) Appellant is incorrect.

- ***Appellant waived this issue at trial.***

First, Appellant waived this issue by not raising any due process or notice issues at trial. Importantly, the issue regarding whether Specification 1 included only the incident in the kitchen or Appellant's actions while GH slept was front and center at the trial when a member raised the question.

Yet there, the only objection raised by either Appellant or his trial defense counsel was to how the military judge would instructed the panel regarding the two factual scenarios. Neither Appellant nor his trial defense counsel ever objected as to whether Appellant was on notice of the two theories and neither raised any due process issue regarding the specification. Further, Appellant's trial defense counsel never stated that they were unprepared to defend against Appellant touching GH's buttocks on the air mattress without her consent.

Moreover, Appellant's counsel affirmatively agreed with the military judge's instruction that would serve as an answer to the member's inquiry into whether Specification 1 included just the kitchen incident or also the sleeping buttocks grab. When the military judge said that he would instruct that the parties could "describe their theories of when and how that may have happened," Appellant's trial defense counsel called the response "perfect." (R. at 1019.)

Here, when the issue for Specification 1 was squarely raised, neither Appellant nor his trial defense counsel raised any due process or notice claims. Notably, Appellant also did not object to the possibility that two factual scenarios were in play for Specification 1. While Appellant now claims he "objected to an instruction to the members that they could use any conduct that satisfied the elements to convict," such an assertion is incorrect and contradicted by the record. (*See* App. Br. at 10, *citing* R. at 1017-18.) A review of those pages finds that Appellant did not object to the possibility of two scenarios, but only objected to the military judge specifically mentioning what those possibilities were. Again, when the military judge said he would "allow the parties to describe their *theories*," Appellant's counsel responded that such an instruction was "perfect." (R. at 1019.) (emphasis added.)

Considering these circumstances, this Court should find Appellant affirmatively waived this issue.

- ***If Appellant did not waive the issue, there is still no error, plain or otherwise.***

Even if this Court finds waiver does not apply, Appellant still forfeited the issue by not raising any due process or notice issue at trial. Thus, this Court should review for plain error and find none.

To begin, Appellant was charged in Specification 1 with Abusive Sexual Contact under Article 120(d), UCMJ. Appellant notably takes no issue with the specification language itself

nor does he allege that the specification in and of itself is in anyway deficient. Indeed, a review of the specific language of Specification 1 shows Appellant was properly put on notice that he was charged with committing abusive sexual contact under Article 120(d), UCMJ. The specification expressly alleged every required element, and Appellant was fairly informed that he must defend against abusive sexual contact without consent.

Instead, Appellant limits his argument to the claim that he thought the Specification only dealt with him grabbing GH's buttocks in the kitchen while claiming ignorance that the Specification could also include him grabbing GH's buttocks while on the air mattress.

Appellant's claims are lacking. The record shows that he was on notice and neither he nor his trial defense counsel were deprived of the ability to defend against this conduct.

To start, Appellant admitted to AFOSI on no less than 12 occasions throughout his September 2020 interview that he touched GH's buttocks while on the air mattress. Thus, he knew AFOSI, the prosecution, and his command were aware of his admissions. Furthermore, his trial defense counsel were aware of his admissions as well, since Appellant's interview was provided to the defense prior to trial.

Additionally, the AFOSI ROI provided to Appellant before trial references GH's statement that Appellant had his hand down the back of her underwear while she slept. Further, Appellant was also provided a sexual assault examination report where GH told Ms. MM that she woke up with Appellant's hand in her underwear.

Moreover, the specification's language, that included the date, location, and fact that Appellant grabbed GH's buttocks to gratify his desires and was done without her consent, encompasses the very misconduct Appellant admitted to committing no less than 12 times during his AFOSI interview.

Considering these circumstances, Appellant was on fair notice prior to trial and should have reasonably contemplated that him grabbing GH's buttocks while on the air mattress was included within Specification 1. Yet, even if either Appellant or his trial defense counsel were somehow unsure as whether the misconduct to which he had repeatedly confessed to would be encompassed within Specification 1, Appellant had the means to confirm this information by filing a Bill of Particulars. He did not.

Then, at his arraignment in July 2021, the general nature of Specification 1 was announced, specifically that Appellant "touched the named victim's buttocks with his hand." Again, this description matched exactly to what Appellant admitted to AFOSI he did to GH while on the air mattress. Still, Appellant claims he was in the dark as to what Specification 1 encompassed.

Still more, the Government's opening statement put Appellant's grabbing of GH's buttocks on the air mattress squarely at issue when the trial counsel repeatedly mentioned Appellant's admission to AFOSI that he touched her buttocks. In that same argument, the trial counsel never mentioned the incident in the kitchen. Thus, in the opening moments of his trial, both Appellant and his trial defense counsel were on notice and reasonably aware that Specification 1 included Appellant's act of touching GH's buttocks while on the air mattress.

While Appellant references his trial defense counsel's opening statement within this issue, he fails to mention the trial counsel's opening statement and its sole focus on Appellant's actions on the air mattress. While Appellant claims a "bait and switch" where the prosecution only turned to the sleeping buttocks grab in a last-ditch effort to "salvage its case," the trial counsel's opening statement shows the air mattress buttocks grab was the primary focus of the

Government's case from the beginning. This opening statement quashes Appellant's unsupported assertions of an end-of-trial bait and switch. The trial counsel's opening statement also renders Appellant's claims that "Circuit Trial Counsel believed Specification 1 was about the kitchen at least through the direct examination of [GH]" and "It was not until closing arguments that the Government moved the goal posts and incorporated not only another instance of conduct, but another theory of liability as well" unsupported. (*See* App. Br at 10, 18.)

Later, when the prosecution played Appellant's AFOSI interview, which included at least 12 admissions to touching GH's buttocks on the air mattress, Appellant yet again was put on notice that his touching GH's buttocks on the air mattress was at issue in his trial.

Appellant fails to make any reference within his Issue I analysis of his repeated confession to grabbing GH's buttocks on the air mattress. Instead, he claims the "Government charged its case based upon the statements given by [GH]," and that her statements to AFOSI and Ms. MM stated that Appellant touched her buttocks in the kitchen. (App. Br. at 10.) Yet, Appellant omits his own confession, which was provided to him prior to his trial, is Prosecution Exhibit 3 in the current record, was played to the members over the course of hours during the trial, and was repeatedly mentioned by the trial counsel in both opening and closing statements. His failure to address his own admission to the very misconduct he now claims he was not on notice of being charged with is telling.

Next, Appellant takes issue with the charging decisions by the Government by stating, "If the Government had intended for Specification 1 to cover the conduct on the air mattress while [GH] was sleeping, it would have charged it in the same manner as Specifications 2 and 3." (App. Br. at 10-11.) However, this Court has repeatedly dismissed similar arguments in prior cases.

In United States v. Harris, No. ACM 39640, 2020 CCA LEXIS 299, at *27 (A.F. Ct. Crim. App. 2 Sep. 2020), this Court rejected an argument that the Government was required to charge a bodily harm sexual assault offense and an incapable of consent sexual assault offense in the alternative. There, this Court held that the appellant "entirely fails to explain why proof that SrA LS could not consent due to impairment by alcohol would not be relevant to prove that he did not consent, and thereby satisfy the elements of sexual assault by causing bodily harm, with which he was charged and for which he was convicted." Id. at *26-27. This Court noted, "It is hardly a novel situation that the available evidence in a particular case might meet the elements of multiple offenses, affording the Government some discretion in its charging decisions" Id. at *27 (*citing* United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014)).

The following year, citing Harris, this Court again held that the Government was not required to charge the bodily harm and incapable of consent offenses in the alternative. Horne, at *61. There, this Court held, "The Government had the discretion to charge Appellant with both offenses in the alternative, or either offense based on its assessment of the evidence. We find no merit to Appellant's claim that he had a due process right to have both offenses charged in the alternative." Id. at *62.

In this case, and as analyzed in more detail below, proof that GH did not consent due to her being asleep was relevant to prove that she did not consent, and thereby satisfy the elements of abusive sexual contact without consent, which is the offense Appellant was charged and convicted.

All told, to the extent that Appellant did not waive this issue at trial, there was no error, let alone plain error, in Appellant's Specification 1 conviction. Appellant was convicted of abusive sexual contact for touching GH's buttocks with his hand without consent, he was

on notice of this offense, and the record does not support that he was convicted of an uncharged offense. Therefore, this claim must fail.

II.

THE MILITARY JUDGE DID NOT VIOLATE THE SURPLUSAGE DOCTRINE, AND APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Standard of Review

Whether an appellant was convicted of a theory other than what was charged is question of law reviewed de novo. *See generally* Tunstall, 72 M.J. at 193.

Law

Case law cited in Issue I also applies to this issue. Additionally, Article 120(d), UCMJ, Abusive Sexual Contact, incorporates the various alternative theories of liability for the offense of sexual assault under Article 120(b). Appellant was charged with abusive sexual assault without consent, which is analogous to Article 120(b)(2)(A), UCMJ, which prohibits the commission of a sexual act "without the consent of the other person." Article 120(b)(2)(B), UCMJ, addresses sexual acts committed by a person who "knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring."

In order to find Appellant guilty of sexual assault under Article 120(b)(1)(B), UCMJ, by bodily harm as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant committed sexual contact upon another person; and (2) he did so without Spc3 GH's consent. *See* Manual for Courts-Martial, United States (2019 ed.) (MCM), pt. IV, ¶ 60.b.(4)(d). "Consent" is defined as "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no

consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7). In determining whether a person consented to the conduct at issue, "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." MCM, pt. IV, ¶ 60.a.(g)(7)(C).

Additional Facts

The additional facts stated in Issue I are also pertinent to Issue II.

Additionally, during the Government's closing argument, trial counsel stated Appellant committed the "butt massage" while GH "lay in bed next to [Appellant] asleep," before adding, "He did those things without her consent." (R. at 1037-38.) The trial counsel continued, "And at no point during his hours-long interview did he ever even suggest that she consented to that conduct." (R. at 1038.)

Trial counsel also highlighted the anger GH showed when she awoke as evidence that she did not consent. (R. at 1039, 1044.) Trial counsel rhetorically asked, "Now, ask yourselves, if she consented to this conduct, why would she react that way? Why would she kick him out of her apartment if she consented to any portion of that conduct?" (R. at 1044.)

Trial counsel also argued how the butt touching in the kitchen, which GH immediately responded to with a harsh rebuke, was evidence that she did not consent to the later butt grabbing on the air mattress. (R. at 1040.) To that, trial counsel also noted the multiple other factors showing GH did not consent to being touched, including Appellant's

admission that he knew GH did not want him to stay overnight, and GH telling Appellant that he was "coming over as a friend." (R. at 1054.)

When trial counsel spoke about GH being asleep, he stated, "There's no indication she's participating or at any point asked him to touch her," adding that Appellant "has no argument that she was participating or that she consented to that activity." (R. at 1055.) He later argued, "That is not consent. That is not [GH] was awake, so I began touching her body." (R at 1056.)

The trial counsel closed by stating, "When you consider [GH's] reaction, the DNA proof that corroborates this case, the two stories, the accused's own lies, his confession, there is no alternate conclusion except the accused did these things to her *without her consent*." (R. at 1057.) (emphasis added.)

During her testimony, when asked, "when you woke up to *his hand reaching in through the back of your waistband* and touching you on your vagina, did you consent to that?," GH responded, "No, sir." (R. at 471.) (emphasis added.) When asked why she did not consent, Spc3 GH responded, "one, it was unwanted. I had stated that we were just friends. Two, I was sleeping. And three, it was just inappropriate. I don't see him that way." (Id.)

Analysis

Appellant was not convicted on a theory that was not charged; therefore, he is not entitled to relief. Here, Appellant's argument that he was prosecuted under the theory that he committed abusive sexual contact *only* because she was asleep is incorrect.

To start, there is no question that GH being asleep played a part in the Government's case. However, there is a distinction between her being asleep playing *a part* in

showing Appellant committed a sexual act without consent, which is what Appellant was charged, and her being asleep *being the sole reason* for liability.

Importantly, GH being asleep was not the sole evidence presented that GH did not consent and is not the sole reason why Appellant is guilty. The Government presented multiple pieces of evidence showing GH did not consent to Appellant's abusive sexual contact that are in addition to her being asleep. GH told Appellant he was invited over only as a friend. GH told Appellant repeatedly that he was not spending the night, that he should not drink too much, and that she did not want to have to drive him home. When Appellant touched GH's buttocks in the kitchen, she immediately told him to "watch it," a clear indication that she did not consent to him touching her buttocks. Thus, even before she fell asleep, there was ample evidence showing GH had no interest in having her buttocks touched by Appellant and that Appellant *knew* she had no interest. Further, GH specifically testified that she did not consent to Appellant having his hand down the back of her waistband because they were "just friends," she was sleeping, it was "inappropriate," and she did not "see him that way." (R. at 471.) The fact that GH was asleep when the act actually happened is but part of the overall equation of whether Appellant grabbed her buttocks without her consent.

Here, the Government did not merely present evidence that GH was asleep and nothing more. Such evidence would be all that is required to prove a charge alleged under the abusive sexual contact equivalent of Article 120(b)(2)(B), UCMJ. However, when, as charged here, the charge is abusive sexual assault without consent, the equivalent to Article 120(b)(2)(A), UCMJ, more is needed. The Government must affirmatively prove the act was done without the consent of the other person.

The Government in this case proved much more than the plain fact that GH was asleep. The evidence shows GH repeatedly made clear to Appellant that she did not consent to being touching on her buttocks by repeatedly setting boundaries for the night (i.e., "just friends") and clearly rebuffing a prior buttocks grab.

Moreover, trial counsel's closing argument continually tied all of the evidence, and not just her being asleep, to the ultimate fact that Appellant touched GH's buttocks without her consent. There was never an argument that intimated GH merely being asleep equaled guilt for Specification 1. Instead, the trial counsel's argument always tied back to overall consent in statements like, "He did those things without her consent," and "And at no point during his hours-long interview did he ever even suggest that she consented to that conduct." (R. at 1037-38.) Trial counsel also repeatedly tied GH's actions, including her statements to Appellant earlier in the night, her rebuke of his buttocks touch in the kitchen, and her angry reaction upon waking up, to paint an overall picture that Appellant committed these acts without GH's consent. This is perfectly captured in one of trial counsel's closing lines that reads, "When you consider [GH's] reaction, the DNA proof that corroborates this case, the two stories, the accused's own lies, his confession, there is no alternate conclusion except the accused did these things to her *without her consent*." (R. at 1057.) (emphasis added.)

Further, unlike Specifications 2 and 3, the military judge did not instruct on the elements for the theory of abusive sexual contact of a victim who was sleeping. Instead, the only instruction for Specification 1 was that the offense was committed without consent, a sentiment reinforced by the trial counsel repeatedly in closing argument. The military judge correctly stated that to find Appellant guilty of abusive sexual contact, the members had to be convinced beyond a reasonable doubt that Appellant committed the sexual contact without the consent of

GH. (R. at 994.) The plain language of the instructions required the members to find Appellant committed the acts without the consent of GH and did not allow them to find Appellant guilty of abusive sexual contact simply because she was asleep. Absent evidence to the contrary, we presume members follow a military judge's instructions. United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994).

Finally, when a panel member asked whether the element of consent for Specification 1 could include an incapacity to consent, the military judge never instructed that an incapacity to consent standard could be used. Instead, the military judge properly referred the members to his previous instructions on the definition of consent, none of which were objected to by Appellant or his counsel. (R. at 1033.) Specifically, the military judge restated that consent "means a freely-given agreement to the conduct at issue by *a competent person*." (Id.) (emphasis added.)

This Honorable Court has reviewed similar claims in Williams and Horne, both of which were discussed on the record by the military judge and counsel. (R. at 1022-28.) In Williams, a sexual assault under a theory of bodily harm was charged and the victim "had no recollection of whether she did or did not consent," likely because of intoxication. Williams at *53-54. Notably, the victim in that case "never testified she did not consent, and she said she had no recollection of whether she did or did not consent." Id.

This Court noted that the Government was required to prove beyond a reasonable doubt that the victim did not consent to the sexual conduct and that the trial counsel sought to do so by presenting the improbability that an apparently non-responsive AM actually did consent. This Court cited to United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015), for the proposition that requesting members to draw inferences from such circumstantial evidence is a common aspect of court-martial practice, and highlighted that Article 120(g)(8)(C), UCMJ, specifically

notes "[l]ack of consent may be inferred based on the circumstances of the offense" and "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent."

This Court ultimately held as follows:

> We see no reason why the Government may not use evidence of inability to consent—ordinarily the focal point of a prosecution under Article 120(b)(3), UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under Article 120(b)(1)(B), UCMJ. Therefore, we conclude evidence tending to show a person could not consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person did not consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial
> .

Id. at *57-58. This Court found the trial counsel's argument did not mislead the members or ask them to convict the appellant of any offense other than the one charged and that the military judge corrected instructed the members that they were required to determine the victim had not consented. This Court faced a similar scenario in Horne and came to a similar conclusion.[5]

Similar to both Williams and Horne, the Government here was required to prove beyond a reasonable doubt that Appellant committed his act without the consent of GH and did so, in part, by presenting evidence that she was asleep.[6] This Court should draw a similar conclusion that the Government may use evidence of sleep—ordinarily the focal point of a prosecution under the abusive sexual assault equivalent to Article 120(b)(2)(B), UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under the abusive sexual assault equivalent to Article 120(b)(2)(A), UCMJ. Further, as in Williams and Horne, this Court

[5] Our superior Court affirmed both Williams and Horne after granting review in each case on issues unrelated to Appellant's instant claim. *See* United States v. Williams, 81 M.J. 450 (C.A.A.F. 2021); United States v. Horne, 82 M.J. 283 (C.A.A.F. 2022).

[6] One notable difference is that the victim in Williams never testified she did not consent, and she said she had no recollection of whether she did or did not consent. In contrast here, GH testified she did not consent to having Appellant's hand down the back of her waistline while she slept and provided an explanation as to why she did not consent.

should find the trial counsel's argument did not mislead the members or ask them to convict the appellant of any offense other than the one charged and that the military judge corrected instructed the members that they were required to determine the victim had not consented.

Still, Appellant attempts to differentiate his case from the outcome of Williams and Horne by stating that the "overall weight of [trial counsel's] argument was not that GH did not consent, but that she was asleep." (App. Br. at 15.) However, as previously described, that is not the case as the trial counsel's closing argument repeatedly drew multiple pieces of evidence to the ultimate issue – that Appellant committed his act against GH without her consent.

Next, this Court's holdings in Williams, Horne and Harris quell Appellant's surplusage argument. As discussed previously, the offense of abusive sexual contact without consent stands on its own. Where evidence of someone being asleep is all that is needed to prove a charge alleged under the abusive sexual contact equivalent of Article 120(b)(2)(B), UCMJ, the charge of abusive sexual assault without consent, the equivalent to Article 120(b)(2)(A), UCMJ, and which is charged here, requires the Government to affirmatively prove the act was done without the consent of the other person. Appellant's hypothesis that "the Government could simply charge all offenses as without consent" and then simply argue a person was asleep is incorrect. (*See* App. Br. at 15.) As this Court has shown in Williams, Horne, and Harris, the issue of whether a person could not consent (in those cases due to impairment, in this case due to sleep) is a factor that can be considered in determining whether, overall, an act was done without consent.

Finally, Appellant returns to his previous "bait and switch" claim from Issue I by stating that the Government "switch[ed] horses midstream." (App. Br. at 15.) As already addressed in Issue I, this claim is unsupported by the record.

In short, the record shows that the Government did not try Appellant on the theory that GH was merely asleep and the members did not convict him on such a theory. Rather, the record shows that the members convicted Appellant on a theory of abusive sexual contact without consent. Trial counsel's argument focused on this "without consent" standard throughout closing argument. While the Government did argue that GH's being asleep certainly played a part in whether Appellant committed his act without her consent, her being asleep was not the sole evidence presented or argued as to why Appellant touched her buttocks without her consent. Therefore, Appellant's due process rights were not violated, and he is not entitled to relief.

III.

APPELLANT'S CONVICTION IS NOT AMBIGUOUS.

Standard of Review

Whether a verdict is ambiguous and thus precludes this Court from performing a factual sufficiency review is a question of law reviewed de novo. United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010).

Law

"With minor exceptions for capital cases, a 'court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.'" United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) (*quoting* United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997)).

"A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means

beyond a reasonable doubt." Brown, 65 M.J. at 359 (*citing* Griffin v. United States, 502 U.S. 46, 49-51, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991); Schad v. Arizona, 501 U.S. 624, 631, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone.").)

Citing United States v. Vidal, 23 M.J. 319 (C.M.A. 1987), our superior Court stated, "We have recognized that military criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as two-thirds of the panel members agree that the government has proven all the elements of the offense." Brown, 65 M.J. at 359.

In Vidal, our superior Court affirmed a conviction for a single charge of rape when the government presented evidence that the appellant had sexual intercourse with the victim and held her down as another soldier raped her. Vidal, 23 M.J. at 325-326. The Court held "[i]f two-thirds of the members of the court-martial were satisfied beyond a reasonable doubt that at the specified time and place, appellant raped [the victim] -- whether he was the perpetrator or only an aider and abettor -- the findings of guilty were proper. It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." Id. at 325.

Analysis

Despite our superior Courts holdings in Vidal and Brown, Appellant states his case is different. Appellant is incorrect.

Like the Brown court, there is nothing ambiguous or erroneous about the court-martial's verdict in this case. While the Government did argue two factual scenarios to the panel, there is

nothing legally impermissible about doing so. Notably, as Appellant cites in his brief, the issue of a general verdict was discussed between the military judge and Appellant's trial defense counsel. Appellant's counsel took no issue with the military judge's interpretation of the general verdict rule and raised no notice or due process issues.

Appellant begins his argument by citing to Ross for the proposition that a charge that alleges "divers occasions" that is later excepted to one incident must specify the one instance for which an accused has been found guilty. (App. Br. 17.) Yet, as Appellant then acknowledges, the specification at issue did not allege "divers occasions." Thus, Ross and United States v. Walters, 58 M.J. 391 (C.A.A.F. 2003) are not instructive.

Appellant then claims this Court is unable to appropriately analyze his Due Process and surplusage claims in Issues I and II above because of the supposed ambiguity in the verdict. To the contrary, as detailed above, this Court is quite able to analyze Appellant's Issues I and II above and properly resolve them regardless of the general verdict.

Finally, Appellant returns to his notice claim dispelled in Issue I above when he again argues he was "not on notice that more than one instance of conduct and more than one theory of liability was in play." (App. Br. at 18.) Again, as addressed in Issue I above, Appellant was on notice of the two factual scenarios in play (that being the incident in the kitchen and the incident on the air mattress a short time later). Further, as addressed in Issue II above, only one theory of liability was in play – that Appellant committed abusive sexual contact without consent.[7]

[7] Here, Appellant uses his "moved the goal posts" metaphor to argue the Government tried to salvage their case at the last minute. (*See* App Br. at 18.) He also argues the Government "change[]d its tack entirely after both sides [] concluded their presentations of evidence" and that the "Government [did] not disclose the alternate event and theory until the evidence ha[d] been submitted and the members instructed." (Id.) However, Issues I and II above show that was not the case.

Here, the court-martial panel is allowed to enter a general verdict of guilt even when the charge could have been committed by two means, as long as the evidence supports at least one of them beyond a reasonable doubt. *See* Brown, 65 M.J. at 359. As shown in Issue IV below, the evidence supports a guilty verdict for both means argued.

All told, Appellant has provided this Court no reason to compel a different outcome than that of Vidal and Brown. Accordingly, Appellant's claim must fail.

IV.

APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

Law

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

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence

admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

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

The specification as charged under Article 120(d), UCMJ, states that Appellant "did, at or near Colorado Springs, Colorado, on or about 18 September 2020, touch [GH's] buttocks with his hand, with an intent to gratify his sexual desire, without her consent." (Charge Sheet, ROT, Volume I.)

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

> (1) One, that at or near Colorado Springs, Colorado, on or about 18 September 2020, the accused committed a sexual contact upon [GH] by touching her buttocks with his hand;
>
> (2) Two, that the accused committed that sexual contact with an intent to gratify his sexual desire; and
>
> (3) Three, that the accused committed that sexual contact without the consent of [GH].

(R. at 994.)

In discussing the term "sexual contact," the military judge stated:

> "Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia,

> anus, groin, breast, inner thigh, or buttocks of any person, with an intent to arouse or gratify the sexual desire of any person.

(R. at 996.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of abusive sexual contact, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

- ***Appellant touched GH's buttocks in the kitchen with his hand to satisfy his sexual desires and without GH's consent.***

While in her kitchen, the evidence is clear that Appellant touching GH's buttocks without her consent and to gratify his sexual desire. GH testified, "I went to put the cookies into the oven after I had laid them on the baking sheet, opened the oven and bent down to put the cookies in, and I felt a brush against my butt. At that point, I didn't know if it was his hand or if he was walking by, but to be on the safe side I told him that he needed to watch himself." (R. at 436.) GH denied consenting to Appellant touching her buttocks in the kitchen. (R. at 471.)

During his AFOSI interview, Appellant admitted to intentionally touching GH's buttocks when he said he "booped" it, adding, "I don't know if it was like with my hand, or like a spatula, or like my knee, or - - I remember that though." (R. at 759.)

In his brief, Appellant does not attempt to argue his touching was consensual, that a touching did not occur, or that the touching was unintentional. Instead, Appellant makes the factual argument that Appellant did not touch her buttocks specifically with his hand, and the

legal argument that there was no evidence the act was done to satisfy his sexual desire. (App. Br. at 27-28.) Appellant is wrong on both counts.

First, the surrounding circumstances of how both Appellant and GH described the touching shows the touching was with Appellant's hand. Appellant's claim that he "booped" or poked her buttock with either a spatula or his knee is not supported by GH's testimony that she felt something "brush against" her buttocks. She never mentioned a poke or "boop," which would have been much more of a pointed contact with her buttocks, not a brushing as she described. Further, for Appellant to touch her with his knee, he would have had to raise it, which in turn would have created a more pointed and direct contact, not a brushing contact as GH described. He would also not have been able to do this while "walking by" GH. Thus, of the three possibilities Appellant mentions, his hand is only one that logically flows with GH's description of the incident. Given the interplay of GH's testimony and Appellant's confession, this Court should conclude that Appellant touched GH's buttocks with his hand.

As to Appellant's sexual desire, the record is replete with evidence to meet this element. First, months prior in tech school, Appellant told GH that she was "hot." His pursuit of her continued when she arrived at Schriever. He bought her dinner, offered to buy her furniture, got himself invited to her apartment, and attempted to get her to drink. Though Appellant self-servingly said he was just wanting to be friends, Appellant admitted to AFOSI agents that he was open to more when he stated, "I will think about it as a friend and then if it builds, it builds." (R. at 650.) He later said, "Like I'm open to the idea of possibilities, but at this time I just want a friend, and I thought we were decent friends." (R. at 688.)

Still, even Appellant's idea of friendship seems to be contrary to the norm. He told agents, "I think romantic feelings and friendship feelings are kind of all in the same category. Like they're all like relationship." (R. at 649.) He also claimed that unhooking GH's bra while she was asleep was not to "put moves on her" and was not anything "sexual," but instead was done to just "rub her back as a friend."

Undoubtedly, Appellant's idea of "friendship" is remarkably distant from the social norm of the word. Activities Appellant refers to as "friendship" are in fact ones that society views as clear sexual desire. The members could have recognized as much, could have seen through Appellant's "just friends" façade, and could have seen him for what he was - someone who was pursuing a "hot" GH and continually testing the waters to push boundaries further and further. The members could have seen him touching GH's buttocks in the kitchen as merely another step in him satisfying his sexual desire of GH. Considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could easily find Appellant touched GH's buttocks to gratify his sexual desires.

- ***Appellant touched GH's buttocks on the air mattress with his hand to gratify his sexual desires.***

The evidence is also clear Appellant touched GH's buttocks on the air mattress with his hand in order to gratify his sexual desires. Here, GH testified that she awoke to find Appellant's "hand in my pants, in my underwear." (R. at 443.) She added that Appellant's left hand was entering her underwear from the back of her pants. (R. at 444.) GH stated she did not consent to any of Appellant's actions while she slept, stating, "one, it was unwanted. I had stated that we were just friends. Two, I was sleeping. And three, it was just inappropriate. I don't see him that way." (R. at 471.) GH also called her friend Mr. JT and told him that "she woke up to pretty much having her bra unclasped and having her breasts touched and

having a hand in her panties." (R. at 524.) Further, a menstrual pad worn by GH that evening had a partial male DNA profile that was consistent with Appellant's profile and that had only a 1 in 3,199 chance of randomly obtaining the same partial profile in the United States.

In his AFOSI interview, Appellant admitted to unhooking GH's bra and rubbing her back while GH was asleep. (R. at 628-29, 643.) Further, as discussed in Issue I above, Appellant discussed touching GH's buttocks on the air mattress no less than 12 times during his AFOSI interview. Again, those instances include the following:

1. Like with what she's told me, I could see like me being like up against her being like half-asleep, half-awake kind of thing, like not really all there. And like putting my hand down her shorts or something, like grabbing her butt or something, I don't know. I could see it happen, but I like it just doesn't feel real to me. (R. at 723.)

2. And then I don't really like -- it's kind of like where I said, like I think like maybe I was like rubbing her leg a little bit or something, and then I think like -- I don't really know, like I think at that point I was just like rubbing her leg for a little bit, and then I think I -- I touched her butt. (R. at 729.)

3. And then sometime after that I could kind of see myself like -- oh, it's -- it's a terrible move, but a move that I know that I've pulled with significant others in the past. So like if you go into a little leg or butt massage or whatever, and then you like put your hand in their pants or whatever. It's -- it's a god-awful move, but I guess it's -- I don't want to say it works because that seems rude. (Id.)

4. And then I think I moved like up towards her butt or something. And then I think I went like -- I think I like -- maybe like squeezed her butt a little bit and like -- that seems like something. (R. at 737.)

5. I think my hand was like near where like the butt and the vagina meet, that area. But I don't -- I don't think I like -- like so that I feel like I may have like squeezed her butt for a little bit, but I don't think it was near there. I think it was just like squeezing her butt in general. (R. at 739.)

6. But like. I mean, I think it was mainly like squeezing her butt. (R. at 740.)

7. I know for a fact that I was like squeezing her and I was like kind of like rubbing her butt a little bit. (R. at 742.)

8. That's kind of just [inaudible] the butt. It was kind of like just general 1 like closing the hand. (R. at 743.)

9. It was be like -- at first whenever I went into her pants, I think it was just on butt cheek. And then like I was kind of massaging going like up and down a little bit. (R. at 744.)

10. Whenever we were laying down. (R. at 760, when asked by AFOSI when he grabbed her butt for the first time.)

11. At that point I guess it was more like -- like I was just like touching her butt or like -- like having like massaging near there. (R. at 765.)

12. I think like maybe I was just like kind of aroused and wanted to touch her butt or something. (Id.)

Appellant's admissions when paired with GH's testimony that Appellant's hand was down the back of her pants and underwear when she woke up make it very clear Appellant touched her buttocks with his hand.

Still, Appellant claims his conviction is factually insufficient because (1) GH never specifically testified that Appellant touched her buttocks while on the air mattress; (2) that Appellant's multiple admissions were not actual memories, (3) that there was no evidence of his intent to touch her buttocks; and (4) inconsistencies in GH's testimony. All are unpersuasive.

First, even though GH never specifically said Appellant touched her buttocks on the air mattress, the circumstantial evidence of her testimony, along with common sense, shows her testimony indicates such a touching occurred. GH specifically said Appellant's left hand entered her underwear from the back of her pants and that his hand was "in my pants, in my

underwear." Her testimony showed Appellant, in the course of his actions, touched her buttocks with his hand.

Next, Appellant attempts to claim his 12 statements about Appellant's buttocks were merely a mirage and not based on actual memory. To his point, Appellant does equivocate during various points of the interview about whether he actually touched GH's vagina or if he remembered touching her vagina. However, Appellant was acquitted of that specification. But a review of Appellant's interview shows no equivocation on multiple aspects of that evening. He did not equivocate about touching GH's buttocks in the kitchen. He did not equivocate about unhooking her bra while she slept. And he did not equivocate on touching her buttocks. As Appellant put it at one point, "I know for a fact that I was like squeezing her and I was like kind of like rubbing her butt a little bit." (R. at 742.) Appellant's multiple admissions to touching GH's buttocks were uncontradicted and based on his actual memory.

Next, Appellant claims that even if he did touch GH's buttocks, "there is no evidence that he intentionally did so." (App. Br. at 29.) Appellant's claim here is disputed by Appellant's own unequivocal admissions to AFOSI. While Appellant now claims he was asleep or unconscious when he grabbed GH's buttocks, the evidence shows that Appellant was well awake and well intentioned in "rubbing her butt." (R. at 742.)

Finally, Appellant turns to attacking "inconsistencies" in GH's testimony. (App. Br. at 29.) He questions whether GH drank that night, whether she worn pants or shorts, whether alcohol was bought at Target or elsewhere, whether she tried clothes on at some point, whether Appellant had come to her apartment on an earlier date, and how the plans for that Friday night were made. (Id.) All of these questions are irrelevant. While some of GH's testimony may be contrary to Appellant's version of events, both her testimony and Appellant's

admissions clearly match on the issue at hand – whether Appellant touched GH's buttocks on the air mattress. Both accounts show he did.

Given the consistency between GH's testimony and Appellant's repeated admissions, this Court should come to the conclusion that Appellant intentionally touched GH's buttocks with his hand while they were on the air mattress.

Next, in a legal sufficiency context, Appellant returns to his earlier argument that his touching of GH's buttocks was not done to gratify his sexual desires. As discussed above with regard to the touching in the kitchen, Appellant's motives were clear – perhaps even more so with this touching. Here, as before, Appellant thought GH was "hot" and was working his way to his version of a "friendship." Furthermore, Appellant admitted to putting his hands down GH' pants and underwear, rubbing her leg, and touching, grabbing, squeezing and rubbing her butt. It defies reason that Appellant's actions were for anything other than his own sexual desires. Considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could easily find Appellant touched GH's buttocks to gratify his sexual desires.

- ***Conclusion***

All told, Appellant touched GH's buttocks without her consent and to gratify his sexual desires in both GH's kitchen and on her air mattress. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of the abusive sexual assault specification against Appellant was met. As shown above, either incident could have supported a finding of guilt and the Government only needed to prove one. 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.

V.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING SPC3 GH'S STATEMENT.

Standard of Review

Interpreting R.C.M. 1001(c) is a question of law that this Court reviews de novo. United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018) (citation omitted).[8] However, this Court reviews a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001(c) for an abuse of discretion. Id. at 383 (*citing* Humpherys, 57 M.J. at 90). "The 'judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" Humpherys, 57 M.J. at 90 (*quoting* United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)).

Law

It is well established that the Rules for Courts-Martial and case law permit evidence about how crime impacts society. *See* R.C.M. 1001(b)(4). R.C.M. 1001(b)(4), authorizes the government to introduce evidence "as to any aggravating circumstances directly relating to or resulting from the offenses . . . [which] includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to" the victim and is not unduly prejudicial. *See* United States v. Wilson, 35 M.J. 473 (C.M.A. 1992) (noting that R.C.M. 1001(b)(4) allows impact evidence that shows the crimes' effect on the victim, the victim's family, and the close community).

[8] Note: While Barker and other citations reference R.C.M. 1001(A), the 2019 edition of the Manual for Courts-Martial incorporated R.C.M. 1001(A) into R.C.M. 1001 as R.C.M. 1001(c) under the header "Crime victim's right to be reasonable heard."

R.C.M. 1001(c) constitutes the "[v]ictim's right to be reasonably heard." It "belongs to the victim, and is separate and distinct from the government's right to offer victim impact statements in aggravation, under R.C.M. 1001(b)(4)." United States v. Barker, 77 M.J. 377, 378 (C.A.A.F. 2018) (emphasis omitted). R.C.M. 1001(c) sets forth the rules regarding the victim's rights at presentencing, and facilitates the statutory right to "be reasonably heard" provided by Article 6b, UCMJ.

Under R.C.M. 1001(c)(2)(A), a "crime victim" is "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." Article 6b, UCMJ, also outlines the rights of a victim within the military justice system, including the right to be reasonably heard in sentencing hearings. R.C.M. 1001(c) "effectuates the right to be heard at presentencing, and thus provides that, in noncapital cases, the victim has the right to be reasonably heard through a sworn or unsworn statement." Barker, 77 M.J. at 382. Thus, "the Government admits aggravation evidence, to include victim impact statements, under R.C.M. 1001(b)(4), and victims exercise their right to reasonably be heard at presentencing under R.C.M. [1001(c)]." Id. It is indisputable that R.C.M. 1001(c) reflects the emphasis on a victim's right to be reasonably heard regarding the "impact . . . directly relating to or arising from the offense of which the accused has been found guilty." United States v. Hamilton, 78 M.J. 335, 341 (C.A.A.F. 2019).

Additional Facts

During sentencing proceedings, trial defense counsel objected to Court Exhibit A, a victim impact statements offered by GH. (R. at 1131.) GH's counsel sought to admit the statements under R.C.M. 1001(c). Trial defense counsel objected to certain content being outside the scope of a victim impact statement. (R. at 1132.) In Court Exhibit 1, paragraph 3,

GH stated, "I felt disgusted, violated and physically gross. He dredged up old memories of what happened to me when I was younger. The displeasing feeling of his hand and his penis felt vile." Appellant's trial defense counsel stated this portion did not directly relate to an offense of which Appellant was found guilty. (Id.) Counsel also objected to the entirety of paragraph 4 (which spoke about GH's SAFE exam experience), the last sentence of paragraph 6 (which spoke to the financial impact and nightmares GH had as a result of the crime), and the entirety of paragraph 8 (which spoke about Appellant spreading rumors in the dorm). (R. at 1141.)

In discussion between GH's counsel and the military judge, this Court's opinion in United States v. Da Silva, no. ACM 39599, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020) was discussed. (R. at 1135-39.) Also, within the discussion with all counsel, the military judge and counsel discussed to United States v. Tyler, 81 M.J. 108, 112 (C.A.A.F. 2021) and Hamilton. (R at 1131, 1138, 1140.)

The military judge, relying on Da Silva, held, "I'm inclined to permit what I think would not qualify as victim impact evidence insofar as it's acquitted misconduct, and to give a curative instruction along the lines of a Talkington instruction that say some misconduct is referenced that you did acquit. While the victim had a right to say this out of her perspective, you are not to consider any acquitted misconduct for purposes of deciding sentence in this case." (R. at 1140.) The military judge further noted the following:

> similar language is used in describing the unsworn statement for victim and accused, and in the same way that the accused it says in RCM 1001(d)(2)(A), the accused may testify and make an unsworn statement or both in extenuation and mitigation, or rebut matters presented by the prosecution, or rebut matters of fact contained in any crime victim's sworn or unsworn statement. That has not limited the accused from saying things beyond the scope of that. CAAF has just found that when you allocute beyond the scope of that,

> corrective instruction. So, for what it's worth. And CAAF also ruled in Tyler that Congress intended in 6b rights to essentially provide similar levels of allocution rights to crime victims and to an accused for purposes of unsworn statements. That's the reason for the court's ruling, relying on DeSilva.

(R. at 1141.)

The Court overruled the objection to paragraph 4 regarding the SAFE exam, finding that the SAFE exam came immediately after the contact offense, the reported misconduct arose during the SAFE exam, and "that this is sufficiently directly related or resulting from to qualify as victim impact for the purposes of RCM 1001(c)." (R. at 1143.)

As to paragraph 3 and the portion of paragraph 6 mentioned nightmares, the military judge stated he would give a "Talkington-type" instruction that would reference paragraphs 3 and 6 and instruct the members that they are not to use any acquitted misconduct against Appellant. (R. at 1144-45.) As to the financial impact mentioned in paragraph 6, GH's counsel later submitted an amended statement, which became Court Exhibit B, that inserted a nexus between the financial impact (that being GH having to move because she did not want to stay in her apartment) and the convicted offense. (R. at 1168.) Court Exhibit B is what was eventually given to the members. (R. at 1169.)

For paragraph 8, about Appellant spreading rumors in the dorm, Appellant's counsel ultimately withdrew that objection. (R. at 1145.)

After an overnight recess, the military judge issued a more-detailed ruling on the mentioned acquitted misconduct as follows:

> The court finds acquitted misconduct is not victim impact within the meaning of RCM 1001(c), and the court does have discretion to exclude it [inaudible] the CAAF's reaffirmed guidance in United States v. Tyler, 81 MJ 108, CAAF 2021, citing to both United States v. Hamilton, which was CAAF 2019, and the prior version of RCM 1001(c).

Quoting from Tyler at page 113, in Hamilton, we cautioned that RCM 1001(a) is "not a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the military rules of evidence." Instead, the military judge has an obligation to ensure the victim's unsworn statement comports with the parameters of victim impact and mitigation as defined by RCM 1001(a). And then it cites to the Discussion section of that rule that says: The victim's unsworn statement should not exceed what's permitted under RCM 1001(a)(C). Upon objection by either party, or sua sponte, the military judge may stop or interrupt the victim's unsworn statement that includes matters outside the scope of RCM 1001(a).

But the second principle is this: Still that discretion is supposed to also acknowledge that the victim and accused's allocution rights are intended to be substantially co-extensive. Accordingly, I will permit the brief reference to acquitted misconduct in the victim allocution consistent with the reasoning in United States v. Da Silva -- that's Air Force Court of Criminal Appeals 2020, citation 2020 CCA Lexis 213 at page 52 to 53, and U.S. v. Tyler at page 113: "The victim's right to make an unsworn statement is procedurally akin to the accused's right of allocution. Because we presume that Congress and the President were aware of our case law in interpreting an accused's unsworn, we further presume that they intended the unsworn statements to be treated similarly."

In that regard, the court notes that notwithstanding the rule verbiage governing the accused's unsworn statement that also limits it to matters in extenuation and mitigation in rebuttal, the case law has permitted the accused to talk about collateral consequences just with an accompanying limiting instruction, which brings us to principle three.

Finally, while Tyler makes clear that counsel may generally argue the contents of accused and victim unsworn statements during sentencing arguments, I will not permit trial counsel to reference acquitted misconduct in their sentencing argument because fair argument is limited only to portions of the victim unsworn statement that qualify as admissible victim impact. That's Tyler, 81 MJ 113. "We hold either party may comment on properly admitted victim unsworn statements."

In the end this ruling balances AFCAA's admonition in United States v. Robelero, 21 2017 CCA Lexis 168 at page 18, unpublished

> Air Force Court of Criminal Appeals opinion. "Article 6b is not a blanket authorization for a victim to state to the sentencing authority whatever he or she might desire. With AFCCA's reasoning, in Da Silva that a military judge must 'ensure a victim's right to be reasonably heard' is protected with the parameters of RCM 1001(c), while ensuring that if the court members are allowed to hear victim impact information, they could reasonably -- be reasonably interpreted by the court members as comment on acquitted offense, but they are instructed that they cannot do so. That is Da Silva 2020 CCA Lexis 213 at 53 to 54.
>
> Accordingly, acquitted misconduct will be permitted in its brief form in the victim allocution. A curative instruction will also be administered similar to the Talkington instruction that the court is applying for the accused's reference to collateral consequences of sex offender registration and admin discharge.

(R. at 1157-59.)

The military judge's instruction to the members read as follows:

> During her unsworn statement, the victim made brief reference to the acquitted misconduct in this case, namely that the Accused allegedly rubbed his penis on her and penetrated her vulva while she slept. While the rules for victim allocution are broad and permitted [GH] to say this in her unsworn statement, the Rules of Courts-Martial do not permit you to consider that aspect of her statement in arriving at an appropriate sentence in this case. Once again, you may sentence the Accused solely for the misconduct of which he has been convicted: Specification 1.

(App. Ex. LVI.)

Analysis

In Da Silva, this Court squarely dealt with the issue of a victim unsworn statement commenting on an acquitted offense. This Court stated:

> When faced with these situations, we see the military judge's responsibility as two-fold: (1) ensuring AS's right to be reasonably heard is protected within the parameters of R.C.M. 1001A; and (2) ensuring that if the court members are allowed to hear victim impact information that could be reasonably interpreted by the court members as a comment about an acquitted offense that they are instructed they cannot do so.

. . .

> *We think the preferable course of action for military judges should be to tailor the unsworn statement instruction.* This preserves a crime victim's right to be reasonably heard while ensuring court members do not wrongly interpret victim impact information that they "must consider." SVCs should be attuned to these concerns and prepared to offer the military judge a tailored instruction which protects their client's right to be reasonably heard while simultaneously making sure that appellate error is not unnecessarily introduced because their client's statement could be reasonably viewed as commenting on an acquitted offense.

Da Silva, at *53-54. (emphasis added.) This Court assumed an abuse of discretion because the military judge permitted the unsworn statement to include comments on an acquitted offense without a clarifying instruction to the court members but ultimately found no prejudice. Id. at *54, *61.

Here, following Hamilton and Tyler, and relying on the very direction this Court provided in Da Silva, the military judge did exactly what this Court instructed by providing a tailored instruction that specifically highlighted that GH's statement made brief reference to the acquitted misconduct in this case and that the Rules of Courts-Martial did not permit them "to consider that aspect of her statement in arriving at an appropriate sentence in this case." (App. Ex. LVI.) The military judge specifically told the members that they "may sentence [Appellant] solely for the misconduct of which he has been convicted: Specification 1." (Id.)

There was no abuse of discretion, and there was no error in the military judge's ruling or instruction. Still, Appellant finds fault because the military judge "relied on" this Honorable Court's direction in Da Silva. (App. Br. at 32.) Appellant claims this Court's direction was merely *dicta* while also arguing that the "military judge overlooked CAAF's admonition in Tyler that military judges are responsible for keeping the victim impact statement within the bounds" of R.C.M. 1001(c).) (Id.)

First, it is important to note the issue before our superior Court in Tyler did not involve the content of a victim unsworn statement, an issue that was squarely before this Court in Da Silva. Instead, the Tyler Court dealt with whether the Military Rules of Evidence applied to unsworn victim statements (the Court held they did not) and whether an unsworn victim statement, although not evidence, could nevertheless be commented on in presentencing argument (the Court held it could). *See* Tyler, 81 M.J. at 112-13.

Further, as it relates to the content of a victim's unsworn statement, Tyler made no new law or holding. Instead, our superior Court in its discussion cited to either Hamilton or the R.C.M. 1001A discussion.[9] Both Hamilton and R.C.M. 1001A are noted in this Court's Da Silva opinion.

Still, in claiming that the military judge "overlooked" anything, Appellant himself overlooks that the military judge's ruling specifically cites and quotes the Tyler opinion that "the military judge has an obligation to ensure the victim's unsworn statement comports with the parameters of victim impact and mitigation as defined by RCM 1001(a)" and that the "victim's unsworn statement should not exceed what's permitted under RCM 1001(a)(C)." (R. at 1157.)

Here, the military judge properly cited, analyzed and followed R.C.M. 1001(c) and our superior Court's Hamilton and Tyler opinions. Moreover, the military judge followed to the letter this Honorable Court's direction in Da Silva to tailor an unsworn statement instruction. In doing so, the military judge upheld his responsibly to (1) ensure GH's right to be

[9] For instance, Appellant in his brief states that the military judge "overlooked C.A.A.F.'s admonition in Tyler, that military judges are responsible for keeping the victim impact statement within the bounds of the Rule for Courts-Martial." (App. Br. at 32.) However, that "admonition" was merely a restatement of the R.C.M. 1001A Discussion, which the Tyler Court cited to and then quoted.

reasonably heard was protected within the parameters of R.C.M. 1001(c); and (2) ensure that if the court members were allowed to hear victim impact information that could be reasonably interpreted by the court members as a comment about an acquitted offense that they are instructed they cannot use that information when sentencing Appellant. As the military judge squarely instructed, "Once again, you may sentence the Accused solely for the misconduct of which he has been convicted: Specification 1." Absent evidence to the contrary, we presume members follow a military judge's instructions. Loving, 41 M.J. at 235. And further, even if the military judge abused his discretion by allowing the entirety of the victim impact statement, the instructions prevented any potential prejudice to Appellant.

The military judge here did not abuse his discretion, and Appellant suffered no prejudice. Therefore, this Court should deny Appellant's claim.

VI.[10]

APPELLANT'S APPROVED SENTENCE IS ENTIRELY APPROPRIATE.

Standard of Review

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

Law

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This Court should affirm sentences it finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(c), UCMJ. This Court

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

also has the power to disapprove a mandatory minimum sentence. United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

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

This determination is separate from an act of clemency, i.e., treating an accused with less rigor than he deserves due to a consideration of mercy. The service appeals courts are not authorized to engage in exercises of clemency. Healy, 26 M.J. at 396; *see also* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Analysis

Convicted of abusive sexual contact , Appellant claims his rightfully-deserved sentence to six months confinement and a bad conduct discharge is inappropriately severe. (App. Br, Appendix, at 1.) Appellant believes his offense was merely an "Article 15 level offense" and that it "stands to reason that his punishment should be concordant with a crime committed [sic] in that forum. (Id.)

Appellant is mistaken. To start, Appellant's sentence is entirely appropriate. Looking at the facts and circumstances of his crime, as well as Appellant personally, a sentence to six months confinement and a bad-conduct discharge is deserved. As described in Issue IV above, Appellant committed abusive sexual contact by grabbing GH's buttocks while in her apartment. Appellant was a guest in GH's apartment and used that opportunity to prey upon her by touching her without consent. Appellant crossed the boundaries of what GH

thought was merely a friendship and used that opportunity to take advantage of her trust. In doing so, he violated the safety GH felt in her own apartment, where GH felt most secure. Due to Appellant's actions, GH now experiences anxiety, has issues sleeping, and is struggling to build relationships and to trust others, all of which have impacted GH ability to do her job.

Still, Appellant tries to mitigate his actions by essentially stating his offense was not that serious and should not have even warranted a court-martial. Instead, Appellant believes his sexual offense is better viewed as a mere "Article 15 level offense." Appellant's self-serving statements only highlight how Appellant still fails to understand the gravity of his offense and the impacts he has caused GH.

Moreover, the maximum sentence faced by Appellant highlights the seriousness of this offense. Here, Appellant faced a maximum confinement sentence of seven years, reduction to the grade of E-1, forfeiture of all pay and allowances, and a dishonorable discharge. (R. at 1201.) This was no "Article 15 level offense."

Yet, Appellant was sentenced to just six months confinement, only seven-percent of that seven-year maximum. Further, though he faced a dishonorable discharge, he was sentenced to the lesser bad-conduct discharge. Appellant's confinement sentence was well-deserved and entirely appropriate for his actions. Notably, Appellant makes no attempt to explain why, in the face of his offense, his sentence is inappropriate due to his particular circumstances and his record of service. Instead, Appellant calls such an analysis "unnecessary" while still asking for the windfall of this Court disapproving his bad-conduct discharge *and* his entire confinement sentence. Appellant's scant argument that his abusive sexual contact was merely an "Article 15 level offense" and should be punished as such should ring hollow to this Honorable Court.

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

VII.[11]

APPELLANT'S REPRIMAND, AS AMENDED BY THE MILITARY JUDGE'S POST-TRIAL ORDER, IS NOT IN ERROR.

Standard of Review

The standard of review for this claim is the same as that in Issue VI above.

Additional Facts

On 10 December 2021, the General Court-Martial Convening Authority issued a Decision on Action that included a reprimand. The second sentence of that reprimand stated, "Sexual assault of anyone, much less a fellow service member, is completely intolerable and falls far below the basic standard of conduct expected of every Guardian." (ROT at Vol. I.)

On 20 January 2021, the military judge issued an Order to take correction action on the reprimand language in accordance with his authority under R.C.M. 1111(b)(2). (Id.) Specifically, the military judge ordered that the words "sexual assault" be replaced with the words "abusive sexual contact." The military judge stated that Appellant was acquitted of the "sexual assault" specification (Specification 3). While the military judge noted that "'sexual assault' as a legal matter, [was] a generic term of convenience," the military judge observed, "A

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

lay observer reading the reprimand could b misled into thinking that this was a penetrative offense that [Appellant] was convicted of – but it wasn't." (Id.)

That same day, the military judge issued an Entry of Judgment for Appellant's case. (Id.) In it, the words "sexual assault" are replaced with "abusive sexual contact" in the reprimand. As corrected, the military judge entered the result of the court-martial into the record.

Law and Analysis

"A convening authority cannot include language in a reprimand that directly references an offense that has been dismissed or resulted in an acquittal." United States v. McAlhaney, No. ACM 39979, 2022 CCA LEXIS 135, at *13-14 (A.F. Ct. Crim. App. Feb. 28, 2022) (*citing* United States v. Hawes, 51 M.J. 258, 261 (C.A.A.F. 1999) (striking reference to offense dismissed on appeal from adjudged reprimand).

Here, any error in the convening authority's original reprimand was corrected by the military judge when he replaced the words "sexual assault" with "abusive sexual contact." Further, the relief prayed for by Appellant, that being to correct the record of trial, was already completed by the military judge over one year ago on 20 January 2022. As such, there is no further action necessary from this Honorable Court.

CONCLUSION

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

[redacted]

G. MATT OSBORN, Lt Col, USAF
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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 27 February 2023 via electronic filing.

[redacted]
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	Before Panel No. 1
Specialist 3 (E-3), **DEVIN W. JOHNSON,** United States Space Force, *Appellant.*	)	No. ACM 40257
	)	1 March 2023

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

Pursuant to Rules 17.3 and 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a Reply to the Government's Answer, filed on 27 February 2023. Contemporaneously with its Answer, the Government filed a Motion to Exceed Page Limitations which, at the time of writing, this Court has not yet ruled on. Appellant requests an enlargement for a period of 10 days, calculated from the date of the Government's filing, which will end on **16 March 2023**. The record of trial was docketed with this Court on 2 March 2022. From the date of docketing to the present date, 364 days have elapsed. On the date requested, 379 days will have elapsed.

On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

authority took no action on the findings or sentence of the case. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 10 December 2021.

The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined.

Civilian appellate defense counsel has an active docket of 49 cases, with cases pending before, *inter alia*, the Service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, the Federal Court of Claims, and various habeas corpus cases. Military appellate counsel is currently assigned 20 cases; nine cases are pending initial AOEs before this Court. Military counsel has oral argument before the Court of Appeals for the Armed Forces (CAAF) scheduled for the end of March. Military appellate counsel has no Air Force Court cases that take precedent over this case.

Through no fault of Appellant, his civilian counsel and military counsel need additional time to file the Reply given their respective workloads, the length of the Government's Answer, the need for military counsel to liaise with civilian counsel, and the need for the Appellant to personally review the Reply. Accordingly, an enlargement of time is necessary to ensure Appellant is adequately represented and prepared on appeal. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

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

Respectfully submitted,

[redacted]N, 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 Government Trial and Appellate Division on 1 March 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

1 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 3 (E-3) DEVIN W. JOHNSON, United States Space Force, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF ACM 40257 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 1 March 2023.

[redacted]

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

UNITED STATES,
Appellee,

v.

DEVIN W. JOHNSON,
Specialist 3 (E-3),
United States Space Force,
Appellant.

No. ACM 40257

APPELLANT'S REPLY BRIEF

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	) **APPELLANT'S REPLY BRIEF**))
v.	) Before Panel No. 1)
Specialist 3 (E-3) **DEVIN W. JOHNSON** United States Space Force *Appellant*	) No. ACM 40257)) 16 March 2023))

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

Appellant, Specialist 3 Devin W. Johnson, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 27 February 2023 [hereinafter Answer]. Specialist 3 Johnson stands on the arguments in his initial brief, filed on 26 January 2023 [hereinafter AOE], and in reply to the Answer, submits additional arguments for the issues listed below.

I.

APPELLANT WAS CONVICTED OF AN OFFENSE OF WHICH HE WAS NOT ON NOTICE AND WAS NOT CHARGED.

Additional Facts

The Military Judge instructed the members on the offenses charged as well as on the affirmative defense of mistake of fact as it related to Specification 1. In discussing the definition of "consent" he explained that lack of consent applied to the charged offenses in two ways. (R. at 997). The first instance was a person awake, alert, and not consenting. *Id*. The second was a sleeping person who was not able to give consent. *Id*. He finished the explanation by stating: "The question that you have [to] resolve is whether she was asleep as alleged, and the government has the burden to prove that beyond a reasonable doubt for Specifications 2 and 3.

For Specification 1, where it's alleged she was awake, the government has to prove that she did not give consent." *Id*.

The Military Judge then turned to the defense of mistake of fact as to consent. (R. at 998). He instructed the members that "[u]nder the law, 'mistake of fact' as to consent is a potential defense to Specification 1; that specification being that he touched her buttocks without her consent while *awake*." *Id*. (emphasis added). The Government did not object to these instructions. (R. at 990, 998).

After instructions had been given, but before closing arguments, a member asked whether Specification 1 applied to the conduct in the kitchen or to any conduct that occurred. (R. at 1016, 1031). The Circuit Trial Counsel stated, for the first time, that the Government believed the members could consider both the kitchen touching and the incident on the air mattress for Specification 1. (R. at 1016). The defense stated: "So I know that we put no objection at first. Hearing trial counsel say it, I'm not sure that—I'm not sure it's proper for the judge to instruct on the government's theory of the case." (R. at 1017). He went on to express his concern, saying: "I'm not sure if it's a legal issue if they go back and three of the members find him guilty of the oven and three of them find him guilty of the bed." *Id.* The Military Judge then directed the conversation to general verdicts. Circuit Defense Counsel reiterated the position that the Military Judge should not instruct the members that they could find him guilty of either incident. (R. at 1018). The Military Judge decided that he would instruct that the Government must prove whether the three elements were met on 18 September 2020 and the Circuit Defense Counsel had some concerns about the vague nature of that instruction. (R. at 1018-19). The Military Judge then reworded his proposed instruction and the Circuit Defense Counsel stated: "I think that—even with that language, it's even clearer. That's perfect, Your Honor." (R. at 1019).

The Military Judge instructed the members that they were to determine whether "at any time on 18 September 2020, those three elements occurred: that there was a touching of the buttocks, by the accused; that it was with the intent to gratify sexual desire; and that it was without consent." (R. at 1031-32). He continued: "So, your duty is to determine whether in your judgment, those three elements occurred at any time, during the course of the 18th." (R. at 1032).

Law and Argument

A. A Due Process Objection Was Not Waived.

The Fifth Amendment declares that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V. The Sixth Amendment requires that an accused be informed of the nature and cause of the accusation. U.S. CONST., amend. VI.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (quotations and citation omitted). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id*. (quotations and citation omitted). "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *Id*. at 157. (quotations and citations omitted).

Given the constitutional nature of the rights at issue in Specialist 3 Johnson's case, any waiver must be clearly established as an intentional relinquishment of a known right. The record simply does not support such a waiver. The Circuit Defense Counsel objected to the Military Judge instructing the members that they could consider both the kitchen incident and the air mattress incident in determining whether Specialist 3 Johnson was guilty of

Specification 1. He did not withdraw the objection. When the Military Judge stated that the general verdict rule allowed the members to consider either event and proposed an instruction, the Circuit Defense Counsel expressed concern over the language. (R. at 1019). When the Military Judge adjusted the language to clarify it, the Circuit Defense Counsel stated that the change made the instruction clearer. *Id*. His comment was not intended to withdraw his initial objection, but was a comment on the language of the instruction the Military Judge had already determined he would give. As such, this case is distinguishable from *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) ("But Appellant did not just fail to object and thereby merely forfeited his claim. He affirmatively declined to object to the military judge's instructions and offered no additional instructions."). To the extent that this objection can be read to be an objection to the lack of notice and violation of Specialist 3 Johnson's due process rights, it was not withdrawn and should be considered by this Court. Should this Court not read this exchange as an objection under the Fifth and Sixth Amendments, then these rights were never intentionally relinquished.

If this Court should find waiver, this is an appropriate case for this Court to use its unique statutory responsibility granted in Article 66, UCMJ, and correct an obvious error. *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016). Here, the question concerning Specialist 3 Johnson's right to notice of the offense of which he is charged is a significant one. The record demonstrates that the Preliminary Hearing Officer, the Military Judge, and the Defense Counsel all believed that Specification 1 referenced the alleged assault in the kitchen while G.H. was awake. (Preliminary Hearing Officer's Report, R. at 411, 997, 998, 1016). Circuit Trial Counsel's questioning of Specialist 3 G.H. further reinforced this belief when his final three questions mirrored the three specifications as they appeared to have been charged. (R. 471). It was not until all evidence was submitted and the members instructed that the Government stated its belief that this specification could refer to the conduct on the air

mattress while G.H. was asleep. (R. at 1016). Specialist 3 Johnson asks this Court to review and resolve this important constitutional question.

B. Specialist 3 Johnson Was Not On Notice That Specification 1 Included Conduct On The Air Mattress While G.H. Slept.

The Government argues that Specialist 3 Johnson was on notice that Specification 1 included his actions on the air mattress while G.H. slept. (Gov. Ans. at 29). The Government bases this argument on the fact that Specialist 3 Johnson discussed massaging G.H.'s buttocks during his interview with AFOSI. *Id*. This argument is not supported by the record.

First, Specialist 3 Johnson never affirmatively stated that he remembered touching Specialist 3 G.H.'s buttocks. He repeatedly insisted that he does not have memories of the alleged events, but that after talking to G.H. for over an hour and thinking about it that he had images of how it *could have* happened in his mind. (R. at 630, 666, 677, 678, 687, 689, 696, 699, 701, 704, 706, 707, 722, 723, 726, 727, 728, 729, 731, 732); *c.f. United States v. Merritt*, 72 M.J. 483 (C.A.A.F. 2013) ("the fact that a servicemember may be ashamed of certain conduct is not sufficient by itself to equate to due process notice that the conduct was subject to criminal sanction.").

Second, G.H. never alleged that he touched her buttocks while on the air mattress. The Government repeatedly references her testimony about his hand being in her underwear without including her testimony that his hand was on her vagina and his penis was pressed against her buttocks. (R. 443-45). Her allegations from the start included the incident in the kitchen and an instance of digital penetration and penile contact on the air mattress. (Preliminary Hearing Officer Report). It stands to reason that the three specifications alleged would follow those three allegations.

Third, the manner in which the specifications were charged would give Specialist 3 Johnson no notice that conduct occurring in the same course as that alleged in

Specifications 2 and 3 would be included in a specification charged in an entirely different manner. As the Government points out in its Answer, when abusive sexual contact without consent is charged, "more is needed." (Gov. Ans. at 36). The Government has provided no explanation for why it would have taken three incidents occurring under the same circumstances, on the air mattress while G.H. slept, and charge two of them as while asleep and one as without consent. If the Government intended to charge Specialist 3 Johnson with the touching both in the kitchen and on the air mattress, why was it not charged as "on divers occasions"?

Fourth, the Government did not charge all of the conduct raised by G.H. or by Specialist 3 Johnson in his interview. G.H. told her friend that she awoke to Specialist 3 Johnson touching her breasts. (R. at 524). Specialist 3 Johnson discussed unclasping G.H.'s bra and rubbing her back repeatedly. (Pros. Ex. 3). Neither of these allegations made it onto the charge sheet. Specialist 3 Johnson was not on notice that his imagined scenario of a buttocks massage was the conduct underlying Specification 1 and not the allegation she made concerning the incident in the kitchen simply because he spoke of it to AFOSI.

Finally, the Government never corrected any of the statements made by the various participants concerning the conduct alleged in Specification 1. It did not correct the Preliminary Hearing Officer. (Preliminary Hearing Officer Report). It did not correct Defense Counsel after the opening statement. (R. at 411-12). It did not object to the Military Judge's instructions referencing Specification 1 as occurring while G.H. was awake. (R. at 990, 998). Circuit Trial Counsel's last three questions to G.H. on direct point to exactly what conduct underlay each specification:

> Q. I just have a few final questions for you, [G.H.], when you were in your apartment, putting cookies in the oven and Specialist Johnson touched your buttocks, did you consent to that?

A. No, sir.

Q. Later, after you had gone to sleep, after you had had a sort of a groggy half—being half awake for a few minutes, and then going back to sleep again, when you woke up to his hand reaching in through the back of your waistband and touching you on your vagina, did you consent to that?

A. No, sir.

Q. Did you consent to him dry humping you with his erect penis on your thigh, buttocks, and leg?"

A. No, sir.

(R. at 471).

The Government's arguments that Specialist 3 Johnson was on notice that Specification 1 included conduct on the air mattress while G.H. was asleep are contrary to the record, refuted by the manner in which the allegations were charged, and contrary to common sense. This last-minute change to incorporate previously uncharged conduct deprived Specialist 3 Johnson of fair notice and convicted him of an offense of which he had not been charged. *See also United States v. Simmons*, 82 M.J. 134, 136 (C.A.A.F. 2022) ("we hold that under the totality of the circumstances presented here, enlarging the charged time frame of one of the offenses by 279 days—after arraignment and over defense objection—was likely to mislead the accused as to the offenses charged.") (quotation and citation omitted). He was prejudiced by this lack of notice in that the evidence was already admitted, the members were instructed, and closing arguments were about to begin. The Government was able to make its arguments for Specification 1 on two separate sets of facts, while depriving the defense of the ability to defend the conduct on the air mattress. This resulted in a conviction for Specification 1, in violation of Specialist 3 Johnson's right to due process.

II.

THE MILITARY JUDGE VIOLATED THE CANON AGAINST SURPLUSAGE AND APPELLANT'S DUE PROCESS RIGHTS WHEN HE ALLOWED THE GOVERNMENT TO ARGUE A DIFFERENT THEORY OF LIABILTY THAN CHARGED.

The Government argues that, in alignment with *United States v. Williams*, 2021 CCA LEXIS 109 and *United States v. Horne*, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. May 27, 2021), the counsel at trial merely used the evidence regarding G.H. being asleep as part of its argument on consent. (Gov. Ans. at 39). This argument ignores the pains Circuit Trial Counsel clearly took to paint this as a case of a sleeping victim. He emphasized the timeline that put G.H. soundly asleep at least an hour and a half after her last "half-asleep" moment. (R. at 1040). He told the members over and over that G.H. was asleep when the alleged conduct occurred. (R. at 1037, 1038, 1039, 1040, 1042-43, 1044, 1055, 1056).

While the Government argues that something more than mere sleep was needed to convict, the record does not show more. The Government did not use evidence of G.H. being asleep as part of a bigger picture of lack of consent. It used it as the basis for arguing lack of consent. To the extent that Circuit Trial Counsel discussed consent, he did so in reference to all of the charged offenses. (R. 1037-38, 1057). Nothing in the Government's closing argument differentiated the elements of Specification 1 from those of Specifications 2 and 3. They were lumped together as offenses that occurred on the air mattress while G.H. slept. Should this Court determine that the members convicted Specialist 3 Johnson of the conduct that occurred on the air mattress, the use of the specification as it was charged to reach guilty finding violates the surplusage doctrine. This violation resulted in Specialist 3 Johnson's conviction of an offense different than the one with which he was charged, in violation of his due process rights.

III.

THE GUILTY FINDING AS TO SPECIFICATION 1 OF THE CHARGE IS AMBIGUOUS AS IT IS NOT CLEAR WHICH INCIDENT THE MEMBERS DETERMINED MET THE ELEMENTS OF THE OFFENSE.

The Government argues that *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007) supports a guilty finding even when the charge could have been committed by two means. (Gov. Ans. at 44). This reading of *Brown* applies its holding too broadly. In *Brown*, the conduct alleged was charged as a rape. *Brown*, 65 M.J. at 357. In determining which lesser included offenses were implicated, the military judge found that the members could reach a guilty finding to indecent assault based upon finding digital and penile penetration, digital penetration alone, or penile penetration alone. *Id*. at 357-58. The Court determined that a factfinder could enter a general verdict of guilt even when the charge could have been committed by two or more means. *Id*. at 359.

The facts of Specialist 3 Johnson's case do not allow for the application of *Brown*'s holding. The Court in *Brown* cites to *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) to support its finding, but *Vidal* only applies this principle when the offenses are so closely connected in time as to constitute a single transaction. *Id*. Such was the case in *Brown*. The members could have found that the indecent assault was committed through either digital or penile penetration or both. Each of the three scenarios were made up of alleged conduct occurring during a single transaction. The question was only as to which of the alleged acts the members found the evidence proved beyond a reasonable doubt.

Here, the "two means" argued by the Government were not part of a single transaction. They were separate in time, in circumstances, and in theory of commission. The holding in *Brown* would be stretched too thin if it were applied to any conduct that might have occurred during a charged time frame, even if that conduct was not what contemplated when the specification was created. Allowing such a finding under the auspices of the general verdict

would create exactly the conditions of which the Court in *Vidal* warned: difficulty in preparing a defense, potential exposure to double jeopardy, and deprivation of the right to jury concurrence concerning the commission of the crime. *Id*. Where the two incidents do not constitute a single transaction, the Government must identify the charged conduct before trial. Without such clarity, the resultant ambiguity clouds the appellate review process.

IV.

THE GUILTY FINDING TO SPECIFICATION 1 OF THE CHARGE IS NEITHER LEGALLY NOR FACTUALLY SUFFICIENT.

A. The alleged contact in the kitchen is factually insufficient.

G.H. testified that she felt something brush her buttocks when she bent to put the cookies in the oven. (R. at 436). When she confronted Specialist 3 Johnson, she said he said it was an accident caused by the size of the kitchen. *Id*. She did not find this to be unreasonable, given how small her kitchen is. Specialist 3 Johnson told AFOSI that he "booped" G.H.'s buttocks as she bent over, either with his hand, his knee, or a spatula. (R. at 759). He told AFOSI that the two of them laughed over the interaction. (R. at 760).

Somehow, the Government has taken these two accounts and determined that the only logical scenario is that Specialist 3 Johnson touched G.H. on the buttocks with his hand to satisfy his sexual desire. (Gov. Ans. at 47). While the Government does not believe Specialist 3 Johnson when he says that he poked or "booped" G.H., and does not believe him that it might have been with his knee or a spatula, and does not believe him that the two laughed about it afterwards, the Government does believe him when he says that he touched her intentionally. The Government believes G.H. when she says something brushed her buttocks but does not believe her when she says that it is reasonable that the touch was unintentional given the size of the kitchen. Despite the only two people in the room both describing the touch as innocent, although in different ways, the Government argues that this

Court should be convinced that this incident was both intentional and done with the intent to satisfy Specialist 3 Johnson's sexual desire. The evidence admitted at trial simply does not support a finding beyond a reasonable doubt that Specialist 3 Johnson even touched her buttocks with his hand, let alone that he did so with the required intent.

B. The alleged contact in the kitchen is legally insufficient.

The Government argues that the record is "replete with evidence" of Specialist 3 Johnson's intent to satisfy his sexual desire through this kitchen encounter. (Gov. Ans. at 47). The Government seems to characterize every interaction between Specialist 3 Johnson and G.H. as predatory and sexual because he once said she was "hot" in tech school. *Id*. It argues that Specialist 3 Johnson's attempts to help G.H. get settled in her new duty station was a "pursuit" of her. *Id*. The Government claims that Specialist 3 Johnson "got himself invited to her apartment, and attempted to get her to drink" in this pursuit. *Id*.

This claim is not supported by the evidence at trial. Although he had made the "hot" comment months before at tech school, Specialist 3 Johnson had not asked G.H. on a date, made any sexual comments towards her, or acted as anything other than a friend in the days before 18 September 2020. Whether Specialist 3 Johnson's idea of actions taken between friends meets the Government's view of "clear sexual desire" is of no relevance. The element requires that the action be taken with a specific intent to satisfy Specialist 3 Johnson's sexual desire. His actual intent is what is at issue, not the Government's beliefs on societal views of friendship.

Certainly, even if it were true that he was interested in G.H. as more than a friend, that does not imbue any contact between the two with sexual desire. Neither version of an event that occurred solely between Specialist 3 Johnson and G.H. include any

evidence of Specialist 3 Johnson's specific intent to touch her buttocks in the kitchen in order to satisfy his sexual desires.

Even if this Court could be convinced that Specialist 3 Johnson touched G.H.'s buttocks with his hand and without her consent, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

C. The alleged contact on the air mattress is factually insufficient.

The Government argues that G.H. testimony that she awoke to find Specialist 3 Johnson's hand in her pants is sufficient to satisfy Specification 1. (Gov. Ans. at 48). This argument ignores the rest of her response. She testified that she woke up and felt Specialist 3 Johnson's hand in her pants. She felt "this fingering motion" and "this warmth that felt like a penis on my back right end." (R. at 443). G.H. alleged that Specialist 3 Johnson's hand was on her vagina and his fingers were digitally penetrating her when she awoke. (R. at 444). At the same time, she described feeling his penis pressing against her buttocks. (R. at 445). Never did G.H. testify that Specialist 3 Johnson touched her buttocks with his hand while they were on the air mattress. The Government's attempts to shoehorn her answers into this specification fail because that is simply not what she testified to.

The Government counts 12 occasions in which Specialist 3 Johnson stated that he could see himself massaging G.H.'s buttocks on the air mattress. (Gov. Ans. at 49). However, there are more than 20 occasions on which Specialist 3 Johnson explained that he was asleep, that he was not aware of any contact with G.H. other than rubbing her back while she lay on his chest, and that he has created images of how something might have occurred after having spoken to G.H. for over an hour. (R. at 630, 666, 677, 678, 687, 689, 696, 699, 701, 704, 706, 707, 722, 723, 726, 727, 728, 729, 731, 732, 736, 742).

AFOSI spent seven hours convincing Specialist 3 Johnson that these "images" were recollections. (R. at 575). Counting on his discomfort with expressing disbelief of a purported victim of sexual assault, they continued to press Specialist 3 Johnson on his version of events. The most striking part of Specialist 3 Johnson's statement to AFOSI is that he never once mentions G.H. being on her period or wearing a menstrual pad. His "images" were merely conjecture and hypotheticals, not memories. Even if this Court were to take Specialist 3 Johnson's statements as fact, he told AFOSI that he was asleep and acting unconsciously. (R. at 765, 766). He told them that his actions would not have been sexual and would not have been intended to be foreplay. *Id*. There is no evidence in the record that Specialist 3 Johnson had a conscious intent to touch G.H. or to do so in order to satisfy his sexual desire.

The Government argues that the inconsistencies in G.H.'s versions of events are "irrelevant." (Gov. Ans. at 51). The credibility of a complaining witness is always relevant. In this case, G.H.'s version of events varied so dramatically from Specialist 3 Johnson's as to create real questions as to exactly what occurred. The members seem to have had the same questions, as they acquitted Specialist 3 Johnson of Specifications 2 and 3. The evidence at trial, including the inconsistencies, the character for untruthfulness, and the diametrically opposed accounts of every interaction between the two that week create a reasonable doubt that Specialist 3 Johnson made contact with G.H.'s buttocks or any other part of her body inside of her underwear.

D. <u>The alleged contact on the air mattress is legally insufficient</u>.

Without evidence showing Specialist 3 Johnson's specific intent to satisfy his sexual desires, the guilty finding is legally insufficient. Specialist 3 Johnson told the AFOSI agents that he did not have romantic or sexual feelings towards G.H. He did not believe that, if he did touch her, that it was intended to be sexual or to be foreplay. He guessed that his

subconscious wanted to cuddle up with a woman, but this was purely a guess and not an admission or other evidence of actual intent.

The Government argues that Specialist 3 Johnson was "well awake and well intentioned" in touching her buttocks on the air mattress. (Gov. Ans. at 51). In so arguing, the Government points to statements Specialist 3 Johnson made to AFOSI on page 742 of the Record. Yet, a few moments after this one, Specialist 3 Johnson explains that he was "mostly asleep at that point" and had just woken up but "not like woken up in a sense." (R. at 746). Even later he reiterates that he "woke up-ish, like kind of groggy, half-awake, and then like, not really even there mentally." (R. at 765). He said that he was not sure what his intent was but that he "probably just like subconsciously enjoy[ed] like cuddling with a woman" but he didn't actually recall thinking those things. (R. at 765-66).

Even when viewed in the light most favorable to the Government, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

V.

THE MILITARY JUDGE ERRED IN ALLOWING G.H.'S VICTIM IMPACT STATEMENT TO BE ADMITTED AT TRIAL.

The Rule for Courts-Martial that gives a victim the right to provide an impact statement states that "After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense." R.C.M. 1001(c)(1). The Rule further describes the victim impact as "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from *the offense of which the accused has been found guilty*." R.C.M. 1001(c)(2)(B) (emphasis added).

G.H.'s right to be reasonably heard only extends to victim impact and matters in mitigation. R.C.M. 1001(c)(3). G.H., therefore, did not have a right to

be heard concerning the offenses of which Specialist 3 Johnson was acquitted. The Military Judge did not have a responsibility to ensure her right to be reasonably heard as to the offenses of which Specialist 3 Johnson was acquitted because the Rules for Courts-Martial do not grant her such a right. Any accommodation made to a victim that allows them to exceed the limits of the right to be heard granted in R.C.M. 1001 violates a servicemember's due process right to a trial free from inadmissible and prejudicial evidence. *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (explaining that an appellant has the right to be sentenced "on the basis of the evidence alone.") (citation omitted). As the Court of Appeals for the Armed Forces has made clear, a military judge has an obligation to ensure the content of a victim's unsworn statement comports with the parameters of victim impact as set out in Rule for Courts-Martial 1001. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). Allowing a statement on offenses of which the accused was not found guilty to be introduced and then instructing the members not to consider it is not a sufficient mechanism to protect the accused's interests.

Contrary to the Government's assertion, this Court cannot be assured that the members followed the Military Judge's instructions to disregard G.H.'s improper statements. The Government asked the members to sentence Specialist 3 Johnson to three months confinement, reduction to E-1, and a bad-conduct discharge. (R. at 1212). Instead, they doubled the confinement and added a reprimand to the reduction and discharge. (R. at 1250).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the guilty finding and dismiss with prejudice.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 16 March 2023.

[redacted]
SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40257**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Devin W. JOHNSON	)	
Specialist 3 (E-3)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal