IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 19 February 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **27 April 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

GRANTED
24 FEB 2022

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 19 February 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

23 February 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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 23 February 2[redacted].

[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 (SECOND)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 20 April 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 May 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one ...tion of wrongful distribution of intimate visual images, in violation of Article 117a, ...at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to ...l pay and allowances, to be confined for a total of 48 months,[2] and to be dishonorably

GRANTED
26 ~~Apr~~ 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for

discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

---

the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

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 20 April 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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]

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. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 20 May 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 June 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one ion of wrongful distribution of intimate visual images, in violation of Article 117a, . at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 48 months,[2] and to be dishonorably

GRANTED
26 MAY 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.
[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for

discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]
J AF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

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 20 May 2022.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

24 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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 May 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 (FOURTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 10 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 July 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 164 days have elapsed. On the date requested, 210 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ, 10 U.S.C. § 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to

GRANTED
14 JUN 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

forfeit all pay and allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Counsel is currently assigned 19 cases; 5 cases are pending initial AOEs[3] before this Court. This is military counsel's fifth priority case. The following cases have priority over the present case:

1. *United States v. Hernandez*, ACM 39606 (rem) - The record of trial is 4 volumes, the trial transcript is 422 pages. There are 22 prosecution exhibits, 2 defense exhibits, and 26 appellate exhibits. Counsel has reviewed a portion of Appellant's transcript and exhibits in preparing to brief and present oral argument, and is reviewing the rest of the transcript currently.

---

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Appellate counsel is also assigned 3 cases that have been re-docketed following a remand. Appellate counsel did not review 2 of these cases originally, as prior appellate counsel was assigned to these cases prior to their remand.

2. *United States v. Kitchen*, ACM 40155 – The record of trial is 10 volumes, the trial transcript is 1371 pages. There are 8 prosecution exhibits, 11 defense exhibits, and 60 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

3. *United States v. Ramirez*, ACM S32538 (f rev) - The record of trial consists of 6 volumes, the trial transcript is 899 pages. There are 5 prosecution exhibits, 14 defense exhibits, and 43 appellate exhibits. Counsel has reviewed approximately 200 pages of Appellant's ROT.

4. *United States v. Massie*, ACM 40182 - The record of trial consists of X volumes, the trial transcript is 220 pages. There are 10 prosecution exhibits, 9 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 June 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

13 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 June 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 19 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 August 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Counsel is currently assigned 22 cases; 7 cases are pending initial AOEs[3] before this Court. This is military counsel's fifth priority case. The following cases have priority over the present case:

1. *United States v. Witt* - ACM 36785, USCA Dkt. No 220090/AF – the Court of Appeals for the Armed Forces granted review of one issue on 7 July 2022. Appellant's brief is due on 6 August 2022.

2. *United States v. Kitchen*, ACM 40155 – The record of trial is 10 volumes, the trial transcript is 1371 pages. There are 8 prosecution exhibits, 11 defense exhibits, and 60 appellate exhibits. Counsel has reviewed approximately 300 pages of Appellant's transcript, and several appellate exhibits related to the motions practice discussed in the above transcript pages.

3. *United States v. Ramirez*, ACM S32538 (f rev) - The record of trial consists of 6 volumes, the trial transcript is 899 pages. There are 5 prosecution exhibits, 14 defense exhibits, and 43 appellate exhibits. Counsel has reviewed approximately 200 pages of Appellant's ROT.

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[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Appellate counsel is also assigned 1 case that has been re-docketed following a remand. Appellate counsel did not review this case originally, as prior appellate counsel was assigned to this case prior to its remand.

4. *United States v. Massie*, ACM 40182 - The record of trial consists of X volumes, the trial transcript is 220 pages. There are 10 prosecution exhibits, 9 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 11 July 2022.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

21 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 July 2022.

[redacted]

MARY ELLEN PAYNE
Associate Chief, 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 40226**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alexander V. JONES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 July 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 22d day of July, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **25 August 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]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 18 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 September 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030.

ge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

GRANTED
24 Aug 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 24 cases; 9 cases are pending initial AOEs[4] before this Court. This is military counsel's fifth priority case. The following cases have priority over the present case:

1. *United States v. Anderson*- ACM 39969, USCA Dkt. No 22-1093/AF – the CAAF granted review of one issue on 25 July 2022. Appellant's brief is due on 24 August 2022.

2. *United States v. Ramirez*, ACM S32538 (f rev) - The record of trial consists of 6 volumes, the trial transcript is 899 pages. There are 5 prosecution exhibits, 14 defense exhibits, and 43 appellate exhibits. Counsel has completed her review of Appellant's ROT and identified issues to raise to begin drafting his Assignments of Error.

---

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel filed a Supplement to Petition for Grant of Review in *United States v. Halter*, ACM S32666 (f rev) on 25 July 2022, and co-authored a Grant Brief in *United States v. Witt*, ACM 36785, USCA Dkt. No 22-0090/AF, submitted to the Court of Appeals for the Armed Forces (CAAF) on 5 August 2022. During the month of July, counsel was on leave out of the country from 10-16 July, and on leave out of state from 30 July-1 August 2022.

[4] Appellate counsel is also assigned 1 case that has been re-docketed following a remand. Appellate counsel did not review this case originally, as prior appellate counsel was assigned to this case prior to its remand.

3. *United States v. Kitchen*, ACM 40155 – The record of trial is 10 volumes, the trial transcript is 1371 pages. There are 8 prosecution exhibits, 11 defense exhibits, and 60 appellate exhibits. Counsel has reviewed approximately 650 pages of Appellant's transcript, and all of the appellate exhibits related to the motions practice discussed in the above transcript pages.

4. *United States v. Massie*, ACM 40182 - The record of trial consists of X volumes, the trial transcript is 220 pages. There are 10 prosecution exhibits, 9 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 18 August 2022.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

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

[redacted]

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 22 August 2022.

[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]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 14 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 October 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of stribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

GRANTED
16 SEP 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 19 cases; 8 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case, and second priority case before this Court. The following cases have priority over the present case:

1. *United States v. Witt*, ACM 36785 (reh), USCA Dkt No. 22-0090/AF - the CAAF granted review of one issue on 7 July 2022. Appellant's reply brief is due on 16 September 2022.

2. *United States v. Anderson*, ACM 39969, USCA Dkt No. 22-1093/AF - the CAAF granted review of one issue on 25 July 2022. Appellant's reply brief is due 3 October 2022.

3. *United States v. Kitchen*, ACM 40155 – The record of trial is 10 volumes, the trial transcript is 1371 pages. There are 8 prosecution exhibits, 11 defense exhibits, and 60 appellate exhibits. Counsel has reviewed Appellant's entire record of trial, consulted with Appellant

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel co-authored a Grant Brief in *United States v. Anderson* ACM 39969, USCA Dkt. No 22-1093/AF, submitted to the Court of Appeals for the Armed Forces (CAAF) on 24 August 2022, filed a reply brief in *United States v. Hernandez*, ACM 39606 (rem) on 24 August 2022, and filed a brief in *United States v. Ramirez*, ACM S32538 (f rev) on 9 September 2022.

concerning Assignments of Error to raise, and has begun drafting Appellant's brief. Appellant's brief is due 17 October 2022, and absent extraordinary circumstances, no further enlargements will be requested.

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

15 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstance, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's motion is granted, the defense delay in this case will be 300 days in length. This almost 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. Additionally, 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 September 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40226**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alexander V. JONES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 17 October 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 October, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **23 November 2022**.

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
Deputy 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. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 17 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 November 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Appellant's case is now military counsel's first priority case before this Court.[4]

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.

---

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel co-authored a Reply Brief in *United States v. Witt,* ACM 36785 (reh), USCA Dkt No. 22-0090/AF, submitted to the Court of Appeals for the Armed Forces (CAAF) on 16 September 2022, co-authored a Reply Brief in *United States v. Anderson*, ACM 39969, USCA Dkt. No 22-1093/AF, submitted to the CAAF on 30 September 2022, and filed a lengthy brief in *United States v. Kitchen*, ACM 40155 today, 17 October 2022.

[4] Along with civilian co-counsel, military counsel has a Supplement to Petition for Grant of Review due in *United States v. Daniels III*, ACM 39407 (rem) on 27 October 2022, and a Supplement to Petition for Grant of Review due in *United States v. Torello*, S32691 on 2 November 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 17 October 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

19 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's 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 and the Air Force Appellate Defense Division on 19 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 (NINTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 16 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 December 2022**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

[1] as acquitted of one charge and one specification of domestic violence in violation of UCMJ. R. at 1030.

GRANTED

18 NOVEMBER 2022

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Since the filing of Appellant's last EOT, counsel has reviewed approximately 200 pages of Appellant's transcript. Counsel is currently assigned 22 cases; 10 cases are pending initial AOEs before this Court. Appellant's case is military counsel's first priority case before this Court, and third priority case overall. The following cases have priority over Appellant's case.

1. *United States v. Witt*, ACM 36785 (reh), USCA Dkt No. 22-0090/AF – Counsel will be presenting oral argument before the CAAF on 6 December 2022.

2. *United States v. Knodel*, ACM 40018 – Counsel anticipates attending a motions hearing 12-13 December 2022 in Miramar, CA as part of Appellant's *DuBay* proceedings. Appellant's

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel filed a reply brief in *United States v. Ramirez*, ACM S32538 (f rev) on 18 October 2022, was second chair for the *United States v. Anderson* oral argument at the Court of Appeals for the Armed Forces (CAAF) on 25 October 2022, filed a supplement to petition for grant of review to the CAAF in *United States v. Torello*, ACM S32691 on 7 November 2022, filed a supplement to petition for grant of review in *United States v. Daniels III*, ACM 39407 (rem) on 16 November 2022, and filed two motions relating to *Dubay* proceedings in *United States v. Knodel*, ACM 40018 on 16 November 2022.

DuBay hearing has been scheduled for 10-12 January 2023. Two motions have been filed and counsel anticipates another two motions may be filed and litigated during the motions hearing.

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]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 16 November 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 16 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 (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 January 2023**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of ribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. dge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

GRANTED
20 DEC 2022

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Since the filing of Appellant's last EOT, counsel has reviewed approximately 800 pages of Appellant's transcript, and has requested to view the sealed materials in Appellant's ROT. Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Appellant's case is military counsel's first priority case before this Court, and second priority case overall. The following case has priority over Appellant's case.

1. *United States v. Knodel*, ACM 40018 – Appellant's *DuBay* hearing is set for 10-12 January 2023 and will be held at either MCAS Miramar, or the navy base located near MCAS Miramar (depending on the availability of the MCAS Miramar courtroom). Counsel anticipates calling 15-20 witnesses (if granted by the military judge), and the Government will be calling Capt Knodel's three trial defense attorneys. Pursuant to this Court's *DuBay* hearing Order, dated

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review in *United States v. Carlile*, ACM 40053 on 23 November 2022, argued *United States v. Witt*, USCA Dkt. No. 22-0090/AF on 6 December 2022, filed a reply brief in *United States v. Kitchen*, ACM 40155 on 13 December 2022, and participated in a *DuBay* motions hearing held at MCAS Miramar in *United States v. Knodel*, ACM 40018 on 13 December 2022

28 September 2022, the military judge has 46 questions (some with subparts) to provide further fact-finding regarding.

Counsel anticipates finishing her review of Appellant's record of trial and consulting with Appellant regarding potential issues to raise before the next EOT. However, due to the upcoming Christmas and New Year's holidays, leave plans with family, and preparation and travel for the upcoming *DuBay* hearing on 10-12 January 2023, counsel anticipates potentially needing one final EOT to complete the drafting and finalizing of Appellant's Assignments of Errors.

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]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 16 December 2022.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

19 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's 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. If this new delay is granted, Appellant will consume over two-thirds of the 18-month standard for this Court to issue a decision, leaving about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed 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]

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 and to the Air Force Appellate Defense Division on 19 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]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 2 Case No. ACM 40226 Filed on: 15 December 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, Appellant hereby moves to examine the sealed material in Appellant's record of trial (Appellate Exhibits (App. Ex.) II, III, IV, V, VI, VII, VIII, XXX, XXXIII, XXXIV, XXXIX, XL, XLI, XLII) and transcript pages 27-68, 83-93, 146-153, 815-816. These materials were released to trial counsel and defense counsel.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. A review of the entire record is necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), 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(c), 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, military defense counsel's examination of sealed materials is reasonably necessary to fulfill their responsibilities in this case, since counsel cannot perform their duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial.

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

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 Appellate Government Division on 15 December 2022.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

15 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40226 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States 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 Appellant avers 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.

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 15 December 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 40226**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alexander V. JONES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 December 2022, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Appellate Exhibits II, III, IV, V, VI, VII, VIII, XXX, XXXIII, XXXIV, XXXIX, XL, XLI, and XLII, and transcript pages 27–68, 83–93, 146–153, and 815–816.

Appellant's motion states the materials were reviewed by trial and defense counsel and sealed by the military judge. Appellant's counsel avers that viewing the sealed materials is "reasonably necessary to fulfill their responsibilities in this case."

The Government responded to the motion on 15 December 2022. It does not object to Appellant's counsel reviewing materials that were released to "all parties at trial—so long as the [Government] can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to 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 finds Appellant's counsel has made a colorable showing that review of the exhibit is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 21st day of December, 2022,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits II, III, IV, V, VI, VII, VIII, XXX, XXXIII, XXXIV, XXXIX,**

XL, XLI, and XLII, and transcript pages 27–68, 83–93, 146–153, and 815–816, subject to the following conditions:

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

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

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 (ELEVENTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 13 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 February 2023**. The record of trial was docketed with this Court on 28 December 2021. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 420 days will have elapsed. Counsel requests to withdraw her previously filed EOT, which incorrectly indicated the date above as 14 January 2023. This EOT has been corrected to reflect that the EOT is being filed on 13 January 2023.

On 9-13 and 15-18 August 2021, contrary to his pleas,[1] Appellant was convicted by a panel of officer and enlisted members, at a general court-martial convened at Joint Base McGuire-Dix-Lakehurst, New Jersey, of one charge and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ. R. at 1030. A military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and

[1] Appellant was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ. R. at 1030.

allowances, to be confined for a total of 48 months,[2] and to be dishonorably discharged from the service. R. at 1069. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 24 September 2021.

The record of trial consists of 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits; the transcript is 1070 pages. Appellant is currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Since the filing of Appellant's last EOT, counsel has reviewed Appellant's unsealed transcript, has reviewed a majority of the sealed materials in this case, has consulted with Appellant regarding issues to raise, and has begun researching issues for his brief.

Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Appellant's case is military counsel's first priority case before this Court, and second priority case overall. The following case has priority over Appellant's case.

1. *United States v. Knodel*, ACM 40018 – Appellant's *DuBay* hearing is currently underway at Naval Base San Diego. Counsel and Appellant's civilian co-counsel have called 16 of their 19 witnesses. Pursuant to this Court's *DuBay* hearing Order, dated 28 September 2022, the military judge has 46 questions (some with subparts) to provide further fact-finding regarding. Counsel arrived in San Diego on Saturday night, prepped with Appellant and co-counsel on

[2] Appellant was sentenced to be confined for 36 months (for Specification 1 of Charge I), to be confined for 18 months (for Specification 2 of Charge I), and to be confined for 12 months (for the Specification of Charge III), with the sentences for Specification 1 and 2 of Charge I running concurrently, and the sentence for Charge III running consecutively. R. at 1069.

[3] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review in *United States v. Ramirez*, ACM S32538 on 5 January 2023.

Sunday and Monday, and has been in court since Tuesday. While counsel was scheduled to return home on Saturday, following an RCM 802 with the military judge this evening, counsel anticipates that the hearing will not conclude until either Saturday or Sunday.

Counsel anticipates finishing her review of Appellant's record of trial and beginning to draft Appellant's Assignments of Error upon returning home. Upon completion of the *DuBay* Hearing, this case is counsel's first priority case, and absent extraordinary circumstances, counsel does not anticipate needing to request any further EOTs.

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]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 13 January 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEXANDER V. JONES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40226 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over one year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's 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. If this new delay is granted, Appellant will consume over two-thirds of the 18-month standard for this Court to issue a decision, leaving about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 17 January 2023.

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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 40226**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alexander V. JONES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 13 January 20223, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 20th day of January, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **21 February 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

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 LEAVE TO FILE IN EXCESS OF PAGE LIMIT**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	No. ACM 40226 21 February 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file his Assignments of Error (AOE) in excess of this Court's 50-page limit.

Appellant's brief exceeds the page limit by 17 pages and exceeds the word limit by 2,367 words. Good cause exists for exceeding this Court's page limit and word count requirement. Specifically, Appellant has raised five issues in his brief before this Court, including whether Appellant was denied his right to a unanimous verdict, whether Appellant's convictions for sexual assault (two specifications) and wrongful distribution of intimate images are legally and factually sufficient, whether the military judged erred in failing to excuse a panel member for implied bias, and whether the military judge abused her discretion in denying Appellant's motion to compel the complaining witness' medical records regarding diagnoses and prescribed medications. Exceeding the page limit is necessary to address these aforementioned issues with sufficient discussion of the facts and relevant law.

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

GRANTED
2 MAR 2023

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 February 2023.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO LEAVE TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	Case No. ACM 40226 21 February 2023

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

Pursuant to Rule 13(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file Issue V of his Assignments of Error (AOE) under seal. Issue V cites to pages found within the sealed portions of Appellant's transcript (83-84, 88, 90-91), and Appellate Exhibits (App. Ex.) II, III, IV, XXXIV, which were ordered sealed by the military judge. Issue V relates to the military judge's ruling regarding whether certain aspects of the complaining witness's medical records were protected under Mil. R. Evid. 513. The inclusion of this information is necessary for this Court's consideration of the case. Pages 61 thru 67 of Appellant's brief, corresponding to Issue V, are filed under seal.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully Submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

GRANTED
2 MAR 2023

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 February 2023.

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

ALEXANDER V. JONES,
Airman First Class (E-3),
United States Air Force
Appellant.

No. ACM 40226

BRIEF ON BEHALF OF APPELLANT

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **ALEXANDER V. JONES**, United States Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel 2 No. ACM 40226 Filed on: 21 February 2023

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

Assignments of Error

I.

WHETHER A1C JONES WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II.

WHETHER A1C JONES'S CONVICTIONS FOR SEXUAL ASSAULT ARE LEGALLY AND FACTUALLY INSUFFICIENT?

III.

WHETHER A1C JONES'S CONVICTION FOR WRONGFUL DISTRIBUTION OF INTIMATE VISUAL IMAGES IS LEGALLY AND FACTUALLY INSUFFICIENT?

IV.

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO EXCUSE LT COL E.W. FOR IMPLIED BIAS?

V.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN DENYING THE DEFENSE'S MOTION TO COMPEL THE

COMPLAINING WITNESS' MEDICAL RECORDS RELATING TO DIAGNOSES AND PRESCRIBED MEDICATIONS?[1]

Statement of the Case

On 9-13 and 15-18 August 2021, Airman First Class (A1C) Alexander V. Jones, Appellant, was tried by a panel composed of officer and enlisted sitting as a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey. Record (R.) at 1, 143, 173, 231, 347, 495, 660, 905, 1037. Contrary to his pleas,[2] he was convicted of one charge and two specifications of sexual assault in violation of Article 120, 10 U.S.C. §920, Uniform Code of Military Justice (UCMJ), *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*),[3] and one charge and one specification of wrongful distribution of intimate visual images, in violation of Article 117a, UCMJ, 10 U.S.C. § 917a. R. at 1030. He elected to be sentenced by a military judge. R. at 1035. The military judge sentenced A1C Jones to reduction to the grade of E-1, total forfeitures, a total of 48 months' confinement,[4] and a dishonorable discharge. R. at 1069. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Decision on Action, dated 24 September 2021.

Statement of Facts

A1C Jones and J.J. met in 2017 while working together at Accurate Background, a company which conducted background checks for other companies on potential employees. R. at 674. They

[1] This issue is being filed under seal.
[2] A1C Jones was acquitted of one charge and one specification of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. §928b. R. at 1030.
[3] All references to the punitive articles, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the 2019 *MCM*, unless otherwise noted.
[4] The military judge sentenced A1C Jones to 36 months' confinement for Specification 1 of Charge I, 18 months' confinement for Specification 2 of Charge I, and 12 months' confinement for the Specification of Charge III, with the sentences for Specification 1 and 2 of Charge I running concurrently with each other but consecutively with the sentence for Charge III. R. at 1069.

started talking during their work breaks, hit it off, and went on a date. *Id*. Their relationship then progressed into a serious dating relationship. *Id*. While they were dating, A1C Jones enlisted and went off to technical school in Texas. R. at 675. They got married in August 2018, approximately a year and a half after they started dating, when they knew A1C Jones would be stationed at Joint Base McGuire-Dix-Lakehurst in New Jersey. R. at 674, 675. J.J. joined him in New Jersey in December 2018. R. at 675.

After moving in with A1C Jones, J.J. indicated things "kind of started to go downhill." R. at 676. They would have good days and bad days. *Id.* Throughout their marriage, J.J. suspected A1C Jones was cheating on her. R. at 740-41. She went through his phone on multiple occasions to try to confirm her suspicions. R. at 741. She even told his friends she thought he was cheating on her. *Id*. After telling A1C Jones on several occasions that she was contemplating divorcing him, on 10 March 2020, J.J. finally told A1C Jones she wanted a divorce. R. at 681, 742. Their 10 March 2020 divorce conversation occurred after another fight in which J.J. accused A1C Jones of cheating. R. at 742. A1C Jones was upset because he wanted to stay together. R. at 681. Because A1C Jones wanted to work things out, he and J.J. tried to reconcile. R. at 682. But this reconciliation period lasted for only a short period of time, and J.J. told A1C Jones she still planned on leaving him. *Id*. However, between 10 March 2020, when J.J. told A1C Jones she wanted a divorce, and 28 March 2020, when she alleged A1C Jones sexually assaulted her, J.J. and A1C Jones had consensual sex at least twice. R. at 682, 744. A1C Jones estimated they had consensual sex four or five times. R. at 861-62. According to J.J., this consensual sex was a result of A1C Jones's putting effort in and helping around the house. R. at 683. However, despite A1C Jones's efforts, J.J. still felt that they should get divorced because she "was done." *Id.*

The Nature of A1C Jones's and J.J.'s Sexual Relationship

Starting in January of 2020, J.J. and A1C Jones would have arguments that would eventually lead to sex. R. at 745. When interviewing with the Air Force Office of Special Investigations (AFOSI), J.J. characterized this as "angry sex," and claimed A1C Jones would start fights with her to initiate "angry sex." R. at 747-48. J.J. and A1C Jones also had rough, aggressive sex that included consensual strangulation. R. at 748. Significantly, aggressive sex played a role in their sex life throughout the duration of their relationship; they even engaged in aggressive sex before they were married in August 2018. *Id*.

The Night of 28 March 2020

On 28 March 2020, J.J. took her dogs to the park in the afternoon, then went to her friend C.'s house for dinner. R. at 683. They grilled food and sat around a fire. *Id*. J.J. had one alcoholic drink. R. at 683. She stayed at C.'s house for several hours and returned to the home she shared with A1C Jones around 0100. R. at 684. J.J. was filling up her humidifier prior to going to bed when she heard A1C Jones's Mustang enter the neighborhood. *Id*. She did not want to see him, so she tried to finish up and get to bed. *Id*. Based on his Snapchat story,[5] J.J. knew A1C Jones had been out drinking with his friends. *Id*.

J.J.—who was wearing an Apple watch—turned the voice memo recording function of her watch on. R. at 684-85. The voice memo recording function on an Apple watch captures audio and is much like the voice memo recording function on a phone. R. at 685. A user must physically touch the recording button to start and stop the recording. *Id*. J.J. started recording because she "had this funny feeling that something—like an argument—was going to happen," and she wanted "proof,"

[5] Snapchat is a mobile communication application in which users can exchange text, photos, and videos that disappear after viewed, unless they are saved. A Snapchat story is a photo or video that a user makes visible to all or a select few of his or her followers.

and the ability to "kind of remind [herself] that something happened[.]" *Id*. According to J.J., A1C Jones was more prone to arguing when he had been drinking. *Id*. She believed he would say "a bunch of mean things to [her]," and she wanted to be able to listen to the recording later to remind herself why she felt they should get divorced. *Id*.

When A1C Jones returned home, J.J. was still in the bathroom. R. at 684. Their house only had one bathroom, which was a standalone bathroom rather than a bathroom in the master suite. R. at 740, 866; Defense Exhibit (Def Ex.) B at 4. Upon seeing her in the bathroom, A1C Jones asked J.J. where she had been, what she had been doing, and who she had been with. R. at 686. According to J.J., when A1C Jones confronted her, he "just kind of wouldn't let [her] leave the bathroom and kept asking [her] a million questions." R. at 684-85. J.J. told him that "it wasn't really his business" and she told him to leave her alone. R. at 686. After A1C Jones asked J.J. if she had a Tinder[6] account and she denied having one, A1C Jones took J.J.'s phone from her and locked himself in another room. *Id*. When the trial counsel asked how J.J. was feeling during this encounter, she stated, "I was kind of freaked out. He was probably the most aggressive he had been during our time living together." *Id.*

The First Audio Recording

J.J.'s watch recorded an argument between her and A1C Jones. R. at 687.[7] At the start, J.J. asked A1C Jones to "leave [her] doorknob alone." *Id*. After gaining access to the bedroom, A1C Jones took J.J.'s phone, asked her for the passcode to her phone, and inquired why she downloaded

[6] Tinder is a mobile dating application.

[7] The audio recording is found at Prosecution Exhibit 3. A transcript of the audio recording is found at Prosecution Exhibit 8. The military judge instructed the members, "[t]he admitted transcript is not a substitute for your own review of the audio evidence; so, I would ask that you listen and you may look at the transcript. But, to the extent there is any difference, the audio is the controlling evidence in this case." R. at 686-87.

Tinder. R. at 688-89. He told her the App Store showed she had downloaded Tinder and someone sent him screenshots of her Tinder profile. R. at 690. After initially denying downloading Tinder (R. at 688), J.J. admitted to downloading it, saying:

> Good, what I wanted worked. Did it piss you off? The whole point of it being downloaded. . . Did it piss you off like it was supposed to? You think I didn't know you saw it? it's the only reason I downloaded it was to get even with you. To show you what it feels like When the person you're married to has a fucking Tinder account.

R. at 690. She added, "I am so happy my pettiness worked." *Id*.

The trial counsel asked J.J. to explain what was happening during the first six or seven minutes of this exchange. R. at 691. J.J. explained that A1C Jones took her phone and locked himself in another room. *Id.* Because he had locked the door, J.J. was unable to get into the other room and she and A1C Jones had an argument about Tinder. *Id*. Despite just saying that she was "freaked out" by A1C Jones's "aggressive" behavior (R. at 686), when the trial counsel asked about the first few minutes of the recording, J.J.'s characterized this as a typical argument, agreeing that the argument was nothing out of the ordinary. R. at 691.

A1C Jones eventually let J.J. into the locked room, and throughout the first audio recording, she continued to ask for her phone back. R. at 692, 696. At one point, J.J. inquired, "Which friend was it that sent it to you? It pissed you off, didn't it? The whole goal of that Tinder account was just to piss you off." R. at 692. A1C Jones responded, "You like it when I'm pissed off?" *Id*. J.J. replied, "I'm giving you a taste of your own medicine." *Id*. When J.J. again told A1C Jones she wanted her phone back, he told her to beg for it. R. at 693. In response, she repeatedly asked him to give her phone back. R. at 694.

During this exchange, J.J. asked A1C Jones to leave her alone. She told him to stop, and he responded, "You stop." *Id*. To this, J.J. answered, "I didn't do anything. You just got a taste of your own fucking medicine." *Id*. A1C Jones told J.J. to open her mouth. R. at 695. She said no and to

leave her alone. *Id*. A1C Jones replied, "Don't act like you don't want it." *Id*. He also stated, "I'll bet your pussy's wet right now." *Id.*

When the trial counsel inquired what was happening during these last minutes, J.J. explained that A1C Jones was sitting on the mattress in the guest bedroom and she was searching for her phone, which he had hidden. R. at 696. According to J.J., A1C Jones was pulling her hair and shoving his fingers into her mouth. *Id.* J.J. explained that she was able to get away from A1C Jones and ran into the living room. *Id*. He followed and slammed her face into the couch. *Id*. At that point, the recording stopped. R. at 698. When asked, J.J. claimed she did not stop the recording. *Id*.

The trial counsel then asked her to examine some photos. R. at 696-97. J.J. explained that the pictures depicted "[the] bedroom door where [A1C Jones] took the doorknobs off to get to [her]." R. at 697. Later, on cross-examination, J.J. agreed that A1C Jones removed her bedroom doorknob while she was calling 911. R. at 763, 775. During re-direct, J.J. clarified that A1C Jones removed "the bathroom doorknob and the bedroom doorknob. The bedroom one came off when I was on the phone with 911." R. at 775.

Later, when the trial counsel asked her whether A1C Jones ever put his hand on her neck and strangled her during this exchange, J.J. indicated he strangled her "a couple of times." R. at 703. She would try to pull his hands off her neck, and he would "just push harder." *Id*. When he had his hands around her neck, J.J. "couldn't breathe. It wasn't comfortable." *Id*. When trial counsel asked whether A1C Jones was strangling her when she was heard gasping on the audio recording,[8] she replied, "So, he -- actually, yeah, so he was choking me and he was slamming me into the couch cushion." *Id*.

[8] *See* R. at 695; Pros. Ex. 3; Pros. Ex. 8 ("muffled choking sounds.").

The Alleged Sexual Assault

According to J.J., after the recording ended, A1C Jones picked her up from the living room, brought her into the bedroom and slammed her onto the bed. R. at 698. At the time of the alleged assault, A1C Jones was almost six feet tall and weighed about 210 pounds. R. at 710. During the alleged sexual assault, A1C Jones was wearing jeans, a t-shirt, and boots. R. at 698, 701-02, 714.

J.J. claimed, "[A1C Jones] sat down on top of me to where like his butt was like on my chest basically." *Id*. She went on:

> [A1C Jones] -- so, he took my leggings off and then, from there, he was -- he like started fingering me. He then proceeded -- like, he licked down there if you will; and then, I -- like I was trying to get away and by the time -- so, then, obviously, I couldn't get away. So, he ended up kind of like pulling me to a different angle of the bed where he was standing and basically, like I was on the edge of the bed. And he just pulled down his pants a little bit and the way that he was holding me, I couldn't, I couldn't move and I was trying to pull the sheets or like the edge of the bed to pull myself up and he would just slam me back down onto him and he would just like thrust a lot harder into me.

R. at 698-99.

J.J. further explained that when she said he fingered her, she meant A1C Jones put his fingers inside her vagina. R. at 699-700. When A1C Jones performed oral sex on her, "[h]e was still sitting on top of [her] where his butt was kind of like up against [her] chest to where [she] couldn't move." R. at 700. After he "lick[ed] down like between [her] legs" he jerked her to the side of the bed. R. at 700, 701.

A1C Jones was "standing up on the edge of the bed," and J.J. indicated that "he had [her] laying down and had [her] like kind of pinned to where [she] couldn't move." R. at 701. After that, he had sex with her by putting his penis in her vagina. *Id*. According to J.J., A1C Jones "continued until he ejaculated inside of [her]." R. at 702. When the trial counsel asked, "[h]ow do you know he ejaculated inside you[,]" J.J. replied, "You can . . . you could tell." *Id.* After he ejaculated, "he

actually kept going. During that time span, when J.J. tried to pull away from A1C Jones, he would thrust harder or slam her back down onto him. *Id*. After that, he backed off, and she was able to go into the bathroom to clean up. *Id*. She used the bathroom and "tr[ied] to push out what he did." R. at 706. While in the bathroom, she remembered she had been recording, saw the recording had stopped, and restarted the voice memo recording. R. at 705.

The Second Audio Recording

In the second recording, A1C Jones can be heard asking J.J. to help him take off his boots. R. at 710.[9] She responded in the negative, and he questioned, "What is your problem?" R. at 711. She replied, "I don't have any respect for you at this point." *Id*. When he asked why, J.J. said, "You know why." *Id*. A1C Jones queried, "Cause you downloaded Tinder?" *Id*. While J.J. stated, "That's not why," she immediately followed up on his reference to Tinder, asking, "Which friend showed you?" *Id*.

They then squabbled back and forth a bit. J.J. asked for her phone, and when A1C Jones said, "What[,]" J.J. retorted, "You don't want me in your shit, get out of mine." R. at 712. They continued to bicker, and a bit later, J.J. was heard slapping A1C Jones. *Id*. A1C Jones responded to her action, indicating, "Now, you slapped me for no reasons, domestic abuse [inaudible]." R. at 713. Further into the conversation, A1C Jones informed J.J., "The more you force me away, the more I'm going to be distant. This is the only time you're really gonna be able to talk to me, so --" *Id*. In response, J.J. claimed she did not want to talk to him and had nothing to say to him. *Id*. After her claim, A1C Jones replied, "Because you did the Tinder thing for me to come around." *Id*. However, J.J. clarified, "No, I did it to piss you off." *Id*. A1C Jones noted, "Yes you did. I know you, [J.]. I've been married

[9] The audio recording is found at Prosecution Exhibit 4. A transcript of the audio recording is found at Prosecution Exhibit 9.

to you and I've been with you for a long time. So, what -- so say what you want to say." *Id*. After J.J. reiterated, "I have nothing to say," A1C Jones noted, "I can still fuck you when you're that way." R. at 714.

When the trial counsel asked J.J. to explain what was happening on the recording, she clarified this recording was made after the assault. *Id*. She noted they were in the main bedroom at the time of the conversation. *Id*. At one point, A1C Jones was laying on the bed behind her, which is when he made the comment about being able to have sex with her lying that way. R. at 715. J.J. turned the opposite way to go to sleep. *Id.*

The recording continued with J.J. telling A1C Jones to leave. R. at 716. In response, he asked, "You don't want to come with me . . . Back to my room?" *Id*. J.J. first replied, "no," and then "go away." *Id.* During this conversation, A1C Jones inquired why J.J. did not leave and pack up all her things if he was "such a fucking bother?" R. at 717. He stated his belief that J.J. wanted to "just be single again[,]" and she wanted "everybody to pitty [*sic*] [her]." *Id*. Further into the conversation, A1C Jones said, "I'm being super civil about this." R. at 718. J.J. responded, "You just fucking basically raped me." *Id*. The following conversation then ensued:

> [A1C Jones]: No, I didn't.
>
> [J.J.]: Yes, you did.
>
> [A1C Jones]: No, I did not. I did not rape you. If I raped you -- if I would have raped you, I would still go, but I'm not that type of person.

R. at 719. J.J. indicated that when the audio stopped this time, she stopped it herself. R. at 722.

After A1C Jones left her room, J.J. texted a friend of hers, I.A, but I.A. did not respond. *Id*. However, on cross-examination, J.J. testified that after A1C Jones left her bedroom, she was locked out of her phone for about 15 minutes. R. at 762. She was just staring at her phone, waiting for it unlock so she could access it. *Id*. At that point, J.J. heard A1C Jones talking and laughing on the

other side of the wall. R. at 722, 762. She left her room and "kind of like flew into [his] room because it blew [her] mind that he was laughing and stuff after that all happened." R. at 722. When he got to his room, she saw him lying on his bed, talking on the phone. R. at 762. When she asked who he was talking to, he said his friend Mack. R. at 763. Based on the way he was talking, she did not believe he was talking to Mack. *Id*. Instead, J.J. believed he was talking to a girl. *Id*. At that point, something "freaked [her] out" and she went back to her bedroom and locked the door. R. at 722, 763. She could not recall what had "freaked [her] out." R. at 722, 763. According to J.J., she called 911 about 10 to 15 minutes after the second recording ended. R. at 722. At the time she called 911, A1C Jones had been home for about two and a half to three hours. R. at 768. She told the 911 dispatcher that A1C Jones had come home several hours before and they had been arguing for a few hours. R. at 727.[10] While she was on the phone with 911, J.J. heard her doorknob being unscrewed, and A1C Jones entered her bedroom. R. at 763. When he walked in, A1C Jones asked J.J. what was wrong and if he could help. R. at 763-64.

J.J. told the 911 dispatcher A1C Jones had "forced himself onto [her]." R. at 723. Additionally, she claimed A1C Jones had choked her multiple times and slammed her against a wall. R. at 730. When the 911 operator asked if she was injured, she replied in the negative. *Id.*

J.J.'s Statements to First Responders

Security Forces first responders arrived within five minutes of J.J.'s 911 call. R. at 771. J.J. testified that she spoke to the first responders for a while. R. at 733. One of the first responders she spoke with was Technical Sergeant (TSgt) S.P. R. at 754. During cross-examination, J.J. testified she did not recall telling TSgt S.P. that A1C Jones slammed her into the mirror in the bathroom. R. at 754. She did, however, recall that A1C Jones had slammed her into the bathroom mirror because

[10] The audio recording of the 911 call is found at Prosecution Exhibit 5.

she cleaned the sink up after the fact. *Id*. She agreed she did not tell AFOSI, or defense counsel during her pre-trial interview, that she cleaned up the sink. *Id*. J.J. acknowledged she had listened to arguments during A1C Jones's motions hearing relating to TSgt S.P.'s testimony. R. at 755. She heard discussions about the photographs of the bathroom, and that nothing was found to be amiss in the bathroom. *Id*. She agreed that her testimony was now that she cleaned up the bathroom. R. at 756. When J.J. was asked by the defense counsel whether she told TSgt S.P. that A1C Jones was trying to have sex with her in the bathroom, she responded, "I don't remember. He was trying to kiss me and everything else in the bathroom however." R. at 755.

TSgt S.P. testified that upon his arrival at J.J.'s residence, she told him A1C Jones had "pulled her into the bathroom, had her by the hair, and pushed her into the mirror, which was above the counter[.]" R. at 909. As a result, TSgt S.P. inspected the mirror to see if there were any marks, such as handprints or oil from her face, which "would indicate that somebody was pushed into [the mirror], or [if anything was] broken." R. at 909. He saw none. R. at 909. He also examined the cabinet and saw that none of the toiletries had been knocked over. R. at 909. In his written report, TSgt S.P. indicated he found no evidence of a struggle in the bathroom. R. at 911. J.J. did not, at any point, tell TSgt S.P. that she cleaned up the bathroom after A1C Jones assaulted her. R. at 912.

J.J. also spoke with TSgt R.E. TSgt R.E.'s role was to check J.J. for "any marks, bruises, scrapes, and just to be there as a female-to-female ratio." R. at 920. TSgt R.E. checked J.J. from "bottom to top" and asked J.J. if she was experiencing any tenderness or if any areas of her body hurt. R. at 920. She checked J.J.'s scalp and inspected J.J.'s throat. J.J. did not indicate any soreness or tenderness. R. at 920. She had no marks or bruising on her throat or elsewhere on her body. R. at 921.

The Sexual Assault Forensic Examination

After speaking to the first responders, J.J. was taken to the hospital where she underwent a sexual assault forensic examination (SAFE). R. at 734. During the exam, S.W., the sexual assault nurse examiner (SANE) conducted a head-to-toe assessment, and then conducted a vaginal exam and some internal exams. R. at 792. At that point, J.J. had not showered or douched. R. at 757-58. She used small gauze pads or Q-Tips to collect specimens from the outer vaginal area. R. at 793. S.W. looked for cuts, bruises, or any type of injury. *Id*. She conducted the inner examination of the vagina using a speculum. R. at 794. During the internal exam, S.W. looked for any bruising, tears, cuts, or scrapes. *Id*. During the exam, she used a ProScope camera to take close-up pictures of J.J.'s vagina. R. at 791. S.W. indicated she collected specimens from J.J. during the outer vaginal exam and during the inner examination. R. at 795. Once she completed J.J.'s exam, she transferred the SAFE kit to law enforcement. *Id*.

S.W. asked J.J. what happened and documented what J.J. told her in the case history section of her report. R. at 799. S.W. wrote down J.J.'s account verbatim. *Id*. J.J. told the SANE that A1C Jones "pushed her hard into the bathroom counter and then grabbed her hard and pulled her neck back." Pros. Ex. 10 at 3. She reported A1C Jones picked her up and slammed her into the couch, where he pushed her face into the pillows of the couch. Pros. Ex. 10 at 3. She claimed he later picked her up again and "body slammed her into the bed of the bedroom." Pros. Ex. 10 at 3. She told the SANE that A1C Jones squeezed the left side of her neck and held her right arm down during the sexual assault. Pros. Ex. 10 at 3. J.J. told the SANE that after the sexual assault, she "locked herself in the bathroom and called 911." Pros. Ex. 10 at 4. According to J.J., A1C Jones "removed [the] doorknob but then he said he was going outside to wait for the police." Pros. Ex. 10 at 4. When later asked about her statements to the SANE that she called 911 after locking herself in the bathroom,

J.J.'s explanation was that she "called 9-1-1 after the bathroom and after the incident in the bedroom." R. at 756.

J.J. told S.W. that A1C Jones did not use a condom during the assault and that he had ejaculated inside her. R. at 800-01. She told S.W. that "oral contact occurred. There was licking and kissing and there was contact with her genitals." R. at 801. While J.J. stated A1C Jones penetrated her vagina with his fingers and penis, she denied he made any contact with her anus or around it. *Id*. Additionally, J.J. claimed A1C Jones strangled her. R. at 803. S.W. testified that when a patient indicates they have been strangled, she asks specific questions and looks for specific things. R. at 804. In J.J.'s case, S.W. did not observe injuries consistent with strangulation, and noted no injuries to J.J.'s neck or eyes. R. at 804, 809. S.W. noted J.J. had no burst blood vessels in her eyes, nor did she have any swelling of her neck or any petechial hemorrhages. R. at 809. J.J. did not report any symptoms usually associated with strangulation, such as a sore throat, loss of consciousness, memory loss, or any pain in her neck. R. at 810-11. S.W. also did not find any injuries relating to the alleged sexual assault. R. at 804, 812. During her examination, S.W. did not document a single bruise on J.J. R. at 804, 807-08. J.J. did not complain of vaginal pain. R. at 757. When asked about her medical history, J.J. indicated she was bipolar. R. at 807.

J.J.'s Interview with AFOSI

After the SAFE, J.J. spoke with AFOSI Special Agent B.G. R. at 925. During the interview, J.J. indicated the assault started in the bathroom. R. at 926. From the bathroom, she claimed she and A1C Jones went into the hallway, then back to the bathroom, and then to the bedroom. R. at 927-28. From the bedroom, they went to the living room, and then back to the bedroom. R. at 928. She claimed A1C Jones pushed or tossed her against the bathroom counter twice. R. at 929. J.J. told AFOSI about the audio recordings. R. at 767. However, she did not give the audio recordings to

AFOSI that night because AFOSI did not ask for them. R. at 767. Instead, she provided them a few days later, on or about 30 March 2020. R. at 767.

On cross-examination, A1C Jones's defense counsel asked J.J. the following questions about her interview with AFOSI:

> Defense counsel: Isn't it true, when you told OSI what happened, you stated that you were in the bathroom when it started?
>
> J.J.: Yes.
>
> DC: That, at that point, Airman Jones brought you into the hallway?
>
> J.J.: Yes.
>
> DC: Then, he brought you back to the bathroom?
>
> J.J.: I don't remember that part, but, probably, yes.
>
> DC: And, at that point, he was pushing you into the counter again?
>
> J.J.: If I said that, then, yeah.
>
> DC: Well, I mean, is that what happened?
>
> J.J.: Yeah. I mean, a lot of stuff happened that night; so, it's a lot to try and remember a year-and-a-half later.
>
> DC: And, at that point, you told OSI that Airman Jones picked you up and took you to the bedroom?
>
> J.J.: Not from the bathroom, or from the hallway even; that was from the living room.

R. at 758-59.

After having her memory refreshed, J.J. agreed she told AFOSI that A1C Jones took her from the bathroom into the bedroom. R. at 760. Additionally, J.J. agreed that at some point she ended up in the guest room looking for her phone. R. at 753. She also agreed she was in the living room while she made the first recording. R. at 753.

J.J.'s Efforts with Other Witnesses

On cross-examination, J.J. admitted she had contacted several potential witnesses in the case to warn them A1C Jones's defense counsel may be contacting them. R. at 768-69. J.J. also told these potential witnesses they did not need to speak to A1C Jones's defense counsel if they did not want to. R. at 769. One of these potential witnesses was I.A., the friend J.J. texted the night she was assaulted. R. at 722, 769. J.J. indicated she and I.A. talk almost every day. R. at 770. While she claimed to have texted I.A. after the alleged assault, J.J. admitted she had deleted all her messages with I.A. from that timeframe. R. at 770.

A1C Jones's Interview with AFOSI

During his AFOSI interview, A1C Jones discussed the status of his relationship with J.J. He characterized their marriage as "failing," as J.J. had told him she wanted to get divorced two weeks prior. R. at 860. However, A1C Jones indicated J.J. had brought up getting divorced previously. *Id*. Based on these previous occasions, A1C Jones "[did not] see any difference" between J.J.'s desire for a divorce on 10 March 2020 and her mentioning the possibility of divorce before. *Id*. A1C Jones told investigators he and J.J. had consensual sex four or five times after J.J. told him on 10 March 2020 that she wanted a divorce. R. at 861-62. AFOSI asked A1C Jones whether J.J. ever said she did not want to have sex or if she ever told him to stop. R. at 862. A1C Jones explained that if J.J. told him she did not want to have sex, they would not have sex, or if she told him to stop, he would stop. R. at 863, 864.

A1C Jones told investigators that on the night of 28 March 2020, he returned home and saw J.J. was still awake and in the bathroom. R. at 864-65. He and J.J. engaged in consensual sexual intercourse. R. at 872. They began kissing in the bedroom and he reached down and touched J.J.'s vagina and clitoris. R. at 870. He "start[ed] playing with her and she was turned

on[.]" R. at 869. When putting his fingers inside J.J.'s vulva, A1C Jones could tell she was wet. R. at 870. She was wearing black leggings and he took them off using both hands. *Id.* While he performed oral sex on her, it was only for a short period of time—10 seconds or so—as she was already turned on. R. at 872. They began having sex with J.J. laying on the bed and A1C Jones behind her, which he characterized as "doggie." R. at 871. After a minute or two, he flipped her over, and they had sex in the missionary position, with her on her back and him standing up with her legs on his shoulders. R. at 874. When asked, A1C Jones noted he and J.J. did not use condoms during sex. R. at 873. He indicated that when he ejaculated, "[i]t's usually inside of her every single time[.]" *Id*.

After they began having sex in the missionary position, J.J. told A1C Jones to stop and started crying. R. at 874, 876. They had sex for only 30 to 45 seconds before she told him to stop. R. at 874. A1C Jones believed J.J. told him to stop because "she was regretting the decision she made and she thought [he] was going to get the wrong intentions of that she was going to stay instead of leave, because she plans on leaving." *Id*. When she told him no, he stopped. *Id*. A1C Jones did not ejaculate, because J.J. "said stop, so [he] stopped." R. at 875. After she told him to stop, A1C Jones "pulled out and then [he] asked her what was going on and why and that's when she told [him] that she wanted nothing to do with [him.]." *Id.* When she said that, he was "kind of just lost words[.]" *Id.* He asked her why, and J.J. said it was because of "all that [he'd] put her through[.]" *Id*. He understood the "all [he'd] put [her] through" to relate to her belief that he was cheating on her. *Id*.

After the abrupt end to the sex, A1C Jones went to the guest bedroom. R. at 876. J.J. came in and accused him of cheating and talking to someone on the phone. *Id*. She then went back to the bedroom, and locked herself in. R. at 879. A1C Jones could hear J.J. crying, so he

removed her bedroom doorknob to check on her. R. at 865. He was aware she was taking medication and wanted to make sure she was not harming herself and was okay as she was still his wife and he still cared for her. R. at 865-66, 879-81. A1C Jones explained that on previous occasions, J.J. had said her life does not really matter. R. at 880. After entering the room, he asked her if she was okay and what was wrong. R. at 882. He then heard her say "my husband forced himself on me," so he told her he would be outside. R. at 879.

The DNA Results

Dr. D.W., a forensic biologist, was recognized as an expert in forensic DNA and serology. R. at 826. As part of her job as a forensic biologist, she examines evidence for bodily fluid stains such as semen and blood. R. at 822. She performs DNA analysis on the stains and conducts a general DNA analysis evidence and known standards taken from certain individuals. *Id*. The process of looking for bodily fluid stains is called serology. *Id*. Dr. D.W. explained that 99.9% of our DNA—the blueprint or set of instructions for an organism—is the same. R. at 827. "In forensic DNA testing, [a forensic biologist is] looking at specific areas within that less that 1% that vary between individuals to develop what's known as a DNA profile and use that for comparison purposes between items of evidence and known individuals." *Id*.

Dr. D.W. examined buccal, vaginal, cervical, and external genital swabs from J.J., a sample from A1C Jones's underwear, and a known reference sample from A1C Jones. R. at 829. In conducting her analysis of J.J.'s vaginal swabs, Dr. D.W. indicated that the F2[11] DNA profile was interpreted as being a mixture of two individuals. R. at 831. The mixture was consistent with the profiles of J.J. and A1C Jones. R. at 831-32. Because this mixed profile was consistent with J.J. and

[11] The F2 DNA profile is designed to capture semen cells if they are present, though non-sperm cells may also be found in this fraction. R. at 831.

A1C Jones, Dr. D.W. conducted additional tests to determine if the DNA in the F2 profile contained sperm cells or tested positive for seminal fluid. R. at 832. In this case, both tests were negative, and therefore, Dr. D.W. could not say that A1C Jones's profile came from semen or sperm. R. at 832. Dr. D.W. indicated that the DNA could have come from regular skin cells, or saliva. *Id.* Based on the DNA results, Dr. D.W. indicated that "some sort of contact ha[d] occurred." R. at 833.

Dr. D.W. was informed that J.J.'s samples were collected only five-and-a-half hours after the alleged assault. R. at 834. She was also told that J.J. alleged A1C Jones did not wear a condom and that he ejaculated during the alleged assault. R. at 834-35. She was also aware that J.J. did not bathe or douche prior to providing the samples. R. at 835. When asked whether her findings were consistent with ejaculation during sexual intercourse, Dr. D.W. testified, "Given the timeframe between when the incident occurred and the samples were collected this would -- it would -- I do find it unusual not to find any sperm in the sample, if ejaculation, in fact, had occurred." R. at 835. She confirmed that if ejaculation had occurred within such a short timeframe, typically she would find sperm. *Id.* In fresh ejaculate, Dr. D.W. indicated that she would usually find "millions of sperm." R. at 837. Yet, she found not even a single sperm in J.J.'s sample. *Id.* Dr. D.W. agreed that she "cannot tell" whether the DNA she found were the result of consensual or non-consensual sexual activity. R. at 836-37.

ARGUMENT

I.

A1C JONES WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

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

Additional Facts

On 12 July 2021, A1C Jones's defense counsel submitted a motion for unanimous findings, arguing that in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), A1C Jones was entitled to a unanimous verdict under the Fifth, Sixth, and Fourteenth Amendments. Appellate Exhibit (App Ex.) XVI. In the alternative, the Defense requested that the findings worksheet be modified to include whether the member's verdict was unanimous of non-unanimous. App. Ex. XVI. On 23 July 2023, the Government opposed the motion. App. Ex. XVII.

On 9 August 2021, the military judge denied A1C Jones's motion for a unanimous verdict and his request to announce whether findings were unanimous. App. Ex. XXXVIII. A panel of eight officer and enlisted members convicted A1C Jones. R. at 187, 1017. There was no requirement for a unanimous verdict; three-fourths, or six of eight members, were needed to concur in the findings to render a finding of guilty. R. at 1017. It is unclear how many members concurred in the guilty findings.

Law and Analysis

The Court of Appeals for the Armed Forces (CAAF) granted review in *United States v. Anderson* to determine whether a military accused has a constitutional right to a unanimous verdict. 82 M.J. 840 (C.A.A.F. 2022). The CAAF has granted trailer review of several cases wherein the appellant preserved the issue at trial. *United States v. Veerathanongdech*, USCA Dkt. No. 22-0205/AF; *United States v. Martinez*, USCA Dkt. No. 22-0165/AF; *United States v. Apgar*, USCA Dkt. No. 22-0226/AR; *United States v. Miramontes*, USCA Dkt. No. 22-0233/AR; *United States v. Aikanoff Jr.*, USCA Dkt. No. 22-0258/AR. As A1C Jones preserved this issue at trial by motion,

this Court should—and must—decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

WHEREFORE, A1C Jones respectfully requests this Court set aside his findings and sentence.

II.

A1C JONES'S CONVICTIONS FOR SEXUAL ASSAULT ARE LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Knarr*, 80 M.J. 522, 528 (A.F. Ct. Crim. App. 2020), *rev. denied*, 80 M.J. 348 (C.A.A.F. 2020) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Law

Article 66(c), UCMJ,[12] mandates that this Court review the legal and factual sufficiency of the evidence and affirm only those findings of guilty which this Court finds correct in law and in fact. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Wheeler*, 76 M.J. 565, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)). It does, however, mean "a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence," such that if there is "a real possibility that the accused is not guilty, [the panel] must

[12] This language now appears in Article 66(d) (2019 ed.).

give him the benefit of the doubt and find him not guilty." *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1844 (29 Feb. 2020) [*Benchbook*].

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The legal sufficiency test requires this Court to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 396 (*citing Turner*, 25 M.J. at 325)). "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, our unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

1. The Elements of Sexual Assault

To convict A1C Jones of sexual assault (Specification 1 of Charge I), in violation of Article 120, UCMJ, the Government was required to prove beyond a reasonable doubt:

(1) [o]n or about 28 March 2020, at or near Joint Base McGuire-Dix-Lakenhurst, New Jersey, the accused committed a sexual act upon [J.J.] by penetrating her vulva with his penis; and,

[(2)] that the accused did so without the consent of [J.J.].

R. at 945. *See* 2019 *MCM*, pt. IV, ¶60.b.(2)(c); 2019 *MCM*, pt. IV, ¶60.e.(2)(d).

To convict A1C Jones of sexual assault (Specification 2 of Charge I), in violation of Article 120, UCMJ, the Government was required to prove beyond a reasonable doubt:

(1) [o]n or about 28 March 2020, at or near Joint Base McGuire-Dix-Lakehurst, New Jersey, the accused committed a sexual act upon [J.J.] by penetrating her vulva with his fingers with the intent to gratify his lust or sexual desires; and,

[(2)] that the accused did so without the consent of [J.J.].

R. at 946. *See* 2019 *MCM*, pt. IV, ¶60.b.(2)(c); 2019 *MCM*, pt. IV, ¶60.e.(2)(d).

In explaining the elements of sexual assault for the members, the military judge defined several terms, including "sexual act," "vulva," and "labia." R. at 946. Additionally, the military judge defined "consent," and "mistake of fact as to consent." R. at 946-47.

Analysis

A1C Jones's convictions for sexual assault are legally and factually insufficient. Given A1C Jones admission to penetrating J.J.'s vulva with his fingers and penis (R. at 871, 872, 874), the sufficiency of the prosecution's case boils down to whether J.J. consented to these sexual acts. Both consent and an honest and reasonable mistake of fact as to consent are complete defenses to A1C Jones's alleged crimes, which the government was required to disprove beyond a reasonable doubt. R.C.M. 916(j)(1); *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984).

1. The Nature of A1C Jones's and J.J.'s Sexual Relationship Supports A1C Jones's Statements to AFOSI that he and J.J. had Consensual Sex on 28 March 2020.

J.J. admitted that starting in January 2020—more than two months prior to the sexual assault allegations—she and A1C Jones would get into arguments, and the arguments would lead

to consensual "angry sex." R. at 745, 747. J.J. even believed A1C Jones would start fights with her to initiate "angry sex." R. at 748. Additionally, throughout the duration of their relationship, J.J. and A1C Jones had engaged in rough, aggressive, but consensual sex, which included activities such as consensual strangulation. R. at 748. The aggressive, "angry" nature of their sexual encounters close in time to the charged event informed A1C Jones's understanding and perception of his sexual relationship with J.J. Their prior history of consensual "angry sex" helps to explain A1C Jones's comment to J.J. in which he suggests she would be sexually aroused during their argument. R. at 695. Given this recent history, even if A1C Jones and J.J had argued earlier on 28 March 2020, this argument has no bearing on whether she later consent to sexual activities with A1C Jones that same night. In fact, based upon this recent history, an argument may have made it more likely that they engaged in consensual sex that night. Moreover, notwithstanding the issues with the audio recordings—discussed in more detail below—the audio recordings only cover thirty minutes. *See* Pros. Ex. 3; Pros. Ex. 4. J.J. testified that A1C Jones had been home for two and a half to three hours before she called 911. R. at 768. Therefore, while J.J. claimed she started the audio recording when A1C Jones arrived home (R. at 684-85), and she claimed she called 911 within 10-15 minutes of the ending of the second audio (R. at 722), several hours of time are inexplicably unaccounted for.

While J.J. told A1C Jones she wanted a divorce on 10 March 2020, which might have indicated a lack of interest in having sex with him on 28 March 2020, she had previously told him she was considering divorce on several other occasions, yet they continued to have consensual sex. R. at 682, 742, 744, 861-62. A1C Jones "[did not] see any difference" between J.J.'s claim of wanting a divorce on 10 March 2020 and her bringing up the possibility of divorce on other occasions. R. at 860.

2. The Lack of Forensic Data for the Audio Recordings Renders these Recordings Unreliable.

The Government provided no forensic evidence to prove J.J.'s audio recordings were *actually* from 28 March 2020. *See* Pros. Ex. 3; Pros. Ex. 4. Additionally, J.J. told AFOSI about the recordings during her interview on 28 March 2020, yet she did not provide AFOSI the audio recordings that same day. R. at 767. Despite these audio recordings likely being the *most* probative piece of evidence AFOSI could have obtained, according to J.J., AFOSI did not ask her for the audio recordings. R. at 767. Instead, she provided them a few days later, on or about 30 March 2020. R. at 767.

During her closing argument, A1C Jones's defense counsel catalogued the issues with the audio recordings:

> Let's talk about what you didn't get. Well, one thing you don't have is forensic evidence from [J.J.'s] watch or phone. You don't know if she spliced this video.[13] You, in fact, don't know the exact time these videos were allegedly recorded. *I mean, aside from her testimony*, *you don't even know if this was on that night*; but, you definitely don't know when that night. You don't know what time. You just have these vague answers, [one's] before the alleged sexual assault and one's after, that's it.

R. at 1008 (emphasis added).

The defense counsel's argument also highlighted that the members had only been provided thirty minutes of audio, despite J.J. testifying that A1C Jones had been home for two-and-a-half to three hours before she called 911. R. at 727, 768; Pros. Ex. 5. She urged the members to "[c]heck the timing on the videos that you have, the audio recordings. You've only got 30 minutes accounted for; that's it. You've got two-and-a-half hours missing and these audio recordings that are provided to OSI two days after they interview her." R. at 995.

[13] The defense counsel misspoke when said "video," as there is no video only audio recordings. Pros. Ex. 3; Pros. Ex. 4.

The Government—with significant resources at its disposal—was more than capable of gathering forensic data to prove the recordings were created on 28 March 2020, yet the Government did not offer any forensic evidence from J.J.'s Apple watch or I-phone to corroborate her claim that the recordings were *made* on 28 March 2020. Nor did they offer any forensic evidence which showed at what *time* these audio recordings were created. Instead, the only evidence the trial counsel presented was J.J.'s testimony concerning the time and date of the recordings. "The Government may meet its burden to prove each element beyond a reasonable doubt through testimony of only one witness 'so long as the members find that the witness's testimony is relevant and is sufficiently credible.'" *United States v. Roberts*, No. ACM 40139, 2023 CCA LEXIS 17, at *12 (A.F. Ct. Crim. App. 20 Jan. 2023) (unpub. op.) (quoting *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006)). However, in this case, there are numerous reasons to doubt J.J.'s credibility, and in turn, to doubt whether these audio recordings were actually from the night of the alleged assault.

Notably, these audio recordings do not capture the actual alleged sexual assault. R. at 697, 705, 993. J.J. testified that the alleged sexual assault occurred after the conclusion of the first audio recording. R. at 697, 698-702. J.J. claimed she did not stop the audio recording, and to her knowledge, the *only* way to stop the recording was to physically touch her watch. R. 685-86, 697-98, 764. Yet, the recording nonetheless somehow cut off on its own. R. at 685-86, 697-98. The trial counsel argued, "[w]ho knows why it cut off, right? It doesn't matter. . . . it's lucky that she did record what she did." R. at 987. Contrary to the Government's position, it does matter why the recording stopped, especially when J.J.—the creator of the evidence—claimed she did *not* stop the recording. R. at 698. The Government bore the burden of proof. For the Government to suggest that it does not matter why the evidence they offered abruptly cut off

when it did—*especially* when this evidence was offered to prove A1C Jones's guilt—is to flout their burden. The Government does *not* get the benefit of the doubt, A1C Jones does. Significantly, J.J. testified she intentionally stopped the second recording. R. at 722. As such, the audio recordings were wholly unreliable—neither this Court nor any rational factfinder could find they are what they purport to be, much less that they tend to prove A1C Jones's guilt.

3. J.J.'s Lack of Injury does not Support the "Violent" Nature of the Alleged Sexual Assault.

Additionally, J.J.'s description of the events of 28 March 2020 is simply not corroborated by the physical evidence collected in this case. J.J. described a violent encounter with A1C Jones in which he strangled her "a couple of times." R. at 703, 730. J.J. tried to pull his hands off her neck, but she claimed he would "just push harder." R. at 703. When he had his hands around her neck, J.J. "couldn't breathe. It wasn't comfortable." R. at 703. In addition to strangling her, J.J. also claimed that throughout the encounter, A1C Jones slammed her into the wall, slammed her into the couch cushion, slammed her into the mirror in the bathroom, and slammed her onto the bed. R. at 698, 703, 730, 755, 760. She alleged A1C Jones pulled her hair and shoved his fingers into her mouth, put his full weight—all 210 pounds worth—on her chest, and held her down by her arms. R. at 696, 698, 699, 710. J.J. testified that A1C Jones penetrated her with his fingers and his penis, without her consent. R. at 699, 700, 701, 702, 718, 735-36. But despite the violent, physical nature of this alleged assault, J.J. had no injuries related to the alleged strangling. R. at 757, 804, 808-09. She did not complain of any symptoms typically associated with being strangled. R. at 810-11. Nor did she have any external or internal injuries indicative of a sexual assault. R. at 804, 812. Notwithstanding being slammed into several hard surfaces, having her hair pulled, having A1C Jones's full weight on her chest, and having her arms held down by A1C Jones, J.J. did *not* have a *single* bruise, scratch, or mark of any kind. R. at 804,

807-09.

4. J.J.'s Claim that A1C Jones Ejaculated was not Supported by the Evidence.

Moreover, J.J.'s rendition of the alleged sexual assault was contradicted by the DNA evidence. At trial, she testified that A1C Jones had sexual intercourse with her "until he ejaculated inside of [her]," and told the SANE the same. R. at 702, 801, 811-12. She claimed she knew he ejaculated because "You can . . . you could tell." R. at 702. A1C Jones confirmed he and J.J. did not use condoms during sex, and that when he ejaculated, "[i]t's usually inside of her every single time[.]" R. at 873. But A1C Jones indicated that on this occasion he did *not* ejaculate, because J.J. "said stop, so [he] stopped." R. at 874-75. Even after AFOSI confronted A1C Jones—claiming that the DNA results indicated he ejaculated[14]—A1C Jones did not falter. He responded, "So, I don't know how it works, but I did not ejaculate in her." R. at 897.

The swabs taken from J.J.'s vagina—and the resulting DNA profile found on the swabs—corroborated A1C Jones's account of the night. The DNA found on J.J.'s vaginal swabs was a mixture of two individuals, J.J. and A1C Jones. R. at 831-32. In other words, his DNA was found inside her vagina. However, no sperm or seminal fluid was present in the sample. R. at 832. A1C Jones admitted to having engaged in digital penetration and sexual intercourse with J.J., but he denied ejaculating. R. at 869-70, 871, 872, 874. Despite having undergone a SAFE within hours of being sexually assaulted, the sample from J.J.'s vaginal swabs contained no sperm and the sample tested negative for the presence of seminal fluid. R. at 832. Dr. D.W., the Government's forensic biologist, indicated that she "[found] it unusual not to find any sperm in

[14] Special Agent B.G. clarified that AFOSI did not have J.J.'s DNA results at the time of A1C Jones's second interview. R. at 929. He acknowledged that AFOSI did not have any evidence demonstrating that A1C Jones ejaculated in J.J. at the time they confronted him, claiming to have such evidence. R. at 929.

the sample, if ejaculation, in fact, occurred." R. at 835. This is because if ejaculation had occurred in such a short timeframe, Dr. D.W. would typically find sperm. *Id*. While fresh ejaculate, usually contains "millions of sperm," Dr. D.W. did not find a single sperm in J.J.'s sample. R. at 837. Though J.J. claimed that A1C Jones ejaculated in her, this claim was refuted by the DNA evidence.

A1C Jones's convictions rest on J.J.'s description of the alleged sexual assault. J.J. could have claimed that A1C Jones penetrated her vulva with his fingers and penis without alleging that he ejaculated. If the members believed her account, A1C Jones would have still been convicted. However, her rendition of the assault was made more dramatic, and the violation she claimed to have suffered was made more severe, by her claim that A1C Jones ejaculated inside her. J.J. testified that A1C Jones's "continued until he ejaculated inside of [her]," but that "he actually kept going" afterwards, and that "During that time span, if [she] tried to stop, like pull [herself] away, like he would just like thrust harder against [her] or slam [her] into him." R. at 702. These facts are more compelling than simply claiming A1C Jones penetrated her vulva, and these facts help to paint A1C Jones as a violent, callous individual. During his closing argument, the trial counsel attempted to minimize J.J.'s testimony that A1C Jones ejaculated. R. at 965. The trial counsel claimed that proving that A1C Jones ejaculated was not an element of the offense and that "[i]t doesn't matter because the evidence supports that his fingers were inside of her and his penis went inside of her[.]" R. at 966. While the Government did not need to prove A1C Jones ejaculated, the members were instructed they needed to assess the credibility of the witnesses. R. at 955. The lack of forensic corroboration of J.J.'s ejaculation claim impeaches the credibility of her testimony on the whole, while bolstering A1C Jones' account of the incident.

While the lack of injuries and lack of DNA evidence supporting J.J.'s description of the

events in question should cause this Court to find A1C Jones's convictions legally and factually insufficient, J.J.'s testimony is also rife with other inconsistencies.

5. J.J.'s Inconsistencies Render her Testimony Insufficiently Credible.

At trial, J.J. testified that she was in the bathroom when A1C Jones came home. R. at 684. While discussing A1C Jones's return and being in the bathroom, J.J. stated she turned the voice memo recording function on her watch on. R. at 684, 764. According to J.J., A1C Jones confronted her while she was in the bathroom, and he "just kind of wouldn't let [her] leave the bathroom and kept asking [her] a million question." R. at 684. Thus, her trial testimony established that A1C Jones would not let J.J. *leave* the bathroom, as opposed to A1C Jones seeking to gain entrance to the bathroom or to her bedroom. In his interview with AFOSI, A1C Jones confirmed that J.J. was in the bathroom when he got home. R. at 865. However, the audio recording—again, which lacked any indicia that it actually captured the events of 28 March 2020—started with J.J. telling A1C Jones to "leave [her] doorknob alone." R. at 687; Pros. Ex. 3. After A1C Jones entered her room, J.J. told A1C Jones to "get out of my room." R. at 688; Pros. Ex. 3. Notably, J.J. is not heard asking A1C Jones to let her out of the bathroom or asking him to leave the bathroom.

When asked by the trial counsel to explain what was happening in the audio recording during the first six or seven minutes, J.J. explained that A1C Jones had taken her phone and locked himself in another room. R. at 686, 691. Even though J.J. claimed she was "kind of freaked out" by A1C Jones's behavior because "[h]e was probably the most aggressive he had been during [their] time living together," (R. at 686), she, nonetheless, tried to gain access to the locked room. R. at 691. Additionally, when asked about the argument on the audio recording—which revolved around Tinder—she characterized it as a "typical argument," (R. at 691), despite

having just claimed that A1C Jones's behavior was "the most aggressive" she had ever seen. R. at 686. Even though A1C Jones's behavior "kind of freaked [her] out," because of his aggressiveness, (R. at 686), J.J. had no difficulty antagonizing him when she told him she downloaded Tinder to "piss [him] off" and when she informed him that she was "so happy [her] pettiness worked." R. at 690.

Notably, in explaining what was happening in those first six or seven minutes of the first audio recording, J.J. made no mention of A1C Jones tampering with or removing any doorknobs. R. at 691. This is significant because the trial counsel later showed J.J. several photographs of her bedroom door and its doorknob. R. at 697; Pros. Ex. 2. J.J. explained that the photos depicted "[their] bedroom door where he took the doorknobs off to get to me." R. at 697; Pros. Ex. 2 at 1, 3, 4. The trial counsel asked these questions after he played the last few minutes of the *first* audio recording. R. at 696. At that point, J.J. had not described the alleged sexual assault, nor had the trial counsel played the *second* audio recording, which J.J. claimed captured events after the alleged sexual assault. R. at 696-97. As such, it is apparent that the J.J.'s timeline of events placed the removal of the doorknob prior to the alleged sexual assault. R. at 696-97. This chronology is further supported by the trial counsel's very next question after discussing the photos: "So, you get away from him at the end of that recording. You said you go into the living room?" R. at 697. After receiving J.J.'s affirmative response, the trial counsel stated, "[t]he recording stops at that point. Did you stop the recording?" R. at 697. After J.J. indicated she did not stop the recording, the trial counsel asked her to describe what happened next. R. at 698. J.J. then described the alleged sexual assault. R. at 698-702.

Notably, J.J. did not claim that any of the photos of the door or doorknob depicted in Prosecution Exhibit 2 came from the bathroom door. R. at 697. Their house only had one

standalone bathroom, rather than a bathroom in the master suite. R. at 740, 866; Def. Ex. B at 4. Yet, when later asked how many doorknobs A1C Jones removed that night, J.J. testified that he removed "the bathroom doorknob and then the bedroom doorknob. The *bedroom one* came off when I was on the phone with 911." R. at 775 (emphasis added). In contrast, J.J. told the SANE that she locked herself in the bathroom after the sexual assault, which is when she called 911. Pros. Ex. 10 at 4. To the SANE, she claimed that A1C Jones removed this doorknob—the bathroom doorknob—and then said he was going outside to wait for the police. *Id.*

J.J.'s testimony is internally inconsistent. In first describing the sequence of events and explaining the photographs, J.J. claimed that A1C Jones removed her bedroom doorknob to get to her *prior* to the alleged sexual assault. R. at 697; Pros. Ex. 2. Yet, on cross-examination, J.J. agreed that A1C Jones removed her doorknob *when she was calling 911*. R. at 763. After removing her bedroom doorknob, J.J. agreed that A1C Jones asked her what was wrong and if he could help her. R. at 763-64. Yet, to the SANE—within hours of the alleged sexual assault—J.J. claimed to have called 911 from the bathroom, *not* the bedroom, and she indicated that A1C Jones removed the *bathroom* doorknob. Pros. Ex. 10 at 4. During her trial testimony, J.J. later reiterated that A1C Jones removed her *bedroom* doorknob when she was calling 911. R. at 775. During his AFOSI interview, A1C Jones confirmed that he removed J.J.'s *bedroom* doorknob when she was calling 911 because he "didn't know what her thoughts and intentions were, if it were to harm herself or not, because she is on medication and I know that she's still my wife and I care about her." R. at 865-66. J.J.'s initial testimony regarding the doorknobs makes A1C Jones's behavior appear distinctly sinister. However, her later testimony concerning the timing of A1C Jones's removal of her bedroom doorknob during the 911 call (R. at 763, 775) was corroborated by A1C Jones. His removal of her bedroom doorknob was predicated on his

concerns about her welfare and mental health arising from her bipolar diagnosis. R. at 856-66; Def. Ex. A.

Furthermore, while J.J. claimed that A1C Jones tampered with the bathroom doorknob (R. at 775), it is unclear from her testimony *when* A1C Jones would have removed the bathroom doorknob. Additionally, J.J.'s testimony was conclusively rebutted by the evidence presented at trial. The investigators took photographs of A1C Jones and J.J.'s sole bathroom, and the bathroom doorknob can be seen reflected in the mirror. R. at 999 (A1C Jones's defense counsel arguing, "in this photo, when you line it up with the bathroom doors, this is the bathroom, and, in the mirror, reflected, is the doorknob."); Def. Ex. B at 4.

6. J.J.'s Claims of being Assaulted in the Bathroom were Rebutted by the Evidence.

Additionally, at trial, after mentioning she was in the bathroom when A1C Jones returned home, J.J. made no further mention of the bathroom or events in the bathroom, other than to state she went to the bathroom after the alleged sexual assault to clean up. R. at 686, 691, 696, 698-702, 705. However, during her AFOSI interview, the bathroom featured prominently in her description of the events leading up to the alleged sexual assault. During her interview with AFOSI, J.J. stated that everything began in the bathroom. R. at 926. During the alleged altercation, she told AFOSI that two incidents occurred in the bathroom in which A1C Jones pushed her against the bathroom counter or tossed her against the bathroom counter. R. at 928. In addition to AFOSI, J.J. also told the SANE that A1C Jones assaulted her in the bathroom. This is where he "pushed her hard into the bathroom counter and then grabbed her by her hair and pulled her neck back." Pros. Ex. 10 at 3.

J.J. informed TSgt S.P.—a Security Forces' first responder, who arrived within five minutes of her call to 911[15]—that "her husband pulled her into the bathroom, had her by the hair, and pushed her into the mirror, which was above the counter[.]" R. at 909. TSgt S.P. inspected the mirror and did not observe any smudges or marks on the mirror. R. at 909. He also looked at the cabinet and all the items on the counter were standing up, nothing had been knocked down. R. at 909. Despite failing to mention any altercation in the bathroom during her direct examination, on cross-examination, J.J. stated that A1C Jones did, in fact, slam her into the bathroom mirror. R. at 755. She also claimed she cleaned up the bathroom prior to Security Forces' arrival. R. at 754, 756. J.J. did not, at any point, tell TSgt S.P. that she had cleaned up the bathroom after A1C Jones assaulted her, but prior to TSgt S.P.'s arrival. R. at 912. J.J. also acknowledged she did not tell AFOSI, or the defense counsel during her pre-trial interview, that she cleaned up the sink, but did admit that she had listened to arguments during a pre-trial motions hearing relating to the bathroom and how nothing was amiss in the bathroom. R. at 754, 756. The fact that J.J. omitted all reference to being assaulted in the bathroom at trial significantly undermines her credibility. She was aware that evidence did not corroborate her claims, and when confronted, she claimed that, despite being "very emotional, very freaked out," she had the presence of mind to clean up the bathroom so that not a single thing was out of place in the five minutes between calling 911 and Security Forces' arrival. R. at 754, 756, 771. This is simply not credible.

Additionally, J.J.'s description of the alleged sexual assault is not credible. She testified that A1C Jones was wearing jeans, a t-shirt, and boots. R. at 698. She claimed A1C Jones "sat down on top of [her] to where like his butt was on [her] chest basically." R. at 698. Despite his limited flexibility due to wearing jeans, and his limited mobility due to his position—sitting on

[15] R. at 771.

her chest—A1C Jones was somehow able to completely remove J.J.'s leggings, insert his fingers into her vagina, and perform oral sex on her all while she struggled to get away from him the entire time. R. at 698-699, 700.

In contrast, A1C Jones's version of events is much more credible. He told AFOSI that he and J.J. first began kissing before he reached into her pants, then removed her leggings with both hands and briefly performed oral sex. R. at 869, 871-72. A1C Jones did not describe having to contort his body to be able to perform oral sex. Instead, he indicated he touched J.J. and performed oral sex on her with her consent. R. at 872. Since J.J. was already aroused, they then began having consensual sex. R. at 872. A1C Jones described having sex with J.J. in one position before they switched to another "a minute 30" later, before J.J. told him to stop. R. at 874. A1C Jones believed J.J. told him to stop because "she was regretting the decision she made and she thought [he] was going to get the wrong intentions of that she was going to stay instead of leave, because she plans on leaving." *Id*. A1C Jones did not ejaculate because J.J. "said stop, so [he] stopped." R. at 875. As discussed earlier, the DNA evidence is consistent with A1C Jones's version of events—namely, that they had sex only a short time and he did not ejaculate—and contradicts J.J.'s claim that A1C Jones ejaculated during the sexual assault. R. at 702.

Despite not knowing that J.J. was recording him, the second audio recording captured A1C Jones's response to J.J.'s claim that he "just fucking basically raped [her][.]"[16] A1C Jones's response was entirely consistent with his statements to AFOSI: if J.J. told him she did not want to have sex, they would not have sex, or if she told him to stop, then he would stop. R. at 863, 864. Following her claim that he raped her, A1C Jones replied, "No, I didn't." R. at 719. When she reiterated her claim, A1C Jones responded, "No, I did not. I did not rape you. If I raped you

[16] R. at 719; Pros. Ex. 4.

-- if I would have raped you, I would still go, but I'm not that type of person." *Id*.

7. J.J.'s Destruction of Evidence and Interference with Witnesses Renders her Insufficiently Credible.

Initially, J.J. testified that after the sexual assault when A1C Jones left her room, she texted a friend of hers, I.A. R. at 722. However, on cross-examination, J.J. indicated that she was still locked out of her phone for 15 minutes following A1C Jones's departure. R. at 762. She made no mention of having sent a text message to I.A. Instead, she claimed she was staring at her phone, waiting for it to unlock. R. at 762. During cross-examination, J.J. admitted she had deleted all her text messages with I.A. from that timeframe. R. at 770. Thus, not only did J.J. delete relevant evidence from the night of the alleged assault, but she also acknowledged she had contacted several potential witnesses in A1C Jones's case. R. at 768-69. She warned these potential witnesses that A1C Jones's defense counsel may be contacting them, and she told them they did not need to talk to his defense counsel if they did not want to. R. at 769. One of these potential witnesses, I.A., was the very friend that J.J. claimed she text after A1C Jones left her room the night of the alleged sexual assault. R. at 722, 769. It defies logic that a sexual assault victim seeking justice would purposely delete evidence and discourage witnesses from sharing information with defense counsel.

For the aforementioned reasons, A1C Jones's sexual assault convictions are legally and factually insufficient. To convict A1C Jones of sexual assault, the members were required to ignore, or disregard, the following:

1. J.J. purported to have audio recordings from the night of the alleged sexual assault. The Government failed to provide any forensic evidence for these audio recordings. Notably, these audio recordings fail to account for more than two hours of the night, and they do not contain a recording of the alleged sexual assault.

2. For several months prior to the alleged sexual assault, J.J. and A1C Jones would have "angry sex" following arguments. They also had consensual sex at least twice after J.J. told A1C Jones she wanted a divorce.

3. Despite describing a violent physical and sexual assault, J.J.'s body was virtually untouched: she had not a single mark, scratch, or bruise.

4. J.J. claimed that A1C Jones ejaculated inside of her, but the DNA evidence refuted this claim. Although fresh ejaculate contains "millions of sperm," J.J.'s sample did *not* contain a single sperm.

5. J.J.'s story regarding the removal of the doorknobs was internally inconsistent and was rebutted by the evidence. *See* Def. Ex. B at 4.

6. J.J.'s claim of being assaulted in the bathroom was not supported by the evidence. After learning (during the pretrial motions hearing) that her story was not supported by the evidence, J.J. changed her story to fit the evidence.

7. J.J.'s description of the alleged sexual assault was not credible and required A1C Jones to contort his body in a manner which was not believable.

8. A1C Jones's description of the night was supported by the evidence, particularly the DNA evidence demonstrating he did not ejaculate inside of J.J. because when she told him to stop, he stopped.

9. J.J., the alleged victim, destroyed evidence from the alleged timeframe and interfered with A1C Jones's ability to contact potential witnesses.

While several of these facts alone should have resulted in a finding of not guilty, in combination, these facts would lead a rational fact finder to conclude the Government did *not* prove its case beyond a reasonable doubt.

WHEREFORE, A1C Jones respectfully requests this Court set aside the findings for Specifications I and II of Charge I and the sentence.

III.

A1C JONES'S CONVICTION FOR WRONGFUL DISTRIBUTION OF INTIMATE VISUAL IMAGES IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *Knarr*, 80 M.J. at 528 (citing *Washington*, 57 M.J. at 399).

Additional Facts

J.J. testified that she found a Snapchat conversation on A1C Jones's phone in which he sent photos of her to another woman, M.K. R. at 676; Pros. Ex. 1. The photos A1C Jones sent were intimate photos, as J.J. was wearing underwear but nothing else. R. at 678. Two of the photos did not contain J.J.'s face, while one photo showed her mouth and nose, but not the top of her face. Pros. Ex. 1. J.J. was not readily identifiable from the photos themselves, though J.J. testified that she took the photos, recognized her tattoos, and knew the photos were of her. R. at 679. M.K. also indicated that the photos were of J.J because M.K. could tell from the half of her face visible in the first photo. R. at 848. J.J. took and sent the photos while A1C Jones was at tech school; she was approximately 23 years old at the time she took the pictures. R. at 678. When she sent A1C Jones the photos, she told him not to share them with anyone. R. at 679.

J.J. explained that M.K. was a military member who had attended tech school with A1C Jones, and that she and A1C Jones were in "the same little group of friends always hanging out together." R. at 676-77, 680. When she found A1C Jones' conversation with M.K. on his phone, J.J. grew very upset. R. at 678. She confronted A1C Jones about his sharing of the photos. R. at 680. He initially claimed he did not know what she was talking about, but after seeing the photos, he said, "it wasn't what it looked like." R. at 680. J.J. also confronted M.K. about the

photos. R. at 849. M.K. testified that J.J. was upset and she accused M.K. of cheating with A1C Jones. R. at 849, 853. M.K. assured J.J. that M.K. had not cheated with A1C Jones. R. at 853. When she discussed the photos with the AFOSI, J.J. mentioned that once or twice she had asked A1C Jones if he ever thought about threesomes. R. at 749, 751. J.J. thought he sent the photos because he was "young and stupid," and he believed that J.J. wanted to have a threesome. R. at 752. After confronting M.K. about the photos, J.J. invited M.K. to go hiking and they spent several hours together one-on-one time. R. at 752-53; 849. J.J. indicated she took the comments M.K. made as "a compliment," though she maintained M.K. should have never been sent the photos. R. at 775.

A1C Jones admitted to AFOSI that he sent images of J.J. to another woman. R. at 894. He told them he believed J.J. might be interested in having a threesome based on a conversation they had had. *Id*. A1C Jones sent the images of J.J. to this woman to gauge her interest in a possible threesome. *Id.* Specifically, he sent the photos because he "[he] thought that's what my wife wanted"; in other words, he thought J.J. wanted a threesome and he was trying to make it happen. *Id*. These photos were sent during a conversation in which A1C Jones and M.K. talked about J.J. sexually. R. at 676. It is apparent from his conversation that M.K. found the pictures of J.J. arousing. Pros. Ex. 1. During their conversation, M.K. called J.J. "a goddess," and at one point, M.J. indicated her interest in having sex with J.J. Pros. Ex. 1.

Law[17]

1. The Elements of Wrongful Distribution of Intimate Visual Images

To sustain a conviction for wrongful distribution of intimate visual images (the Specification of Charge III), in violation of Article 117a, UCMJ, the Government was required to prove beyond a reasonable doubt:

> (1) [o]n or about 24 January 2019, at or near Joint Base McGuire-Dix-Lakehurst, New Jersey, the accused knowingly and wrongfully distributed intimate visual image[s] . . . of [J.J.];
>
> (2) two, that [J.J.] was at least 18 years of age when the visual images were created;
>
> (3) three, that [J.J.] is identifiable from the visual images or from information displayed in connection with the visual images;
>
> (4) four, that [J.J.] did not explicitly consent to the distribution of the visual images;
>
> (5) five, that, that the accused knew, or reasonably should have known, that the visual images were made under circumstances in which [J.J.] retained a reasonable expectation of privacy regarding any distribution of the visual images;
>
> (6) six, that the accused knew, or reasonably should have known, that the distribution of the visual images was likely to cause emotional distress for [J.J.]; and,
>
> (7) seven, that the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

R. at 949. *See* 2019 *MCM*, Appendix 2, Article 117a, UCMJ.

The members were advised that the words and phrases in Article 117a, UCJM, had been defined in the following manner:

> One, an act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly."
>
> "Wrongfully" means without legal justification or excuse.

[17] A1C Jones incorporates the law section from Issue II, *supra*.

> The term "distribute" means to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means.
>
> The term "visual image" means the following: any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format; or, any digital or electronic data capable of conversion into a visual image.
>
> The term "intimate visual image" means a visual image that depicts a private area of a person.
>
> The term "private area" means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.
>
> The term "reasonable expectation of privacy" means circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public.

R. at 949-50. The members were not provided any further definitions concerning this offense. *See id*. Additionally, they were instructed that for this offense specific knowledge elements were required. They were told:

> One, you must be satisfied, beyond a reasonable doubt that the accused knew or reasonably should have known that his distribution of intimate visual images was likely to cause [J.J.] emotional distress; and, two, you must be satisfied, beyond a reasonable doubt, that the accused knew or reasonably should have known that the visual images were made under circumstances in which [J.J.] retained a reasonable expectation of privacy.

R. at 951-52.

The term "emotional distress" is not defined in the statute, nor is the phrase "reasonably direct and palpable." The Merriam-Webster Legal dictionary provides the following definition of "emotional distress": "a highly unpleasant emotional reaction (as anguish, humiliation, or fury) which results from another's conduct and for which damages may be sought."[18] While the text of

[18] "Emotional distress." Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/emotional%20distress. Accessed 17 Jan. 2023.

Article 117a, UCMJ, does not provide a definition of the phrase "a reasonably direct and palpable connection to a miliary mission or miliary environment," this phrase has now been defined in Executive Order 14,062. This phrase is defined in the following manner:

> The connection between the conduct and a miliary mission or military environment is contextually oriented and cannot be evinced by conduct that is connected only in a remote or indirect sense. To constitute an offense under the UCMJ, the conduct must have a measurably divisive effect on unit or organization discipline, morale, or cohesion, or must be clearly detrimental to the authority or stature of or respect toward a Servicemember.

Executive Order 14,062, 87 Fed. Reg. 4763, 4768 (31 Jan. 2022).

Additionally, the phrase "reasonably direct and palpable" appears in the explanation of offenses to the prejudice of good order and discipline under Article 134, UCMJ. Specifically, the explanation provides:

> To the prejudice of good order and discipline refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial *only in a remote or indirect sense*. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article *does not include these distant effects*. It is confined to cases in which the prejudice is *reasonably direct and palpable*.

2019 *MCM*, pt. IV. 91.c.(2)(a) (emphasis added).

The CAAF has addressed the existence of a direct and palpable connection to the military mission or environment in the context of whether an appellant's speech satisfied the elements of communicating a threat. *United States v. Rapert*, 75 M.J. 164, 171 (C.A.A.F. 2016). In discussing the connection required, the CAAF stated "this connection is contextually oriented, and cannot be evidenced by speech that is 'prejudicial only in a remote or indirect sense.'" *Id*. (internal citations omitted). In determining whether the required connection was present, the CAAF emphasized that the speech at issue had been made on Election Day 2012 regarding the President of the United States. *Id*. As a result, the CAAF found that the appellant's speech "unquestionably undermines

the military's unique interest in ensuring obedience to the chain of command, and also undermines the military's unique responsibility to maintain an effective fighting force during a war. '[T]o accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and esprit de corps.'" *Id*. (citation omitted, alterations in original). Moreover, the appellant's speech had failed to demonstrate "respect for the principle of civilian supremacy." *Id*. The CAAF concluded that "[i]t is patently evident that Appellant's speech runs directly counter to the ethos of the United States armed forces," and, as such, his statements were "directly linked to the military mission and environment." *Id*. at 171-72.

In *United States v. Hiser*, 82 M.J. 60, 67 (C.A.A.F. 2022), the CAAF considered whether the appellant's guilty plea to wrongful broadcast of intimate visual images was provident. The appellant had posted videos of himself and his then-wife, SPC V.G., to a pornography website. The three videos depicted appellant's penis penetrating SPC V.G.s vagina from behind, and appellant captioned each video with an expletive and the phrase "my wife." *Id*. at 63. In conducting its review, the CAAF highlighted the difference between its legal sufficiency review of litigated findings and its review of a guilty plea, noting that in performing the latter review, the CAAF's task is "only to determine from any stipulated facts and from the providence inquiry whether the military judge abused his or her discretion in complying with this rule." *Id*. at 66. The CAAF found that "a 'connection' may be established if . . . a servicemember is 'put in contact' with the images[.]" *Id*. In determining that a "direct and palpable connection to a . . . military environment" had been established, the CAAF focused on the following stipulated facts:

(1) The images were of SPC V.G., who was "a member of the military and she actually did find the videos."

(2) Appellant's purpose in posting the videos was "to embarrass SPC V.G., and [he] recognized that other members of her command could see them and think

'this is degrading to the U.S. military that Soldiers are uploading this kind of behavior and their intimate lives on to social media or the internet."

(3) "[T]here was a negative impact on the military community at Fort Drum."

(4) "SPC V.G. was (according to the stipulated facts) 'likely' to suffer 'emotional distress'" because of the broadcasting of the videos."

Id. at 67.

Analysis

A1C Jones's conviction for wrongful distribution of intimate visual images is legally and factually insufficient. While the Government presented evidence relating to the first five elements, the Government failed to provide sufficient evidence to satisfy elements six and seven. Through testimony and evidence, the Government proved that A1C Jones sent intimate visual images of J.J. to M.K. R. at 676, 678, 894; Pros. Ex. 1. The Government also presented evidence that J.J. was at least 18 years of age when she took the photos, she did not explicitly consent to A1C Jones sending M.K. the photos, and she had a reasonable expectation of privacy regarding the distribution of her photos. R. at 678, 679, 894. While J.J. is not readily identifiable from the photos themselves, J.J. and M.K. both identified J.J. as being the subject of the images. R. at 679, 848. Additionally, A1C Jones refers to his wife during his conversation with M.K. Pros. Ex. 1. This evidence appears to be sufficient. *See Hiser*, 82 M.J. at 65 (finding that SPC V.G. was identifiable because she "actually recognized herself" and because "SPC V.G. was identifiable from a combination of the visual images in the videos and the information displayed in connection with the videos."). However, fatal to the sufficiency of this specification, the Government failed to prove beyond a reasonable doubt that A1C Jones "knew, or reasonably should have known" that his distribution of the images to M.K. was "likely to cause emotional distress for [J.J.]." R. at 949. The Government also failed to prove beyond a reasonable doubt that "[A1C Jones's] conduct,

under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment." *Id*.

While J.J. testified that she was very upset after seeing the conversation between A1C Jones and M.K., (R. at 678), when she confronted M.K., J.J. accused M.K. of cheating with A1C Jones. R. at 853. Therefore, it is unclear whether: (1) J.J. was upset about the sharing of the pictures; (2) J.J. was upset that she believed that A1C Jones was cheating on her; or (3) J.J. was upset about the sharing of the pictures *and* her belief that A1C Jones was cheating on her. Her belief that A1C Jones was cheating on her was of concern to her throughout their marriage. R. at 741. Significantly, during her testimony, J.J. omitted that she accused M.K. of cheating with A1C Jones when she confronted her. *Compare* R. at 676-80 *with* R. at 853. Moreover, the phrase "emotional distress" was never defined for the members. "Very upset" does not seem to as if it would qualify as "anguish, humiliation, or fury;" the terms used to define "emotional distress" in the Merriam-Webster.com Legal Dictionary. While a person could be "very upset," following an argument, being "very upset" after an argument does not to be the same as suffering "emotional distress."

Additionally, according to A1C Jones, he sent the photos to M.K. after having a conversation with J.J. about threesomes. R. at 894. During his interview with AFOSI, A1C Jones never stated he had ill intent when he sent the images of J.J. to M.K. R. at 894. Instead, he claimed that he thought his actions were in line with what his wife wanted. R. at 894. He admitted that there had been a breakdown in communication, as "the communication failed at that point between me and my wife." R. at 894. J.J. confirmed that she had, in fact, initiated a conversation with A1C Jones about threesomes, and she thought his actions showed he was "young and stupid" and he "kind of blew [the conversation] up" and "it turned into this whole big thing." R. at 752.

While J.J. may have been very upset when she saw her images, her testimony demonstrates she did not attribute nefarious motives to A1C Jones's actions. Instead, she considered his actions "young and stupid." R. at 752. She did not indicate any belief that A1C Jones sent these pictures to cause her emotional distress, and she even took the comments M.K. made as "a compliment[.]" R. at 775. Furthermore, M.K.'s testimony revealed an additional reason why J.J. would have been upset when J.J. read their conversation: J.J. believed that M.K. and A1C Jones were having an affair, and she accused M.K. of cheating with A1C Jones. R. at 853. Even drawing every reasonable inference from the record in favor of the prosecution, the Government failed to prove that A1C Jones "knew or reasonably should have known" that distributing the images of J.J. to M.K. would cause J.J. emotional distress.

The Government also failed to prove beyond a reasonable doubt that "[A1C Jones's] conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment." R. at 949. During his closing argument, the trial counsel told the members, "I'm not going to talk about the military mission. I'm going to focus on the military environment. Tech Sergeant [M.K.] and the accused both went to tech school together. They were both active duty. [J.J.] is married to an active-duty military member; that is their environment. . . Of course it has a reasonably direct and palpable connection to the environment that the military has . . . It's absolutely directly connected." R. at 976. As is evident from his closing argument, the trial counsel did not feel that the Government has presented evidence demonstrating a connection to the military mission. R. at 976. While the factfinder was not constrained by the Government's closing argument, the Government presented no facts connecting A1C Jones's conduct to the military mission. Thus, this connection—as conceded by the Government—did not exist.

Additionally, despite the trial counsel's argument to the contrary, the Government also failed to prove that A1C Jones's conduct had a "reasonably direct and palpable connection to a . . . military environment." Notably, during her testimony, J.J. never referred to M.K. in relation to her rank. R. at 676, 677, 678, 767. It was the Government who referred to M.K. by her rank and inquired into her status as a military member. R. at 676, 677, 679. Nor was M.K. identified by rank in A1C Jones's messages to her. Pros. Ex. 1. During her direct examination, J.J. testified that A1C Jones and M.K. "hung out in the same circle," and "it was always like the same little group of friends always hanging out together." R. at 680. While A1C Jones and M.K. went to tech school together, by the time A1C Jones sent these photos, the two were no longer in tech school. No evidence was presented that A1C Jones sent the photos to M.K. because of any tech school connection. Furthermore, while M.K. was in the military at the time A1C Jones sent her J.J.'s photos, the evidence demonstrated that her military status played little to no role in why A1C Jones sent her J.J.'s photos. M.K. did not testify that A1C Jones sent her J.J.'s images because of her military status, or that he asked her to discuss J.J.'s intimate photos with anyone in the military. R. at 847-50. Notably, A1C Jones explicitly told M.K. *not* to discuss J.J.'s images with anyone else, and M.K. agreed. R. at 848; Pros. Ex. 1. What the evidence in fact demonstrated was that A1C Jones sent M.K. these photos because they were good friends (R. at 680), and he was seeking to gauge her interest in having a threesome with him and J.J. R. at 894. Significantly, M.K.'s comments demonstrated she found J.J.'s images arousing, and she even went so far as to state she was interested in having sex with J.J. Pros. Ex. 1.

At the outset, *Hiser* is distinguishable from A1C Jones's case, as *Hiser* involved a guilty plea. As the CAAF noted, its review of a guilty plea is very different from its review of litigated findings. 82 M.J. 66. However, regardless of this significant procedural difference, in *Hiser*, the

CAAF found that the stipulated facts established "a direct and palpable connection to a . . . military environment." 82 M.J. at 67. And the type of facts that the CAAF found persuasive are entirely absent from A1C Jones's case. As opposed to *Hiser*, as discussed *supra*, the Government failed to present any evidence that A1C Jones "knew or reasonably should have known" that sending M.K. J.J.'s images would cause J.J. emotional distress within the context of their prior discussions of having a threesome. Unlike the facts of *Hiser,* J.J. was not a military member herself. Therefore, the distribution of J.J. photos had no effect on *her* status in the military, as she was *not* a member of the military. *See* 82 M.J. at 67. In contrast to *Hiser*, the Government did not admit any evidence or call any witnesses to prove that A1C Jones's leadership, unit, or the military community was aware of his actions, or had been impacted in any way by his conduct. *Id*. While J.J. testified she told a friend about seeing the images (R. at 680), she did not specify who this friend was (*id*.), or whether this friend had any connection to the military environment. Nor did the Government call this friend. During her testimony, J.J. never claimed she made A1C Jones's command aware of his conduct. R. at 675-680. Thus, as the Defense argued in closing, "[A1C Jones's] [l]eadership did not know. The unit didn't know. There was no paperwork. It wasn't brought up, no. No one knew about it until [J.J.] called 9-1-1, [and] talked to OSI[.] . . . So, a year, over a year, a year and some months later, no one knows about it. Clearly, there's no direct and palpable connection." R. at 1004.

The military judge did not provide the members with any specific definition of what constituted "a reasonably direct and palpable connection to a military mission or military environment." R. at 949-50. However, the phrase "reasonably direct and palpable" is defined in Article 134, UCMJ. Moreover, the CAAF previously explained that "this connection is contextually oriented," and it is not sufficient for an appellant's conduct to be connected "only in

a remote or indirect sense." *Rapert*, 75 M.J. at 171. In analyzing this issue, the CAAF explained how the appellant's conduct—the speech at issue—was "directly linked to the military mission and environment." *Id*. at 172. The CAAF concluded that his speech undermined obedience to the chain of command and the military's accomplishment of the mission. *Id*. at 171. In contrast, while the link was "patently evident" in *Rapert*, any link in A1C Jones's case is, at best, "only [] remote or indirect[.]" *Id*. at 171. To allow the Government to prove "a reasonably direct and palpable connection to a . . . military environment," merely because A1C Jones was a military member,[19] M.K. was a military member, and J.J. was the spouse of a military member (R. at 976), makes this element surplusage. "The canon against surplusage requires that, '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.'" *United States v. Page*, 80 M.J. 760, 765 (N.M. Corps. Ct. Crim. App. 2021) (quoting *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017)). The Government was required to prove A1C Jones's conduct had "a reasonably direct and palpable connection to a . . . military environment." The Government failed to do so. This element is not surplusage. The language of this element and the CAAF's interpretation of this language must be given effect. As a result, even drawing every reasonable inference from the record in favor of the prosecution, the Government failed to prove this element beyond a reasonable doubt.

WHEREFORE, A1C Jones respectfully requests this Court set aside the findings for Charge III and its specification and the sentence.

[19] Notably, the military would not have had jurisdiction to court-martial A1C Jones if he was not a servicemember. As such, his military status should be given little weight in the calculus of whether the Government has proven a "direct and palpable connection to a . . . military environment."

IV.

THE MILITARY JUDGE ERRED IN FAILING TO EXCUSE LT COL E.W. FOR IMPLIED BIAS.

Standard of Review

A military judge's ruling on a challenge for cause involving actual bias is reviewed for an abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). "This reflects, among other things, the importance of demeanor in evaluating the credibility of a member's answers during voir dire." *Id.* In contrast, challenges based on implied bias "are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *Id.* In cases involving challenges for implied bias, a military judge's ruling is given less deference because the standard is objective. *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003).

Additional Facts

In attempting to sit a panel for A1C Jones's court-martial, the parties twice busted quorum. R. at 340, 495. After the number of members initially fell below quorum, a second group of officers and enlisted members was assembled. R. at 356. The judge asked the members whether they had "anything of either a personal or professional nature that would cause [the members] to be unable to give [their] full attention to the proceedings throughout the trial?" R. at 370. The military judge prefaced this statement, indicating "I recognize that it's Friday afternoon. And there is a distinct possibility that we will be in trial for most of Saturday, at least a good portion of Sunday, and into Monday." R. at 370. Lt Col E.W., a member of this second panel of members,[20] indicated he had a personal or professional commitment that would render him unable to give his full attention to the proceedings throughout the trial. R. at 370. He also indicated that he believed

[20] R. at 355.

a finding of not guilty for a sexual assault or physical assault charge would reflect negatively on the military. R. at 388. When asked whether he had any strong feelings about cheating in a marriage that may impact his ability to be fair in deciding this case, he indicated he would like to talk about this one-on-one. R. at 389. He had a similar response when asked whether he had any moral, ethical, or religious feelings about consensual threesomes which may impact his ability to be fair in deciding A1C Jones's case. R. at 389-90.

During individual voir dire, Lt Col E.W. testified that he had baseball tickets for a 4:00 pm game that Saturday, and he had extended family coming into town for the game. R. at 396. He indicated that he could likely make the game if he was released by 1400 on Saturday, though his wife "wouldn't be super happy to take the five kids down that direction herself, but she'd be going with family being there to help her going to the hotel[.]" R. at 396. When asked, he indicated that Sunday was "significantly more flexible than Saturday would be for me. Again, just to emphasize, I'll -- wearing the uniform, I'll do what I'm told to do." R. at 396.

In response to several follow-up questions from A1C Jones's defense counsel, Lt E.W. explained that the plans to attend the game were made a month or two prior. R. at 401. His sister-in-law and her family, his brother-in-law's two parents, his wife's parents and her sister, his wife's uncle and aunt from Cincinnati, and Lt Col E.W.'s wife, their five kids, and Lt Col E.W. were planning on attending the game. R. at 401. Overall, 17 or so people including himself were set to attend the game. R. at 401. Lt Col E.W. noted that his family was coming in for the game and they would all be departing on Sunday. R. at 401. On Sunday, the family had planned on attending the basilica downtown in Philadelphia for Sunday service, though, Lt Col E.W. stated that Sunday church service "[could] be worked around." R. at 401. He and his extended family were all planning on staying off-base, at the Casino Hotel, which is right next to the Philly stadium." R. at

402. Lt Col E.W. had "never been there before, so . . ." R. at 402.

When the trial counsel asked Lt Col E.W. about his answer concerning whether a finding of not guilty would reflect negatively on the military, Lt Col E.W. explained that the way he sees it, those outside the military "forget that we do have bad eggs who do come into our ranks," thus, they believe sexual assault "should never happen it the military, and therefore, if it does, it should be an automatic guilty. I think that's a negative light that's put on the military." R. at 399. He went on to note that from an outside, external perspective, "I think there's negative light to whenever a negative sexual assault -- a not guilty verdict is given in a sexual assault." R. at 399. Lt Col E.W. agreed that this was his personal view and he had adopted this view as his own. R. at 399. However, he clarified that he did not believe that there should be an automatic guilty because there had been an allegation. R. at 399. He noted that by "external," he meant Congress and Congress's decision to crack down on sexual assaults. R. at 400.

After inquiring about Lt Col E.W.'s weekend plans, A1C Jones's defense counsel pivoted to follow-up questions concerning Lt Col E.W.'s views on cheating and threesomes. R. at 402. She asked Lt Col E.W. to elaborate on his thoughts on cheating in a marriage. *Id*. Lt Col E.W. responded, "I believe, you know, marriage between a man and woman is sacred, and cheating can vastly impact that relationship in a negative way." *Id*. He then inquired, "What more do you need or do you desire to know on that?" *Id*. In response, the defense counsel noted that his feelings seemed to specifically regard cheating in a marriage, and she asked if he had anything to add, or additional thoughts. *Id*. Lt Col E.W. replied, "Not particularly, no." *Id*. When asked to explain his feelings on threesomes, Lt Col E.W. clarified that "a consensual threesome to me is -- in the marriage vows is not -- is cheating in and of itself." *Id*. The defense counsel followed-up by asking, "So it's not okay?" *Id*. Lt Col E.W. responded, "Correct." R. at 403. Lt Col E.W.

acknowledged to both the defense counsel and the trial counsel that he had "strong feelings" concerning cheating and threesomes. R. at 402, 403. In response to a question from the trial counsel, Lt Col E.W. stated that despite his strong feelings, he could be objective during A1C Jones's court-martial. R. at 403.

A1C Jones's defense counsel challenged Lt Col E.W. for cause based upon implied bias. R. at 474. She argued:

> [Lt Col E.W.] has clearly strong feelings about cheating and how it impacts the marriage. He described marriage as sacred. And he clearly feels strongly that cheating has a negative impact, that additionally tied into threesomes, in his view, is still cheating. Obviously, it negatively impacts the marriage.
>
> Additionally, when asked about sexual assault being an issue in the military ranks, he stated, quote, "There are bad eggs in ranks of the military."
>
> He also stated that there would be a negative light on the military if there were a finding of not guilty in this case. . .
>
> For those reasons, the defense feels that an outside member looking in would not be free from substantial doubt as to the legality, fairness, and impartiality of this court-martial, and with the liberal grant mandate, we request that he be stricken for cause.

R. at 474-75.

When later asked if she had anything to add, the defense counsel replied:

> Your honor, the only thing to add would be given that the member has plans for this weekend and does have a baseball game going on, a large number of family members are coming in this weekend for, that presents that may be in the back of his mind as he's sitting and listening to the evidence and testimony and may break his focus from the facts in the case at hand as well.

R. at 476.

After hearing from the trial counsel, the military judge denied the Defense's challenge for cause for Lt Col E.W. R. at 476. The military judge stated:

> So I have considered the challenge -- the defense challenge for cause under both actual and implied bias theories, and I am aware of the duty to liberally grant

> defense challenges. However, Lieutenant Colonel [E.W.] was very clear in his ability. I think he even said, "I wear the uniform. I will be wherever you tell me to be." He was questioned -- he was questioned ad nauseam about his positions.
>
> He actually clarified, to the Court's questions, about what he meant by when he said the negative reflection is that it was a congressional mandate and that Congress is constantly looking.
>
> He also stated that he could -- that he would weigh this case on the facts of the case alone and was, I think, very candid about his feelings, and for those reasons, your challenge for cause is denied.

R. at 476-77.

After the military judge denied the Defense's challenge to Lt Col E.W., the Defense challenged another member, Lt Col J.J. for implied bias. R. at 477. The military judge denied the Defense's challenge for cause relating to Lt Col J.J. as well. R. at 480. Later, the Defense exercised its peremptory challenge on Lt Col J.J. R. at 491. Lt Col E.W. remained on A1C Jones's panel as its president. R. at 666, 932.

Law

In order to ensure an accused's constitutional and regulatory right to a fair and impartial panel, *Downing*, 56 M.J. at 421, the *MCM* provides that a member must be excused for cause from sitting on a panel whenever it appears that the member "[s]hould not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "Recognizing that the convening authority appoints the members of the court-martial and each party has only a single peremptory challenge, [this Court] has enjoined military judges to be liberal in granting challenges for cause." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998) (citations omitted). The "liberal grant mandate" instructs military judges to grant challenges for cause "when most people in the same position [as the challenged panel member] would be prejudiced." *Id.*

The test for implied bias is objective, analyzing whether "in the eyes of the public, the challenged member's circumstances do injury to the perception of appearance of fairness in the military justice system." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) ("Courts give less deference to the military judge because their position at trial is less important due to the test's objectivity.") (citations omitted). "[T]his test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015).

The discussion to R.C.M. 912(f)(1)(N) provides several examples of grounds which may give rise to a challenge for cause under an implied bias analysis. These examples include that the member "has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has as inelastic opinion concerning an appropriate sentence of the offenses charged." R.C.M. 912(f)(1)(N), *Discussion*. A challenge for cause on the basis of implied bias is analyzed based on the totality of the circumstances in that case. *Peters*, 74 M.J. at 34.

Analysis

The military judge erred when she failed to excuse Lt Col E.W. for implied bias. As noted previously, a member may be challenged when the member's presence on an accused's panel raises "substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Here, at the outset, Lt Col E.W. indicated that he had a personal or professional commitment that would cause him to be unable to give his full attention to the proceedings throughout the trial. R. at 370. In delving into this commitment, the parties learned that Lt Col E.W., his immediate family, and extended family—numbering 17 individuals in total—were scheduled to attend a baseball game

that Saturday at 4 pm. R. at 401. The outing had been planned for more than a month, and Lt Col E.W. noted that his extended family would only be in town for the game and would be dispersing on Sunday after the family attended the basilica in downtown Philadelphia. *Id*. Lt Col E.W. expressed his view that his wife would not be "super happy" to have to wrangle their five kids up to go to the game, and he stated he and his extended family were staying at the Casino Hotel, specifically noting he had never stayed there before. R. at 402. While Lt Col E.W. stated he would be where he was told to be, it is apparent that this commitment was more than just typical weekend plans or a simple sporting event—it was a planned, extended family event. Notably, Lt Col E.W. was not detailed to A1C Jones's court-martial until 13 August 2021. ROT, Vol. 2, Special Order A-26, dated 13 August 2021. Therefore, he would have had no reason to believe he would be unable to attend an event he coordinated a month prior.

In addition to this personal commitment effecting his ability to give his full attention to the proceedings, Lt Col E.W. also espoused "strong feelings" concerning cheating and threesomes. R. at 402. He testified that "marriage between a man and woman is sacred, and cheating can vastly impact that relationship in a negative way." R. at 402. Moreover, he expressed "strong feelings" when asked about a consensual threesome because "a consensual threesome is . . . cheating in and of itself." R. at 402-03. Cheating was an important theme throughout A1C Jones's court-martial. J.J.'s belief that A1C Jones was cheating on her played a significant role in their marriage, and it was a driving force behind her decision to tell A1C Jones she wanted a divorce. R. at 681, 740-42. During his AFOSI interview, A1C Jones noted that "it's been a year she just kept accusing [him] of cheating and cheating and cheating[.]" R. at 860. A1C Jones told AFOSI that, on 28 March 2020, after hearing him on the phone, J.J. accused him of cheating on her again and then she called 911 to report the alleged sexual assault. R. at 876, 897.

Both the Government and the Defense focused on this purported cheating during their closing arguments. The Government argued that J.J. had no motive to fabricate because she had decided to end their relationship. R. at 959, 960, 986. The Defense highlighted J.J.'s "obsession with Airman Jones and him cheating," arguing that her jealously provided her a motive to fabricate. R. at 990-92. The Defense argued:

> after [J.J. and A1C Jones] just had consensual sex, she had just -- they had just argued about Tinder, the one thing she thought would really get to him, would really make him get it, and make him stop screwing around, would make him get that she is not to be taken for granted, she could find somebody else, so, shape up; but, he didn't. He's on the phone talking to another woman, that, that is when she decides to call 9-1-1.

R. at 994.

Finally, Lt Col E.W. was the only member of the second panel to respond in the affirmative when asked whether he believed a finding of not guilty for a sexual assault or physical assault would reflect negatively on the military. R. at 388. He later confirmed his belief that there is "a negative light" placed on the military whenever a "not guilty verdict is given in a sexual assault." R. at 399. When questioned by the trial counsel, he agreed that this view was his own personal view and he had adopted this view. R. at 399. During follow-up questions from the military judge, Lt Col E.W. stated that his public perception was related to external pressure from Congress and "the sheer number of congressional hearings" relating to sexual assault in the military. R. at 400.

Even if each of these factors alone would not arise to the level of implied bias, the cumulative effect of these factors made A1C Jones's challenge of Lt Col E.W. for implied bias, at the very least, "a close case." "[I]n close cases military judges are enjoined to liberally grant challenges for cause." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). Nevertheless, the military judge denied the Defense's challenge to Lt Col E.W.

Moreover, the military judge did not articulate the "implied bias" standard on the record in making her ruling. R. at 476-77. Nor did she provide this standard when she ruled on prior objections for implied bias. *See* R. at 338 (stating only "I look to the totality of the circumstances."); R. at 340 (granting the challenge after providing a comment that caused her pause, but without explaining the implied bias standard). Notably, the implied bias test is not whether the military judge feels a member can sit impartially, it is whether "in the eyes of the public, the challenged member's circumstances do injury to the perception or appearance of fairness in the military justice system." *Terry*, 64 M.J. at 302. The military judge erred in not articulating the standard for implied bias to justify her conclusion, and in basing her analysis on *her opinion* (R. at 476-77) rather than considering how "members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial." *Peters*, 74 M.J. at 34.

A military judge who applies the liberal grant mandate and places her analysis and application of the law to the facts on the record will receive greater deference on review than one that does not. *Clay*, 64 M.J. at 277. The record does not show that the military judge properly applied the implied bias test to the facts of A1C Jones's case. The military judge failed to consider the "totality of circumstances" as she did not discuss the magnitude of the personal commitment that Lt Col E.W.'s presence on A1C Jones's panel would lead him to miss. R. at 476. This was not a run of the mill personal commitment; Lt Col E.W. was missing a sporting event that members of his extended family were traveling to the area to attend. He was losing his monetary investment (for his baseball ticket), time with his family and extended family (who were all leaving on Sunday), his opportunity to attend service at the basilica with his family and extended family, and his opportunity to spend the night in a hotel he had never stayed at before. R. at 396, 401, 402. Nor did the military judge discuss the fact that these plans had been in place for over a month, yet

Lt Col E.W. had been appointed to A1C Jones's panel on 13 August 2021, after A1C Jones's court-martial was already underway.

Additionally, the military judge did not directly discuss Lt Col E.W.'s "strong feelings" regarding cheating and threesomes. R. at 476. She merely noted that he had been questioned about his positions, without clarifying what his positions were. *Id.* The military judge also failed to consider that Lt Col E.W. was the sole member of A1C Jones's second panel to indicate he believed that a finding of not guilty would reflect negatively on the military. R. at 388. Lt Col E.W. indicated the persistence of this belief when he stated, "I think there's a negative light to whenever a negative sexual assault -- a not guilty verdict is given in a sexual assault." R. at 399. Therefore, despite the "sheer number of congressional hearings,"[21] Lt Col E.W. was the only member who believed the military would be held in negative regard if A1C Jones's was found not guilty. The military judge dismissed this factor, without giving it due weight, because Lt Col E.W. had agreed that "the negative reflection is that it was a congressional mandate and that Congress is constantly looking." R. at 476. In *Clay*, the CAAF found that the military judge erred in denying the defense's challenge for cause where there was "no record regarding whether, how, and with what nuance, the military judge applied the principles embodied in the implied bias doctrine." 64 M.J. at 277.

The military judge's failure to excuse Lt Col E.W. and another panel member, Lt Col J.J., left the Defense in the untenable position of having to leave one member they believed was biased on A1C Jones's panel. After exercising its peremptory on Lt Col J.J., Lt Col E.W. remained on A1C Jones's panel. R. at 491. In assessing the totality of the circumstances, the fact that Lt Col E.W. had a personal commitment of significant magnitude, he had strongly held personal beliefs

[21] R. at 400.

about cheating and threesomes, combined with his belief that a not guilty finding in A1C Jones's court-martial would reflect negatively on the military, created substantial doubt concerning the fairness, impartiality, and legality of A1C Jones's court-martial.

WHEREFORE, A1C Jones respectfully requests this Court set aside his findings and sentence.

ISSUE V IS FILED UNDER SEAL (PAGES 61-67)

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 21 February 2023.

Respectfully submitted,

[redacted]
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Appellate Defense Counsel
Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES MOTION TO EXCEED PAGE LIMIT**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant.*	)	No. ACM 40226
	)	3 April 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to file its answer brief in excess of the page limit, but not the word limit, prescribed by this Court. The United States' answer is 51 pages, not including the table of contents, index, or certificate of service.

There is good cause to grant this motion. Appellant raised five assignments of error, one of which addressed the legal sufficiency of two specifications in this case on seven bases and the legal sufficiency of another specification on two bases. Appellant's brief spans 67 pages. In order to properly address Appellant's arguments, and identify the relevant facts and law necessary for resolution of the issues raised, the United States is required to exceed this Court's page limit in its brief.

GRANTED
11 APR 2023

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File Answer Brief in Excess of Page Limit.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 April 2023.

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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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*	)	**UNITED STATES' MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES**, USAF, *Appellant.*	)	No. ACM 40226 3 April 2023

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

Pursuant to Rules 13.2(b), 17.2(b), and 23.3(o) of this Court's Rules of Practice and Procedure, the United States respectfully requests to file the United States' Answer to Appellant's Assignments of Error (AOE) V under seal. The United States' Answer to AOE V cites to Appellate Exhibits II, III, IV, and XXXIV, which were ordered sealed by the military judge.

Undersigned counsel appropriately packaged, marked, and delivered the above-listed portions of the United States' Answer to both this Court and the Air Force Appellate Defense Division on the date of this filing.

Therefore, the United States respectfully requests this Honorable Court grant this motion and permit the United States to file the aforementioned portions of its Answer under seal.

GRANTED
11 APR 2023

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 April 2023.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Airman First Class (E-3) ALEXANDER V. JONES, USAF *Appellant*	)	No. ACM 40226
	)	3 April 2023

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERRORS**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant.*	)	No. ACM 40226 3 April 2023

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

ISSUES PRESENTED

I.

A1C JONES WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT AND FIFTH AMENDMENT

II.

A1C JONES'S CONVICTIONS FOR SEXUAL ASSAULT ARE LEGALLY AND FACTUALLY INSUFFICIENT

III.

A1C JONES'S CONVICTION FOR WRONGFUL DISTRIBUTION OF INIMATE VISUAL IMAGES IS LEGALLY AND FACTUALLY INSUFFICIENT

IV.

THE MILITARY JUDGE ERRED IN FAILING TO EXCUSE LT COL EW FOR IMPLIED BIAS

V.

THE MILITARY JUDGE ABUSED HER DISCRETION IN DENYING THE DEFENSE'S MOTION TO COMPEL THE

COMPLAINING WITNESS' MEDICAL RECORDS RELATING TO DIAGNOSIS AND PRESCRIBED MEDICATIONS.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

At a general court-martial before a panel of officer and enlisted members, Appellant pled not guilty to all charges and specifications. (*Entry of Judgement*, ROT Vol. 1, dated 28 July 2021; R. at 187). Appellant was found guilty, contrary to his pleas, of two specifications of sexual assault against JJ in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one specification of distributing intimate visual images of JJ in violation of Article 117a, UCMJ. (Id.) Consistent with his plea the panel found Appellant not guilty of one specification of assault against JJ in violation of Article 128b, UCMJ.

The United States will provide the relevant facts for each section below.

ARGUMENT

I.
A1C JONES WAS NOT DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT AND FIFTH AMENDMENT

Standard of Review

The constitutionality of a statute is a question of law that is reviewed *de novo*. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the

members as such. (R. at 1016.) Appellant made no objection to this at his trial, findings proceedings were completed on 17 August 2021. (R. at 1030). Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 28.)

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

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

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

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also*, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022) (holding

that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

II.

A1C JONES'S CONVICTIONS FOR SEXUAL ASSAULT ARE LEGALLY AND FACTUALLY SUFFICIENT

Additional Facts

1. Direct Exam of JJ

Appellant and JJ met in 2017 and were married in August of 2018. (R. at 674). Prior to getting married Appellant enlisted in the Air Force. (R. at 675). His marriage to JJ occurred as he was in route from basic training in Texas to technical school at Joint Base McGuire-Dix-Lakehurst. (Id.) JJ joined Appellant at Joint Base McGuire Dix-Lakehurst at the end of December 2018. (Id.) Once JJ moved to New Jersey to be with Appellant, things started to go downhill in their relationship. (Id.) In March of 2020, JJ decided she wanted a divorce from Appellant. (R. at 681). However, Appellant was upset that JJ wanted a divorce because he wanted to work things out. (Id.)

JJ could not afford to move out of the home once she told Appellant she wanted a divorce. (R. at 682). They each stayed in separate rooms at the home with JJ taking the master bedroom, and Appellant sleeping in the guest bedroom. (Id.) After JJ told Appellant she wanted a divorce, they engage in sexual intercourse once or twice consensually. (Id.) JJ then told Appellant she did not want to engage in sex anymore. (Id.) JJ recounted during direct examination that she engaged in sex with Appellant those times because he started putting effort into the relationship and home and doing the things she had always asked him to do. (R. at 683).

On 28 March 2020, JJ went to a friend's home in the evening to grill out and have dinner. (Id.) At her friend's home, JJ was shown a video of Appellant on SnapChat drinking beer with people around him that were also drinking beer. (Id.) After leaving her friend's home that

evening, JJ went back to the home she shared with Appellant while being separated. (R. at 384). JJ could hear Appellant coming home, and she rushed to get ready for bed so that she would not need to interact with him. (Id.) When Appellant got home, JJ was in the bathroom, and he wouldn't let her leave because he kept asking her questions about where she was, who she was with, and what she was doing. (Id. and R. at 686).

JJ turned on the voice memo function on her Apple Watch because she had a feeling something was going to happen that night with the Appellant. (R. at 685). She felt that due to his drinking, Appellant was going to come home and "say a bunch of mean things" to her. (R. at 685). To start the voice memo function, JJ explained it as she just hit start recording and then her watch recorded any sound going on. (Id.) To stop the recording, you usually have to hit stop on the app on the Apple Watch. (Id.) According to JJ, her voice memo has never stopped without her affirmatively turning it off. (R. at 686).

As Appellant was asking JJ questions, he questioned her on whether or not she had a Tinder account and takes her phone. (Id.) After he took her phone, Appellant locked himself in another room. (Id.)

During trial, circuit trial counsel played the first six minutes and forty-nine seconds of Prosecution Exhibit 3, the first audio recording JJ made on her Apple watch after Appellant came home on the night of the sexual assault. (R. 687-91). He then asked JJ to describe what occurred during that time period. (R. at 691). JJ told the court that Appellant locked himself in one room and she tried to get in, but the door wasn't opening. (R. at 691). Appellant refused to give her phone back unless JJ had sex with him, which she declined. (Id.) JJ described the argument surrounding her creation of a Tinder account as one like they would typically have. (Id.)

Trial counsel then continued playing Prosecution Exhibit 3, which is transcribed verbatim in Prosecution Exhibit 8. JJ can be heard telling Appellant to get off of her repeatedly, to give her back her phone repeatedly, and to stop repeatedly. (Pros. Ex. 3 and 8, R. at 692-95). JJ then testified what was going on during the second part of Prosecution Exhibit 3. During the second part of Prosecution Exhibit 3, JJ kept "begging" Appellant to stop what he was doing because he was (1) keeping her phone away from her while sitting on the mattress in their guest bedroom, (2) pulling her hair, and (3) forcing his fingers into her mouth while telling her that she was aroused by what he was doing. (R. at 696). Appellant kept going when JJ asked him to stop "like he was getting more and more like – he was enjoying it more and more." (Id.) JJ stated that she ran off from him to get away. (Id.) She recounted that the last part of the recording was when Appellant was slamming her face into the couch. (Id.) At this point JJ was "super scared," "freaked out," and at a loss for what to do. (Id.) She also did not have her phone, so she could not call for help. (Id.)

JJ told the court that the recording stopped at the point she was in the living room; however, she was not the one to turn it off. (R. at 697-98). At that point, Appellant was slamming JJ's face into the couch while she tried to get away from him. She described:

> So, I had ran into the living room and he grabbed me. He kind of like was slamming my face into the couch and I kept trying to get away from him. He kept telling me that I was turned on and I wanted it. He did eventually pick me up and take me into the bedroom and kind of like slammed me onto the bed. He sat down on top of me to where his butt was like on my chest basically. He was fully clothed. He ripped my leggings off …

(R. at 698).

After Appellant removed JJ's leggings, he started putting his fingers inside her vagina and licked her between her thighs. (R. at 699-700). Appellant then jerked JJ to the edge of the

bed while he was standing. (R. at 699). Appellant was standing and pulled down his pants a little while JJ tried to get him to stop, asked him to stop, to the point JJ "felt like [she] was begging him to stop; but, it didn't matter." (Id.) Appellant had her pinned to where she could not move. (R. at 700) JJ was extremely scared and did not know how the night was going to end. (Id.)

JJ told him to stop, did not want him to continue, and was not enjoying Appellant's actions. (R. at 700). Appellant proceeded to have sex with JJ, even though she was asking him not to and crying. (R. at 701-2). JJ stated that Appellant continued until he ejaculated inside of her and then he kept going. (R. at 702). If JJ tried to get away from Appellant, he would thrust harder into her and slam her into him. (Id.)

At times during the altercation and during the nonconsensual sex, Appellant put his hand around JJ's neck to where it felt like he was choking her. (R. at 703). She states when Appellant put his hand around her neck she could not breathe and was uncomfortable. (Id.) JJ went on to state that the end of Prosecution Exhibit 3 recording was Appellant choking her and slamming her into the couch cushion. (Id.)

After Appellant sexually assaulted her, JJ testified she was locked out of her phone because Appellant had tried to access it too many times with the wrong code. (R. at 704). She realized also that the recording on her watch had stopped so she turned it back on. (R. at 705).

After the encounter, JJ went to the bathroom to try to clean herself up and she felt sick to her stomach. (R. at 706). While she was in the bathroom, JJ thought Appellant was just lying on the bed, but she was just trying to get away from him at that point. (Id.)

JJ described Appellant as about six foot and 210 pounds.

At trial, circuit trial counsel played Prosecution Exhibit 4, the second audio recording made by JJ on the night Appellant sexually assaulted her. (R. at 710). It was transcribed on the record and in Prosecution Exhibit 9. In the audio, Appellant still had JJ's phone and was refusing to give it back to her. (R. at 712). Furthermore, he told JJ that because he paid for the phone, it was actually his and her service would be cut off in the next couple of days. (Id.) He taunted her saying, "So, no Wi-fi, no job; no job, no money, no phone, so." (Pros. Ex. 4; R. at 712).

JJ clarified to trial counsel that Prosecution Exhibit 4 took place after the sexual assault. (R. at 114). She stated that Appellant would not leave the main bedroom, which was her bedroom, and all she wanted to do was get some sleep. (R. at 715). She hoped she could sleep, then talk to someone in the morning, because she was locked out of her phone and did not think Appellant would let her leave the home. (Id.) JJ stated on the record:

> He's – he won't leave the room so that's why I keep asking him to like get out and stuff. He's laying there beside me and at that one pointe where he says, you know, I could still fuck you laying that way, I turned the opposite way just to try to end the night, or morning, I guess you would say.

(Id.)

Circuit trial counsel then played the second portion of Prosecution Exhibit 4. (R. 716-719). JJ described what was happening in the room during the recording. (R. at 719). JJ described Appellant lying on top of her and that she used a pinch she learned while learning to train dogs to stop fighting to try to get him off of her. (Id.) She then accused him of raping her and provided that the assault happened not more than twenty minutes before the recording. (Id.) She told the court that Appellant would just not leave her alone. (R. at 720).

Circuit trial counsel then played the final portion of Prosecution Exhibit 4. (R. at 720). In the recording, the JJ asked Appellant to please get out. (Id.) The following conversation ensued:

> [A] No, but, you've told me to stop before, but you told me not to stop.
>
> [V] Alexander, I don't even want to be with you. Why would I want to be having sex with you?
>
> [A] Because you – that's how you are. You want me to want you so bad that that's why you're – that's why your pussy is so wet. You just want attention.
> …

(Id.)

At the end of the audio recording, JJ can be heard saying, "Come on. Come on. Come on, please let me in." (Pros. Ex. 4; R at 720). This was JJ attempting to get into her phone, but she was still locked out of her phone for approximately fifteen minutes. (R. at 722). JJ stopped this recording herself when she realized it was still going. (R. at 722).

After the audio recording ended, JJ texted her friend IA, but did not get a response back. (Id.) After lying in bed for a little bit, JJ could hear Appellant laughing on the other side of the wall. (Id.) The laughing "blew [JJ's] mind that he was laughing after that all happened." (Id.) The situation "freaked" JJ out, and after she checked to see what Appellant wasdoing she locked herself in her bedroom and called 911. (Id.) JJ stated that maybe ten to fifteen minutes passed between the end of Prosecution Exhibit 4 and her calling 911. (Id.)

Circuit trial counsel then played the 911 phone call JJ made for the members. (R. at 723) In the phone call, JJ told the 911 operator Appellant came home earlier and forced himself on her. (Id.) She told the operator that she was not injured, that Appellant had come home hours earlier and they'd been arguing, and that Appellant choked her. (Pros. Ex. 5) She told the

operator that Appellant slammed her into the wall, choked her, and forced himself on top of her. (Pros. Ex. 5; R. at 730). JJ made the call to 911 because she hoped someone was going to come and help her. (R. at 733).

JJ then went to the hospital with security forces to get a "rape kit" done and had to wait for multiple hours for a doctor and for completion of the exam. (R. at 734). JJ thought she got to the hospital at 0500 hours and didn't leave until around 1100 hours on Saturday. (Id.) By the time the exam was complete, JJ had been up since about 0400-0500 hours the day before, Friday. (Id.)

At the hospital JJ completed the full exam and received antibiotics that made her extremely nauseous and sick for the rest of the day, including during her interview with OSI. (R. at 735). JJ ended up getting so sick later that night, and she threw up for what felt like hours, but may have been only 30 minutes. (Id.)

2. Cross Examination of JJ by trial defense counsel

At some point during the marriage, JJ began suspecting that Appellant cheated on her. (R. at 740). Because of her suspicions, JJ went through Appellant's phone multiple times and found him talking to multiple women. (R. at 741). JJ would confront Appellant about talking to other women and felt he was emotionally cheating on her. (Id.) JJ would also confront the women Appellant was talking to over social media and tell Appellant's friends that he was cheating. (Id.) JJ found out Appellant had been on Tinder during his deployment. (Id.) JJ told Appellant she considered divorce on multiple occasions when she thought he was cheating. (R. at 742).

JJ told Appellant on 10 March 2020 she wanted a divorce, and they fought afterwards. (Id.) JJ downloaded Tinder in March 2020, because she was curious to see if Appellant was on

the application, and in order to spite Appellant. (R. at 743). JJ stayed on Tinder and made multiple swipes in order to keep her account active, so that Appellant would eventually see it, which he did. (Id.)

In May 2020, JJ moved out of the home she had shared with Appellant and took all the furniture from the home based on the advice of her divorce attorney, because it was furniture she had before the marriage. (R. at 744).

JJ and Appellant engaged in consensual sexual intercourse twice after JJ told Appellant she wanted a divorce, but JJ says it was "well before" the 28 March 2020 assault, since it was only a few days after she told him she wanted a divorce on 10 March 2020. (Id.) JJ confirmed that she and Appellant would sometimes engage in sex after arguments starting in approximately January 2019. (R. at 745). JJ did not recall whether she classified the sex she had with Appellant as "angry sex" to OSI in March 2020; however, trial defense counsel refreshed her recollection using her interview. (R. at 745-47). JJ and Appellant occasionally engaged in aggressive sex that included consensual strangulation and rough sex, since before they were married. (R. at 748).

JJ told trial defense counsel that she asked Appellant whether he ever thought about having a threesome once, but trial defense counsel refreshed her recollection with her OSI interview that she told OSI that she mentioned it maybe once or twice to Appellant. (R. at 751) She did not remember if, in fact, there was a second time. (Id.)

JJ confirmed that on 28 March 2020 she heard Appellant's car while she was in the bathroom. (R. at 753). The next sequence in her cross-examination went as follows:

> TDC: You also testified that, at some point, you ended up in the guest room looking for your phone?
>
> JJ: Yes.

TDC: And that you – during the first recording that was played, you were in the living room?

JJ: I think so, yeah.

TDC: And then you ended up in the bedroom.

JJ: That's correct.

(R. at 753-54).

JJ testified she did not remember telling security forces about being slammed in the bathroom by Appellant, but that she remembered it happening and cleaning up the sink afterwards. (R. at 754). She confirmed that she never really thought about cleaning up the sink in her pretrial defense interview or during her OSI interview. (Id.) She did say she told a "Major" about cleaning up the sink before they "switched my attorneys, or switched the defense attorney, or trial counsel." (Id.) In her trial testimony, JJ confirmed that Appellant attempted to "kiss [her] and everything else in the bathroom however." JJ also testified that Appellant did slam her into the mirror in the bathroom. (R. at 755).

During cross-examination, JJ confirmed she was present at the motions hearing for the trial. Trial defense counsel elicited testimony from JJ that she was present at that hearing when the motion to compel the security forces member that was a first responder on the night of JJ's 911 call, TSgt SP, was heard. Trial defense counsel confirmed with JJ that she was there when they discussed that they wanted TSgt SP testimony to show nothing was amiss in the bathroom when security forces arrived shortly after the 911 phone call. (R. at 755-56). JJ then explained to trial defense counsel that she put the items that had fallen into the sink during the bathroom portion of the altercation back in place when she went to clean herself up after the sexual assault, because she needed to use the sink to wash her hands. (R. at 756).

JJ stated during cross-examination that she did not know what she told the SANE after the sexual assault, but she did remember that she called 911 after both the bathroom and the incident in the bedroom. (Id.) She confirmed to trial defense counsel that she did not complain of any injuries to the SANE during the forensic exam. (R. at 757). She confirmed she did not shower or douche prior to the SANE exam. (R. at 758).

JJ told trial defense counsel that "a lot of stuff happened that night; so, it's a lot to try and remember a year-and-a-half later." (Id). However, she testified that from what she could remember, Appellant took her from the living room to the bedroom. (R. at 759). After trial defense counsel refreshed her memory, JJ confirmed she told OSI that Appellant took her to the bedroom from the bathroom. (R. at 760). JJ confirmed once Appellant slammed her on the bed, she tried to get away by pinching his muscles in his arm pit, but did not recall telling OSI that Appellant tried to trip her. (Id.)

JJ confirmed she went to the bathroom after the sexual assault, and Appellant ended up in their bedroom. (R. at 761). JJ confirmed that after the second recording she was locked out of her phone for about fifteen minutes. (R. at 762). JJ confirmed that she heard Appellant talking on the phone in the other room and went to see what was going on. (R. at 763). He told her he was talking to a male friend, but JJ thought he was talking to a woman based on the way he was talking. (R. at 763). Something then scared JJ, and she went back to her room and called 911. (Id.) Appellant then went into the bedroom and asked her what was wrong and if he could help. (R. at 763-64).

JJ admitted to contacting potential witnesses in the case and letting them know that defense counsel would be reaching out to them. (R. at 769). She stated she told the potential witnesses that they did not have to talk to defense counsel if they did not want to talk to them.

(Id.) The potential witnesses included IA, IA's husband, and a couple other friends. (Id.) JJ admitted she deleted all the messages between herself and IA. (Id.)

3. Redirect of JJ by Circuit Trial Counsel

When circuit trial counsel questioned JJ on redirect, JJ stated that approximately five minutes after she got off the phone with the 911 operator, security forces walked in the home. (R. at 771). She further explained that when she talked about "angry sex" with OSI it was consensual sex that was a bit more aggressive, but not sex where she repeatedly said "no" and Appellant did not stop. (R. at 773). In response to circuit trial counsel questioning JJ about the timeline of when she spoke to OSI after the sexual assault, JJ confirmed she'd been up for over 24 hours by the time she interviewed with OSI the morning after she was sexually assaulted, which is when she gave them her account of what occurred during the sexual assault. (Id.) Furthermore, JJ confirmed that Appellant tampered with the bathroom doorknob and then the bedroom doorknob, and the bedroom knob did not come off until JJ was one the phone with 911. (R. at 776).

Standard of Review

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

Law

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes

proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 29 Nov. 2016) (citing Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

The testimony of a single witness may be sufficient to establish guilt beyond a reasonable doubt so long as the trier of fact finds the witness's testimony sufficiently credible. United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (citations omitted).

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

(internal citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

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

Sexual assault in violation of Article 120, UCMJ, requires the following elements: (1) the accused committed a sexual act upon another person; and (2) the accused did so without the consent of the other person. 2019 MCM, pt. IV, 60.b.(2)(d).

Analysis

Appellant's argument that his two convictions for sexual assault are legally and factually insufficient, relies primarily on calling into question the evidence and JJ's credibility, since Appellant confessed to the sexual acts with JJ. Appellant argues his sexual acts with JJ were consensual, and his convictions are legally and factually insufficient for seven reasons. (App. Br. at 23-37). Appellant's conviction turns on JJ's testimony; however, that testimony was corroborated by the audio recordings, 911 phone call recording, and picture evidence. Furthermore, the trier of fact was able to meaningfully assess JJ's credibility over nearly four hours of testimony and rigorous cross-examination.

1. Despite Appellant's assertions, the nature of Appellant's and JJ's prior sexual relationship does not support the sexual conduct was consensual on 28 March 2020.

None of Appellant's and JJ's prior sexual encounters were characterized by her repeatedly saying no and the other person not stopping. (R. at 773). For the charged offense, JJ repeatedly told Appellant to stop and asked him to stop while crying and trying to get away from him, but Appellant had her pinned to where she could not move. (R. at 699-700). Every time she tried to get away from him, he only pulled her closer, slammed her into him, and thrust himself into her harder. (R. at 702).

The audio from Prosecution Exhibit 3 showed the character of the argument Appellant and JJ had that night. It showed Appellant was violating JJ's autonomy and not listening to her tell him to stop when he took her phone, started pulling her hair, and shoved his fingers down her throat. In doing so, he failed to heed any of her words. (Pros. Ex. 3 and 8; R. at 692-5). He took her phone over her protests and refused to give it back while repeatedly telling her to beg to get it back. (R. at 686). While telling her to beg and pulling her hair, he was shoving his fingers in her mouth and telling her she was aroused because of it, despite her telling him to stop. (R. at 696).

Appellant's rendition of events to OSI was entirely false and implausible. He told OSI when JJ told him to stop, he stopped. (Pros. Ex. 6). OSI then question him why he thought she asked him to stop at the point he did, and Appellant explained:

> [OSI]: Okay. All right. So, how long were in [*sic*] at this point? How long did you guys do missionary for?
>
> [Appellant]: Not long. It was like 30, 45 seconds. I don't know what caused it. I think it was when she saw it was me.
>
> [OSI]: Okay. When she saw it was you?
> [Appellant]: Yeah.
>
> [OSI]: Who else would she think it was?

> [Appellant]: I don't know. I think when she saw it was me, she was regretting the decision she made and she thought I was going to get the wrong intentions of that she was going to stay instead of leave, because she plans on leaving.

(Id). However, Appellant 's claims to OSI were undermined by the other evidence presented. Prosecution Exhibits 3 and 4 demonstrated Appellant's true demeanor towards JJ. JJ said no, Appellant escalated – he went from keeping her phone from her, to pulling her hair, to slamming her into the house, to shoving his fingers down her throat while telling her she was getting aroused. None of the victim's words—"no" and "let me go"—or actions—pushing him off and crying—suggest this was a consensual encounter. It strains belief that after the interactions portrayed on Prosecution Exhibits 3 and 4, consensual sexual intercourse occurred, and then Appellant stopped when JJ asked him to.

Appellant told OSI he did not see any difference between JJ bringing up the possibility of divorce on multiple occasions, and her telling him she actually wanted a divorce on 10 March 2020. (R. at 860). However, JJ then followed her decision about divorce up with living in a separate room from Appellant. Appellant's refusal to acknowledge JJ's decision about divorce was a further example of Appellant's disregard for JJ's bodily autonomy and personal choices. It does not bolster that the sexual assault was consensual sex. (*Cf.* App. Br. at 24). He completely disregarded any say she had in her desire to divorce him and then sexually assaulted her by pinning her to the bed and ripping off her leggings. (R. at 698).

As the members were instructed, "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." (R. at 946-47). That is exactly what Appellant is asking this Court to rely on to conclude that JJ actually consented to Appellant's sexual acts. However, this Court would need to look past all of the evidence that Appellant simply would not

listen when JJ told him no and took what he wanted from her over her protests. In using common sense and knowledge of ways of the world, JJ was allowed to say yes to sex with Appellant on one occasion and no to sex on another. The evidence here shows she did not want sex with Appellant on the night of 28 March 2020 and communicated as much to him.

Therefore, the nature of Appellant's and JJ's prior sexual relationship and the context of Appellant's actions that night show Appellant sexually assaulted JJ without her consent, thus it does not call into question the legal or factual sufficiency of Appellant's convictions under Charge I.

2. It is pure speculation that the audio recordings are not what they purport to be.

Legal sufficiency does not demand proof that excludes "every hypothesis or possibility of innocence, but every fair and rational hypothesis for guilt." United States v. Loving, 41 M.J. 213, 281 (C.A.A.F. 1994). Appellant speculates that the audio recordings provided to OSI by JJ were not what she described them to be. But all trial defense counsel did in closing argument to discredit the audio recordings was to say the videos could have been spliced or may not be from the night of the assault. In fact, there was zero evidence raised on the merits to support those allegations. (R. at 1008). Had Appellant truly had concerns about the authenticity of the evidence he could have requested the Government or court appoint him a digital forensic expert to assess the authenticity of the audio recordings. Choosing not to investigate the authenticity of the audio recordings was a strategic decision by trial defense counsel that afforded them the ability to speculate as to their authenticity in closing. Furthermore, JJ provided detailed accounts of what was going on in the home to coincide with what the audio captured. The testimony of one credible witness may suffice to establish guilt beyond a reasonable doubt. Rodriguez-Rivera, 63 M.J. at 383. Given JJ's credible testimony about the night, which described events as

they were happening in the recordings – from dogs being interested in Appellant's boots to Appellant shoving his fingers down her throat – the evidence is sufficient to establish the recordings are what they purport to be: recordings from the night of the sexual assault.

Appellant contends that this Court should doubt the audio recordings because the first recording stopped suddenly, and no witness explained how it stopped. (App. Br. at 26). However, JJ described the voice memo recording as turning on or off by tapping a button on her Apple watch. (R. at 685 and 764). It is more than plausible that a button on a watch might have been hit during a physical altercation while Appellant was grabbing JJ and slamming her into things. It is pure speculation on the part of Appellant that JJ purposely turned off the recording, and such an occurrence is unsupported by the evidence.

As a result, a rational factfinder and this Court could reasonably credit the audio recordings as being what JJ purported them to be in her sworn testimony. Appellant's pure speculation on the unreliability of the audio recordings does not call into question the legal or factual sufficiency of Appellant's convictions under Charge I.

3. No injury is required for Appellant to be guilty of sexual assault beyond a reasonable doubt.

Appellant contends that "despite the violent, physical nature of this alleged assault, [JJ] had no injuries related to the alleged strangling." (App. Br. at 27). The record reflects that JJ in fact did not have reported injuries from the strangulation; however, the SANE testified, "It is common that you won't see any physical injuries from strangulation." (R. at 801). Additionally, the SANE testified that you don't always find injuries when a patient comes in and says they've been sexually assaulted. (Id.) While citing to statements made by the SANE in and around this statement from page 801 of the record, Appellant neglects to note that strangulation does not necessarily mean injury nor does sexual assault. However, this evidence from an expert witness

was before the members to consider, and they reasonably could have credited that part of the SANE's testimony. (R. at 801). Furthermore, many of the surfaces that JJ testified Appellant slammed her into were not hardened surfaces, including the bed and the couch cushion. Therefore, JJ's lack of injury does not negate the legal or factual sufficiency of Appellant's convictions under Specification 1 and 2 of Charge I.

4. Appellant's convictions for sexual assault are factually and legally sufficient even though the forensic evidence does not confirm Appellant ejaculated inside JJ.

Appellant contends the lack of forensic corroboration of JJ's ejaculation claim impeaches the credibility of her testimony on the whole, while bolstering Appellant's account of the incident. (App. Br. at 29). The forensic evidence Appellant is referencing comes from the SANE exam of JJ done right after she reports the sexual assault to law enforcement. The SANE testified that she did "find it unusual not to find any sperm in the sample, if ejaculation, in fact, had occurred." (R. at 835). As the circuit trial counsel argued in closing, a finding of guilt for Appellant does not require the Government prove Appellant ejaculated inside JJ. (R. at 965). Furthermore, it is entirely plausible that JJ genuinely believed Appellant ejaculated inside of her with everything that was going on that night. Whether or not Appellant ejaculated does not hinder JJ's credibility. Her testimony on the stand for how she could tell Appellant ejaculated was, "You can…you could tell." (R. at 702). What is not in question is that Appellant penetrated JJ with both his fingers and his penis, which is consistent with the statements of both JJ and Appellant. JJ being mistaken about a detail such as ejaculation after being sexually assaulted does not mean she was wrong about the larger details like Appellant refusing to acknowledge JJ told him no and wanted him to stop. Those details and Appellant's conduct towards JJ were corroborated by the audio recording. (Pros. Ex. 3 and 4). Therefore, the

potential that Appellant did not ejaculate inside JJ does not raise reasonable doubt that he chose to sexually assault her despite her numerous attempts to get him to stop.

5. The inconsistencies Appellant points to from JJ's testimony are misleading

Appellant contends that JJ's testimony was inconsistent with the audio recordings, because "[JJ] is not heard asking [Appellant] to let her out of the bathroom or asking him to leave the bathroom" in the audio recording. (App. Br. at 30). JJ stated on direct examination that she was in the bathroom when Appellant came home. (R. at 684). She turned her voice memo app on, but did not remember exactly when she turned it on. (Id.) She stated:

> But he came home and I was in the bathroom still trying to fill the humidifier up; and, he had just asked where I had been, what I was doing, why I smelled like smoke, who I was with and just kind of wouldn't let me leave the bathroom and just kept asking me a million questions.

(R. at 684-85). Appellant ended up taking JJ's phone at some point and locked himself in another room with it, and the argument just kept going. (R. at 686). The conversation heard on Prosecution Exhibit 3 shows the recording starts after Appellant took JJ's phone because she was asking him to give it back. (Pros. Ex. 3; R. at 684).

However, Appellant still argues that there were inconsistencies in JJ's account about where she was at different points in the night, which render her testimony uncredible. (App. Br. at 30). Namely, he takes issue with JJ's accounts of being in the bedroom rather than the bathroom when she was on the phone with 911. (Id.) Appellant contends that JJ told circuit trial counsel during direct examination, while she was describing Prosecution Exhibit 2, that Appellant took the bedroom doorknob off to get to her prior to the sexual assault. However, a closer examination of the record shows JJ never stated the doorknob came off *prior to the sexual assault*. (R. at 696-97). The record of JJ's direct examination testimony shows trial counsel

interrupted JJ's testimony about the first recording, the one captured prior to the sexual assault, to ask her about Prosecution Exhibit 2. After questioning her about the photos of the removed doorknob in Prosecution Exhibit 2, trial counsel went back to asking JJ about Prosecution Exhibit 3, which created confusion regarding the timeline of when the doorknob came off. (Id.) At no point did JJ say Appellant took the bedroom doorknob off prior to the 911 phone call. Both JJ's 911 phone call and her in court testimony support that the bedroom doorknob came off while she was in the bedroom during the 911 call, after the sexual assault.

Appellant also contends that JJ's credibility should be questioned because she told the SANE that it was the bathroom doorknob Appellant removed while she was on the phone with 911. (App. Br. 31-32). First, the SANE could have been mistaken about what JJ told her during the forensic examination that took place shortly after JJ was sexually assaulted. Second, JJ may have been confused when recounting where she was, or she might have misspoken to the SANE. Neither possibility negates the fact that JJ was in the bedroom when Appellant tried to remove the doorknob to the bedroom, she told 911 she was in the bedroom while on the call, and she testified that she was in the bedroom when she was under oath. The 911 recording corroborates that JJ was in the bedroom at the time of the call:

> [V] I'm in the bedroom.
>
> [O] You're in a bedroom that's upstairs?
>
> [V] He's down the hallway.

(Pros. Ex. 5; R. at 725).

Therefore, the evidence corroborates that JJ was consistent with her testimony about the when the bedroom doorknob came off – during the 911 phone call. Furthermore, JJ did not mention Appellant removing the knob to the bathroom during direct examination, but she was

able to answer when defense asked her about it during cross-examination and clarify during redirect. JJ testified that Appellant took the bathroom doorknob off prior to the sexual assault but does not give a specific time of when the knob came off. (R. at 775). Additionally, Appellant told OSI that he also took the bathroom doorknob off at some point during the night but did not give a specific time either. (R. at 859). Additionally, the members were instructed to use their common sense and knowledge of ways of the world, which supports that people "never tell the same story the exact same way over and over and over again[.]" (R. at 984). This is especially true when considering that while she was making some of her statements, JJ was dealing with the trauma of a sexual assault and operating on very little sleep. Therefore, the supposed inconsistencies in JJ's testimony on minor details do not in any way undermine the evidence that Appellant sexually assaulted her.

6. The evidence did not rebut JJ's claims that Appellant assaulted her in the bathroom nor did her description of Appellant's position during the sexual assault cut against her credibility.

a. The lack of evidence of smudges and misplaced items in the bathroom did not rebut JJ's claims that Appellant sexually assaulted her or that parts of the physical assault against JJ occurred in the bathroom.

The fact that JJ did not remember to tell the responding security forces officers that she cleaned up the bathroom sink to wash her hands does not negate the credibility of her testimony. It is entirely logical to pick up items out of the sink in order to wash your hands while you are in the bathroom. Furthermore, it is entirely logical for that not to be the first thing on JJ's mind to tell the officers responding to her 911 phone call about being sexually assaulted when she was "very emotional, very freaked out." (R. at 771). It might have been more suspicious for JJ to give these inconsequential details to the responding officers. Appellant makes a point of noting that JJ changed her story to corroborate issues raised during the motions hearing. (App. Br. at

34). However, JJ merely testified when directly questioned about it that she did tidy up the bathroom enough to use the sink. She did not testify she also took Windex to the mirror to clean any smudges, so as to corroborate the accounts of the responding officers. (R. at 755)

JJ was consistent that Appellant pushed her around and tried to kiss her, all the while manhandling her in the bathroom. She gave a logical and thoroughly believable account of why things were not out of place on the bathroom counter, which lined up with the facts of the case. One would not expect someone to leave toiletries in the sink while washing their hands after cleaning herself up from a sexual assault. Thus, the fact that JJ may have left out minor details when describing Appellant's attack to various parties does not undermine the legal and factual sufficiency of Appellant's conviction.

Furthermore, Appellant relies on the testimony TSgt SP to call into question JJ's testimony, noting he didn't notice any smudges on the bathroom mirror to corroborate JJ's claim of being assaulted in the bathroom. However, TSgt PP also didn't recall other pieces of evidence from the scene that he should have noticed when doing his walk through of the home, such as doorknobs lying on the ground. (R. at 914). His testimony did not negate the credibility of JJ's testimony regarding anything that occurred in the bathroom, since the members could have attributed TSgt PP's failure to notice evidence in the bathroom to a lack of attention to minor details, rather than to a lack of credibility on JJ's part.

b. JJ's credibility was not undermined by her testimony regarding Appellant's sexual positions while he sexually assaulted her.

Appellant's contentions regarding the sexual positions between JJ's testimony of the sexual assault and Appellant's version revolve around speculation as to the tightness of his jeans and the implausibility of his position in JJ's testimony. (App. Br, at 34-35).

First, there is no evidence on the record as to Appellant's mobility in his jeans on the night of the sexual assault; therefore, it is pure speculation that he could not have conducted the sexual assault as described by JJ because he was wearing jeans. Second, JJ's testimony about Appellant's odd positioning actually enhances her credibility. Had she wanted to give a fictional account of being assaulted, rather than a true account, she may have made the details more bland and more easily pictured. Instead, JJ gave a truthful and credible account of being sexually assaulted by her husband in such a way that she could not move to stop him nor get him to stop assaulting her by telling him no.

Appellant's reliance on his statements during the second recording that he did not rape JJ is also unwarranted. (App. Br. at 35). Consistently throughout the recordings of that night Appellant refused to acknowledge his actions, refused to listen to JJ, and continually told her that she wanted him. Take the following excerpts from Prosecution Exhibit 3, which JJ recorded before the assault, and Prosecution Exhibit 4, which JJ recorded after the assault:

> [A] Don't act like you don't want it.
>
> [JJ] I don't.
>
> [A] I'll bet your pussy's wet right now.
>
> [JJ] Stop.
>
> [A] I'll bet it is.

(Pros. Ex. 3).

> [JJ] Alexander, I don't even want to be with you. Why would I want to be having sex with you?
>
> [A] Because you – that's how you are. You want me to want you so bad that that's why your pussy is so wet. You just want attention.

(Pros. Ex. 4). Given his demeanor throughout the night of the sexual assault, the final statement he made on the recording after the sexual assault was consistent with him refusing to accept that JJ did not want to have sex with him.

The evidence supports that Appellant categorically was not listening to JJ tell him she did not want to have sex with him, and it demonstrates he thought he had the right to sexually assault her. Thus, his final statement on the recording makes sense in that context – Appellant, out of a sense of entitlement, did not want to admit to sexually assaulting JJ, despite her telling him no and trying to get away from him. His statement at the end of the recording only reenforces that he refused to acknowledge that JJ did not want to have sex with him and then forced her to do so.

7. JJ did not interfere with witnesses nor intentionally destroy evidence

JJ acknowledged during her testimony that she deleted all the text messages between herself and IA, which could potentially include text messages from the night of the sexual assault. (R. at 770-71). During cross-examination trial defense counsel asked JJ pointedly about deleting the texts, but failed to question her why she deleted them, when she deleted, or any other information about the texts. As the evidence in the record stands, there is no evidence that JJ deleted the text messages between her and IA for the purpose of concealing negative information for her. It is speculation on the part of Appellant as to why JJ deleted those messages and what, if anything, was in those messages. His trial defense counsel strategically failed to ask JJ what was in the text message she sent to IA that night. For all the record reflects, it could've been a simple, "Are you up right now." The fact that JJ deleted her text messages with IA did nothing to undermine the evidence that JJ did not consent to sexual intercourse with Appellant on 28 March 2020.

JJ acknowledged that she reached out to individuals to give them a heads up that they may be contacted by attorneys for Appellant. Yet, she merely told them they do not have to speak with trial defense counsel. (R. at 769-70). She did not interfere with their testimony in any way. She did not tell them that she wanted them *not to talk* to defense counsel. She did *not* tell them to change their stories in any way or tell trial defense counsel any specific information. She did not seek to hide anything from trial defense counsel at any point nor make any witness unavailable for them. None of her actions undermined the credibility of her testimony that she did not consent to the sexual intercourse that occurred on 28 March 2020.

In conclusion, none of the issues raised by defense counsel, many of which are entirely speculative, result in Appellant's convictions under Specifications 1 and 2 of Charge I being legally or factually insufficient. Based on the weight entire record and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Viewing the evidence in the light most favorable to the government, a rationale trier of fact could have found each element of the crime beyond a reasonable doubt. Therefore, Appellant's convictions are both legally and factually sufficient. This Court should deny this assignment of error.

III.

A1C JONES'S CONVICTION FOR WRONGFUL DISTRIBUTION OF INIMATE VISUAL IMAGES IS LEGALLY AND FACTUALLY SUFFICIENT

Additional Facts

Appellant sent nearly nude photos of JJ to his technical school classmate MK and talked about JJ sexually with MK in January 2019, in spite of JJ's request that he not share the photos. (R. at 676). MK attended technical school with Appellant while at Joint Base McGuire-Dix-

Lakehurst. (Id.) JJ found the photos when she searched Appellant's phone because she suspected him of cheating. (Id.) JJ took pictures of the conversation and the photos. (Pros. Ex. 1 and R. 677-78 and R. at 752).

JJ told the court that when she opened up Appellant's phone and saw the photos and conversation,

> I was very upset. I remember I was shaking. Like, I was blown away and baffled. It's not something you find and you don't expect to find; but I was very upset.

She told the court that she and Appellant lived on Joint Base McGuire-Dix-Lakehurst when Appellant sent the photos to MK, and they were sent on 24 January 2019. (R. at 678). JJ sent the photos to Appellant when he was in technical school in Texas. (R. at 678). JJ explicitly told Appellant that if she was going to send him the photos, he was not to share them. (Id.) She told him multiple times that she was concerned about the photos being shared. (Id.) Appellant assured JJ that he would not share the photos. (R. at 679). Because of his assurance, JJ sent him the photos while he was in training in Texas. (Id.)

JJ had initially not wanted to send the pictures to Appellant, but he "was being very persistent and kind of begging for them." (Id.) JJ came around to the idea of sending the pictures because of Appellant's assurance that he was not going to share them. (Id.) JJ testified, "I told him I really didn't want that, I mean, I don't want that visual of me out there for just anybody." (Id.)

After JJ discovered the photos, she left her home and went to a friend's home. (R. at 680). She then went back to her home to confront Appellant about the photos. (Id.) She was still very upset and told Appellant she was done. (Id.) Appellant initially claimed he did not

know what JJ was talking about when she confronted him, but then she showed him the photos she took of the conversation between Appellant and MK. (Id.)

During defense's cross examination, JJ stated that she felt at the time Appellant had sent the photos to MK because he was "young and stupid." (R. at 752). JJ also stated she had mentioned wanting to have a threesome to Appellant once, maybe twice, but Appellant blew it up and turned it into a big thing. (Id.) She stated that after discovering the conversation with MK, while Appellant was deployed, she went on a hike with MK. (R. at 752-3).

JJ explained during redirect examination that she hung out with MK because "[MK] did own it once I addressed – like I mentioned it to her and she told me it happened. And – but I liked her as a person, you know." JJ told her she was disappointed in MK for not telling her about the photos, but her problem was not with MK. (R. at 775).

Standard of Review

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

Law

Please see the law section under Issue II above with the following supplements.

The elements under Article 117a, UCMJ, for the Specification of Charge III are as follows:

> (1) on or about 24 January 2019, at or near Joint Base McGuire-Dix-Lakehurst, New Jersey, the accused knowingly and wrongfully distributed intimate visual images of JJ;
>
> (2) that JJ was at least 18 years of age when the visual images were created;
>
> (3) that JJ is identifiable from the visual images or from information displayed in connection with the visual images;
>
> (4) that JJ did not explicitly consent to the distribution of the visual images;

(5) that the accused knew, or reasonably should have known, that the visual images were made under circumstances in which JJ retained a reasonable expectation of privacy regarding any distribution of the visual images;

(6) that the accused knew, or reasonably should have known, that the distribution of the visual images was likely to cause emotional distress for JJ; and,

(7) that the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

(R. at 949). *See* 2019 MCM, Appendix 2, Article 117a, UCMJ.

Analysis

Appellant challenges the legal and factual sufficiency of his conviction under the Specification of Charge III for violating Article 117a, UCMJ, by challenging the legal and factual sufficiency of his conviction on elements 6 and 7. (App. Br. at 38).

1. Element 6 - Appellant knew or reasonably should have known, that the distribution of the visual images was likely to cause emotional distress for JJ.

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. Turner, 25 M.J. at 325. For a conviction to be legally sufficient the evidence must be viewed in the light most favorable to the government to determine if a rational trier of fact could find the elements of the offense were met beyond a reasonable doubt. King, 78 M.J. 218, 221. Appellant contends that the Government failed to prove Appellant knew, or reasonably should have known, that the distribution of the visual images was likely to cause emotional distress for JJ.

Based on JJ's assertions to Appellant that the images she sent him were only for him and were not to be shared, Appellant knew or reasonably should have known, that sending the visual images to MK was likely to cause JJ emotional distress. JJ only agreed to send Appellant the photos after he assured her that he would not share them with anyone else. The record does not

reflect any other time when JJ demonstrated she would be okay with Appellant sharing photos of her with anyone. Given that JJ had specifically told Appellant not to share the intimate photos with anyone else, Appellant, at the very least, reasonably should have known that sharing the photos against JJ's express wishes would have caused her emotional distress.

Furthermore, Appellant sent the photos of JJ in the context of having someone else judge his wife's body, so as to see if that person would be willing to engage in sex with JJ within a threesome. Therefore, far more than sending his wife's intimate photo without any context, he sent it in a highly sexualized manner. The manner that the photos were sent should have put the Appellant on further notice that JJ would be emotionally distressed that he sent them, because he was asking someone else to make sexual remarks and judgments over photos JJ intended to keep private between Appellant and her. Under the circumstances, Appellant should have known the distribution would cause JJ emotional distress.

Additionally, JJ had just moved to Joint Base McGuire-Dix-Lakehurst to be with Appellant, and Appellant sent the photo to another military member on base with them. This singular act by Appellant compromised JJ's position within the military community, which she was just starting to build. Appellant should have recognized that sending intimate photos of JJ at this time in her life - when she had just moved to a new community and was trying to establish new relationships – would cause emotional distress. Despite Appellant's assertion to the contrary, the mere fact that Appellant and JJ engaged in a conversation about a threesome did not give Appellant the right to shop JJ's photo around to other military members for potential partners. JJ did not give Appellant permission to use the photos to solicit another person's interest in a threesome, and a reasonable person would not have thought he could do so without such permission.

Appellant contends that because JJ said she was "very upset" she does not qualify as emotionally distressed under Article 117a, UCMJ. Appellant's argument is that the military judge never defined "emotional distress" for the members; and thus, using the definition from Merriam-Webster.com Legal Dictionary, "anguish, humiliation, or fury," being very upset after an argument is not the same as suffering "emotional distress." (App. Br. at 45).

However, there are two points on this matter. First, Article 117a, UCMJ, does not require that JJ actually suffer emotional distress for Appellant to be guilty under the statute. The statute requires Appellant knew, or reasonably should have known, that the distribution of the visual images was *likely to cause emotional distress* for JJ. (R. at 949; 2019 MCM, Appendix 2, Article 117a, UCMJ). Second, the statute does not quantify the emotional distress that someone must suffer as either substantial or severe, and JJ did suffer significant emotional distress. She became very upset and started shaking when she discovered Appellant's conversation with MK and the intimate photo he had sent her. She then left the house because of how upset she was. The only reason she returned to her home was because she wanted to confront Appellant about his actions. The fact that JJ felt Appellant was "young and stupid" does not negate the fact he knew or should have known sharing JJ's intimate photos with someone who she was friends with and had visited their home multiple times was likely to cause JJ emotional distress, especially in a highly sexualized context.

Therefore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt as to element 6. Viewing the evidence in the light most favorable to the government, a rational trier of fact could have found Appellant knew or reasonably should have known, that distributing JJ's images was likely to cause JJ emotional

distress beyond a reasonable doubt. Appellant's conviction under Article 117a, UCMJ, is both legally and factually sufficient for element 6 of the offense.

2. Element 7 – Appellant's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

Appellant contends the Government failed to prove beyond a reasonable doubt Appellant's conduct, under the circumstances, had a reasonably direct and palpable connection to a military environment for three reasons. (App. Br. at 47). First, Appellant argues that because Appellant did not send the photos to MK because of MK's military status, but because they were good friends, and JJ did not reference MK with her military rank there was not a reasonably direct and palpable connection to the military environment. (App. Br. at 46-47). Second, Appellant attempts to distinguish his case from United States v. Hiser to show how his situation is more attenuated than what CAAF considers a reasonably direct and palpable connection. (App. Br. at 47-48). 82 M.J. 60 (C.A.A.F. 2022). Third, since the military judge did not provide a definition "reasonably direct and palpable connection," Appellant argues it would be contrary to the cannon against surplusage for this Court to find the facts demonstrate a reasonably direct and palpable connection between Appellant's conduct and the military environment. (App. Br. at 48-49). However, contrary to Appellant's assertions, his argument fails at the outset due to CAAF's analysis in Hiser and his other contentions follow suit.

In Hiser, CAAF concluded a "connection" may be established if the broadcasted images "actually do reach a servicemember – that is, a servicemember is 'put in contact' with the images – regardless of whether the accused specifically directed the images at the military and regardless of how likely the images were to reach the military." 82 M.J. at 66. The connection to the military environment in the present case is more direct than the one found in Hiser. Rather than an appellant posting the intimate images without an intended military recipient on public website

as in Hiser, Appellant directed JJ's photos to a fellow servicemember, MK. Whether or not he sent the images to MK because of her service or because of their friendship is irrelevant to the fact that he put MK "in contact" with the images. He involved a fellow servicemember in his conduct, thus establishing a direct and palpable connection to the military environment under Hiser. Because the facts of the present case are not as attenuated as those in Hiser, there is no need for additional indicia, such as JJ being a military member or JJ making Appellant's leadership aware of the misconduct, to show the connection to the military environment.

Appellant calls into question the strategy used by circuit trial counsel in closing argument where he argued JJ's status as a military spouse placed them in the "military environment." However, JJ's status as a spouse of a servicemember, her marriage to Appellant, only strengthens the connection to the military environment that Appellant created when he sent JJ's photos to a fellow service member. JJ had just moved to Joint Base McGuire-Dix-Lakehurst as a military spouse and become part of her husband's military community. She worked from home on base supporting the military as a human resources assistant. (R. at 728). She developed friendships with fellow military spouses and military members. (R. at 775). The military member, MK, who Appellant sent the photo's directly to had been over to Appellant's and JJ's home multiple times. (R. at 677). JJ's status as a military spouse and civilian employee of the military creates a reasonably direct and palpable connection to the military environment.

The fact that MK found the photos arousing does not change the connection his actions had to the military, it involves another military member in his conduct. Furthermore, Appellant did not have to have sent the photos to MK because of their technical school connection or because of her status in the military, because element 7 of Article 117a, UCMJ, does not require that Appellant *intend* to create a connection to the military environment, but that his conduct,

under the circumstances, *had* a reasonably direct and palpable connection to a military environment. 2019 MCM, Appendix 2, Article 117a, UCMJ. Under Hiser, this connection was met when Appellant directed the image to MK, another military member. Hiser, 82 M.J. at 66.

Finally, nor is the phrase "reasonably direct and palpable" made surplusage by the connection drawn by the evidence in the record. (*Cf.* App. Br. at 49). Because, as Appellant points out in part in his brief, Appellant was a military member who illegally sent an intimate photo of his military spouse, who worked for the military and lived on base, to a fellow military member stationed at the same base and who knew Appellant from shared military training. The connection between Appellant's conduct and the military environment is reasonably direct and palpable.

Therefore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witness, this Court should be convinced of Appellant's guilt beyond a reasonable doubt for element 7. Viewing the evidence in the light most favorable to the government, a rationale trier of fact could have found a reasonably direct and palpable connection, under the circumstances, between Appellant's conduct and the military environment beyond a reasonable doubt. Therefore, Appellant's conviction under Article 117a, UCMJ, is both legally and factually sufficient for all elements of the offense, including element 7.

Since Appellant conviction was legally and factually sufficient to all elements of Article 117a, UCMJ, this Court should deny Appellant's requested relief.

IV.

THE MILITARY JUDGE DID NOT ERR WHEN HE FAILED TO EXCUSE LT COL EW FOR IMPLIED BIAS

Additional Facts

During the military judge's group *voir dire*, EW answered in the affirmative that there could be something of either a personal or professional nature that would cause him to be unable to give his full attention to the proceedings throughout the trial, recognizing they would likely be in trial most of Saturday and a portion of Sunday. (R. at 370). He stated the baseball game that he was to attend Saturday started at 1600 hours, and he had a large quantity of family members coming into Philadelphia for the game. (Id.)

During trial defense counsel's group *voir dire*, EW answered affirmatively that he believed a finding of not guilty for sexual or physical assault would negatively reflect on the military. (R. 388). He answered in the affirmative that he had strong feelings about cheating in a marriage that may impact his ability to be fair in deciding the case. (R. at 389). He answered that he did have a moral, ethical, or religious feeling about consensual threesomes that may impact his ability to be fair in deciding the case. (R. 389-90).

EW also answered in the affirmative that if he were in Appellant's position, he would want someone like himself, with his temperament and life experience, sitting as a member of his trial. (R. at 392).

EW was the first member brought back for individual *voir dire*. (R. at 395). To the military judge's questions, he answered that he would need to leave the court-martial by 1400 hours on Saturday to make it to the game, and his wife could take their five kids to the game with the help of the extended family they had coming into town. (R. at 396). His wife would not

have been happy about having to take the five kids by herself but would have help. (Id.) He stated, "Again, just to emphasize, I'll – wearing the uniform, I'll do what I am told to do." (Id.)

Trial defense counsel further questioned EW on his weekend plans. (R. at 400-401). He stated that his plan originally was to just take his "boys" to the game. (R. at 401). However, based on the way his wife's family worked, "once something happens, it explodes, and half her family wound up attaching to it as well." Ultimately, seventeen (17) people, including EW, were to attend the game. (Id.). The extended family was staying at a hotel near the stadium in Philadelphia and not at EW's home.

EW answered in the following manner when questioned by Circuit Trial Counsel regarding his affirmative response for a not guilty verdict reflecting negatively on the military. (R. at 399).

> As the military as a microcosm of society, I think people seem to get a sense that although we should be held to a higher standard, they forget that we do have bad eggs who do come into our ranks, and they expect less of those bad eggs in what should be percentage-wise, if what I am saying is making sense. I think the civilian side of the United States fails to take that into account sometimes and expects us to – that if it happened, we should – it should never happen in the military and, therefore, if it does, it should be an automatic guilty. I think that's a negative light put on the military.
>
> I don't feel it takes away from the proceedings here. I think everything internal is fine. But exterior, I think there's negative light to whenever a negative sexual assault – a not guilty verdict is given in a sexual assault.

(Id.)

When further questioned on the matter, EW stated that his understanding of that public perception would "Not at all" influence his vote in this case. (Id.) To clarify, trial counsel asked EW whether he himself thought it should be an automatic guilty because there's an allegation, to which he responded, "Oh, no, not at all." (Id.) He answered the military judge that the external

pressure from Congress had no influence on whether to vote for a finding of guilty in this case, and he would keep an open mind and hold the Government to their beyond a reasonable doubt burden to prove guilt. (R. at 400).

Trial defense counsel also conducted individual *voir dire* of EW regarding his affirmative response to having strong feelings about cheating in a marriage and having moral, ethical, or religious feelings about consensual threesomes that may impact EW's ability to be fair in deciding the case. (R. at 402). EW stated he needed more elaboration on the cheating question and believed that "marriage between a man and a woman is sacred, and cheating can vastly impact that relationship in a negative way." (Id.) EW stated he saw consensual threesomes as cheating within marriage vows. (Id.)

Circuit trial counsel asked additional follow-up questions on EW's beliefs regarding threesomes and cheating. (R. at 403). EW stated he would not make any kinds of judgments about other facts in the case based on his beliefs regarding cheating or threesomes and he would be able to set it aside and follow the evidence as heard in the case. (Id.) EW elaborated,

> I feel as we put – as we all put these uniforms on, we all have personal feelings that I am – have to put aside to be able to lead in good order and discipline. Just because I have a differing opinion in how things are doesn't mean I can't be objective to the whole of the process. I do realize that not everyone shares the same values with me on that.

(Id.)

Trial defense counsel challenge EW for cause based on an implied bias standard, because of his beliefs regarding cheating and threesomes, his comments about sexual assault being an issue in the military and sexual assault reflecting negatively on the military, and his plans regarding the baseball game. (R. at 474 and 476).

The military judge stated she considered the challenge for cause under both the implied bias and actual bias standards while understanding her duty to liberally grant defense challenges and denied the challenge. (R. at 476).

> So I have considered the challenge – the defense challenge for cause under both actual and implied bias theories, and I am aware of the duty to liberally grant defense challenges. However, [EW] was very clear in his ability. I think he even said, "I wear the uniform. I will be wherever you tell me to be." He was questioned – he was questioned *ad nauseam* about his positions.
>
> He actually clarified, to the Court's questions, about what he meant by when he said the negative reflections is that it was a congressional mandate and that Congress is constantly looking.
>
> He also stated that he could – that he would weigh this case on the facts of the case alone and was, I think, very candid about his feelings; and for those reasons, your challenge for cause is denied.

(R. at 476-77).

In the context of determining a challenge for implied bias against another member, the military judge stated the following:

> With regard to cheating and threesomes, both [Lt Col JJ] and [EW] actually were very reflective about their own personal beliefs, about how that would not affect their ability to be fair and impartial in this court-martial.
>
> The fact that he gives money to his church, I think he went out of his way to point out that he gives money to the church, but he believes that his church does services for other people. I don't think that rises to the level of a challenge for implied bias. In fact, to be perfectly honest, I don't think it's even close for either of them.

(R. at 480).

When later granting a challenge for cause based on implied bias, the military judge stated she did believe that if the "public were watching this and knew that the spouse of a sex assault

victim were on this court-martial that it would cause them to question our military justice system." (R. at 483).

Standard of Review

This Court reviews implied bias challenges pursuant to a standard that is less deferential than abuse of discretion, but more deferential than *de novo* review. United States v. Dockery, 76 M.J. 91 (C.A.A.F. 2017). A military judge's ruling on a challenge for cause is given great deference. *Id.* (*citing* United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000).

Law

"The burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3). There are two generally recognized forms of bias that subject a juror to a challenge for cause: actual and implied bias. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F 2020) (*citing* United States v. Wood, 299 U.S. 123, 133 (1936)). Implied bias is "bias attributable in law to the prospective juror regardless of actual partiality." *Id.*

Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference form appellate courts. Dockery, 76 M.J. at 94 (*citing* United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)). The Court requires a clear signal that the military judge applied the right law, but does not expect record dissertations from the military judge's decision on implied bias. *Id.* A mere incantation of the legal test is rarely sufficient in a close case. *Id*.

Implied bias exists when most people in the same position as the court member would be prejudiced. *Id.* (*citing* United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008)). It is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. *Id.* (internal citations and quotations removed). The core of that objective test is the consideration of the

public's perception of fairness in having a particular member as part of the court-martial panel. *Id*. (*citing* United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2006)).

Analysis

The military judge did not err when she denied trial defense counsel's challenge for cause based on implied bias against EW. First, the military judge is due great deference, because she correctly applied the implied bias standard. Second, trial defense counsel failed to meet their burden of establishing there were grounds to challenge EW based on implied bias. Third, Appellant asserts the military judge erred when she did not place her implied bias analysis on the record; however, the military judge did place her analysis on the record when she explicitly ruled she did not find implied bias and then went into the reasons why.

The military judge stated she considered trial defense counsel's challenge under the implied bias standard. This Court can see from portions of the record that the military judge correctly knew what the standard for implied bias is; and thus, her ruling against trial defense counsel's challenge of EW is due great deference. Furthermore, the military judge stated she considered trial defense counsel's challenge under both applicable standards – actual and implied bias.

However, as the military judge stated, this is not even a close case when it comes to implied bias. The standards that EW expressed he holds with regard to cheating and threesomes within marriage – not engaging in extramarital sexual conduct – are not out of line with military values. *See generally*, United States v. Berry, 6 U.S.C.M.A. 609, 614. Trial defense counsel elicited no statements from EW that could be construed to mean EW would consider Appellant more likely to commit a crime because he cheated or engaged in a threesome. He stated in his views that both were violations of marital vows, which is a far cry from a bias towards Appellant

that would prejudice the public against the military justice system. Through EW's candid and thorough responses, which the military judge recognized, the public could be assured Appellant received a fair trial, because there is no indication that EW's disapproval of the conduct would cause him to reach a verdict on an unfair basis, rather than on the evidence presented. If the opposite was true, anyone who believed in the sanctity of marriage would be unable to be a panel member on cases with the potential for extramarital sexual conduct.

Furthermore, EW assured the military judge that he would be ready and present in court should he be required to be there as part of his military service, despite his plans to go to the baseball game with family the next day. The Court can see from the course of the *voir dire* of EW, that he chose to be more candid and forthcoming with details of his concerns. In doing so, he showed the court that he was taking his potential charge as a panel member very seriously. In recognizing his candor, the military judge made the decision that trial defense counsel's challenge for implied bias did not hold water. Any potential for implied bias was negated when EW informed the military judge that he would do what was required of him by his military service. He brought the situation to the attention of the military judge, as he should have, and let her know there were ways for him to fulfill his military and familial duties. His candidness and willingness to listen to the military judge's instruction demonstrate the integrity he brought to the court-martial process as a panel member. A member of the public would not have believed EW was so distracted by missing the baseball game that he could not sit as a fair and impartial panel member. Therefore, having EW as a member of the panel did not hinder the public's perception of the proceeding's fairness.

When asked to clarify his views with regard to the public viewing the military negatively for acquittals in sexual assaults, EW essentially said that he was aware the public thinks

negatively of the military when there is a not guilty verdict. However, he asserted he would not be swayed by that knowledge in coming to a fair decision. EW's beliefs were hardly a surprise given the publicity the military receives from the media and Congress on issues of sexual assault and domestic violence. EW's candor shows his inclusion as a panel member did not create substantial doubt concerning the fairness, impartiality, or legality of Appellant's court-martial, because there is no indication from EW's *voir dire* that he would allow the public's beliefs about sexual assault in the military to color his judgment or decision-making.

Neither individually nor in the aggregate did trial defense counsel's challenges for cause rise to the level of implied bias for EW; thus, the military judge did not err in denying the challenge. This Court should deny this assignment of error.

ISSUE V IS FILED UNDER SEAL (PAGES 44-51, 1-7*)

CONCLUSION

WHEREFORE, the United States respectfully requests this Court deny Appellant's claims and affirm the findings and sentence in this case.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 April 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **ALEXANDER V. JONES**, United States Air Force, *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40226 Filed on: 18 April 2023

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

COMES NOW, Appellant, Airman First Class (A1C) Alexander V. Jones, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed on 3 April 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 21 February 2023 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

I.

A1C JONES WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Analysis

In its Answer, the Government claims that A1C Jones did not object to the lack of unanimity required to convict him of the charged offenses. Gov. Ans. at 3. Contrary to the Government's assertion, A1C Jones's defense counsel submitted a motion for unanimous findings, or in the alternative, his defense counsel requested that the findings worksheet be modified to

indicate whether the findings were unanimous or non-unanimous. Appellate Exhibit (App. Ex.) XVI. The Government opposed the motion (App. Ex. XVII), and the military judge denied the motion. App. Ex. XXXVIII.

As a result, his defense counsel preserved the issue on appeal, which is significant, as the Court of Appeals for the Armed Forces (CAAF) has denied petitions relating to this issue in cases that predate *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).[1] Additionally, the CAAF has denied petitions if the issue was not preserved at trial after *Ramos* was decided. *See, e.g.*, *United States v. Causey*, 83 M.J. 25 (C.A.A.F. 2022).

WHEREFORE, A1C Jones respectfully requests this Honorable Court set aside his findings and sentence.

II.

A1C JONES'S CONVICTIONS FOR SEXUAL ASSAULT ARE LEGALLY AND FACTUALLY INSUFFICIENT.

1. Their prior sexual relationship supports A1C Jones's statements to AFOSI that he and J.J. had consensual sex on 28 March 2020.

The Government argues that "[t]he audio from Prosecution Exhibit 3 showed the character of the argument Appellant and [J.J.] had that night. It showed Appellant was violating [J.J.'s] autonomy and not listening to her when he took her phone, started pulling her hair, and shoved his fingers down her throat." Gov. Ans. at 17. Notably, J.J. had the benefit of knowing she was recording her interaction with A1C Jones, and she was able to tailor her responses accordingly. R. at 687, 710.

[1] *See United States v. Monge*, No. 22-0268, 2022 CAAF LEXIS 710 (C.A.A.F. 5 Oct. 2022); *United States v. Ramirez*, No. 23-0065, 2023 CAAF LEXIS 155 (C.A.A.F. 20 Mar. 2023).

Moreover, as discussed in A1C Jones's opening brief, the authenticity of the audio recordings is questionable for several reasons, chief among them that the first audio recording abruptly cuts off. App. Br. at 25-27. In vouching for the audio recording's authenticity, the Government asserts that "[i]t is more than plausible that a button on [the] watch might have been hit during a physical altercation while Appellant was grabbing [J.J.] and slamming her into things. It is pure speculation on the part of Appellant that [J.J.] purposely turned off the recording, and such an occurrence is unsupported by the evidence." Gov. Ans. at 19. In fact, it is *more* plausible that J.J. herself turned the audio recording off. J.J. testified that she did not stop the audio recording, yet she confirmed that the only way to stop the recording was to physically touch it. R. at 685-86, 697-98, 764. She verified that her watch's audio recording function had *never* stopped without her manually touching it. R. at 686. While the Government claims that "such an occurrence is unsupported by the evidence," there is support for J.J. being the one to stop the recording, as she was the one who manually stopped the second audio recording. R. at 722.

Assuming *arguendo* that the audio recordings were from 28 March 2020, none of the alleged actions the Government focused on prove that A1C Jones sexually assaulted J.J. Gov. Ans. at 17. First, it is apparent A1C Jones wanted J.J.'s phone because he wanted to see if she was on Tinder. R. at 688-89. J.J. herself admitted she had previously taken A1C Jones's phone because she wanted to check to see if he was cheating on her. R. at 741. After initially denying being on Tinder, J.J. admitted she downloaded Tinder to "piss [A1C Jones] off." R. at 690, 692. His possession of her phone does not prove he sexually assaulted her. Second, even if A1C Jones did pull J.J.'s hair, this would be a physical assault, not a sexual assault. R. at 696. Likewise, the same is true of her claim that he shoved his fingers into her mouth. *Id*. Notably, she had no injuries from his alleged pulling of her hair or from allegedly shoving his fingers down her throat. R. at

804, 807-08. Additionally, J.J.'s rendition of events was inconsistent throughout her testimony. She initially claimed that A1C Jones was shoving his fingers into her mouth during the audio recording (R. at 696), yet she later claimed that this *same* section of the audio recording captured when he was strangling her. R. at 703. Significantly, A1C Jones was never charged with pulling J.J.'s hair or shoving his fingers down her throat (ROT, Vol. 1, Charge Sheet), and he was acquitted of strangling her. R. at 1030.

While the Government focuses on A1C Jones's comments to J.J. about being aroused during their argument (Gov. Ans. at 17), their prior sexual history explains why A1C Jones would believe that J.J. was aroused. R. at 695, 745, 747, 748. A1C Jones and J.J. had a history of angry, aggressive sexual intercourse. R. at 747, 748. In fact, on several prior occasions, they had previously had "angry sex" *after* arguing. R. at 747-48. The Government suggests that "[i]t strains belief that *after* the interactions portrayed on Prosecution Exhibits 3 and 4, consensual sexual intercourse occurred, and then Appellant stopped when [J.J.] asked him to." Gov. Ans. at 18 (emphasis added). As a point of clarification, J.J. testified that the second audio recording (Prosecution Exhibit (Pros. Ex.) 4) took place *after* the alleged sexual assault. R. at 714.

As discussed in A1C Jones's opening brief, and argued by his defense counsel, the recordings only cover approximately 30 minutes. App. Br. at 25; R. at 995. Thus, two-and-a-half hours of time were unaccounted for. R. at 727, 768, 995. A lot can happen in two-and-a-half hours. Two-and-a-half hours provides plenty of time to cool down from an argument, or for an argument to lead to a consensual sexual encounter, especially between a married couple with a history of having "angry sex" after arguing. R. at 747.

2. The lack of injuries and the lack of ejaculation supports A1C Jones's description of the consensual nature of his and J.J.'s sexual encounter on 28 March 2020.

The Government attempts to minimize J.J.'s testimony that A1C Jones ejaculated inside of her, claiming "it is entirely plausible that [J.J.] genuinely believed Appellant ejaculated inside of her with everything that was going on that night." Gov. Ans. at 21. But this interpretation is *not* consistent with the evidence. During his interview with the Air Force Office of Special Investigations (AFOSI), A1C Jones testified that he and J.J. never used condoms. R. at 873. He explained that he would ejaculate inside of her every time. *Id*. Therefore, J.J. would have been intimately familiar with what it felt like to have A1C Jones ejaculate inside of her. She made this clear when she testified, "You can . . . you could tell." R. at 702. She also claimed she went to the bathroom to "clean up" and she used the bathroom to "try to push out what he did." R. at 705, 706. If he did not ejaculate, J.J. would have had no reason to try to push out "what he did," i.e., his semen.

Significantly, during his AFOSI interview, A1C Jones clarified that when he and J.J. had consensual sex on 28 March 2020, he did *not* ejaculate. R. at 874, 875. He did not ejaculate because after they started having sex, J.J. told him to stop, and he stopped. R. at 875. The DNA expert corroborated A1C Jones's statements to AFOSI and refuted J.J.'s claim that A1C Jones ejaculated. R. at 832, 835. While it is true that the Government did not need to prove ejaculation to secure a conviction, J.J.'s claim that A1C Jones sexually assaulted her until he ejaculated was integral to her testimony, thus, this refuted claim should be given significant weight in assessing her credibility. Likewise, while injuries alone—or the lack of injuries—may not be dispositive of the issue, it is important to consider that J.J. described a violent assault where she was being dragged around the house, tossed on various surfaces, strangled, and held down so that she could not move during the alleged sexual assault. *See* App. Br. at 27. Yet, she did not have a single

bruise, scratch, or mark on her body. R. at 804, 807-12. The lack of a single marking strains credulity.

The Government contends that it is "pure speculation that [A1C Jones] could not have conducted the sexual assault described by [J.J.] because he was wearing jeans." Gov. Ans. at 26. However, as the Government aptly noted in its argument, the members were instructed they may use their common sense and knowledge of the ways of the world in assessing the evidence presented. Gov. Ans. at 19, 24. The members—no strangers to the inflexibility of jeans—would have been able to consider the plausibility of J.J.'s claims of being sexually assaulted by A1C Jones while he was wearing said jeans. The Government next posits that "[J.J.]'s testimony about Appellant's odd positioning actually enhances her credibility" because if "she wanted to give a fictional account of being assaulted, rather than a true account, she may have made the details more bland and more easily pictured." Gov. Ans. at 33. The Government's interpretation is flawed because rather than enhancing J.J.'s credibility, her description of an assault that could not be "easily pictured" demonstrates the implausibility that A1C Jones assaulted her in the manner she described.

WHEREFORE, A1C Jones respectfully requests this Court set aside the findings for Specifications 1 and 2 of Charge I and the sentence.

III.

A1C JONES'S CONVICTION FOR WRONGFUL DISTRIBUTION OF INTIMATE VISUAL IMAGES IS LEGALLY AND FACTUALLY INSUFFICIENT.

The Government provides several reasons why it believes that A1C Jones should have known that sending J.J.'s pictures to M.K. was likely to cause emotional distress to J.J. Gov. Ans. at 31-32. The Government's arguments center around what actions a *reasonable person* would

have found appropriate. However, at least one member of A1C Jones's panel informed the parties that he believed "marriage between a man and a woman is sacred . . . [and] a consensual threesome to me is -- in the marriage vows is not -- is cheating in and of itself." R. at 402. As argued in his opening brief, this panel member should have been removed for implied bias as the issue of threesomes was pivotal to the disposition of this offense. *See* App. Br. at 56, 57, 59.

The Government acknowledges that A1C Jones sent the images of J.J. to M.K. following a conversation with J.J. about threesomes. Gov. Ans. at 32. Thus, in determining whether A1C Jones's should have known that his actions would be likely to cause J.J. emotional distress, a reasonable person—*under all the circumstances*—would be aware that J.J. was the one to broach the issue of threesomes with A1C Jones on more than one occasion. R. at 749, 751. Furthermore, this reasonable person would be aware that A1C Jones and J.J. had an active, adventurous sex life. R. at 747, 748. This reasonable person would also be aware that A1C Jones was only twenty years old, that J.J. characterized his actions as "young and stupid," and she felt he had turned their conversation about threesomes "into this whole big thing." R. at 752; Pros. Ex. 13. While A1C Jones's actions were misguided, this same reasonable person would be aware that A1C Jones told AFOSI that he sent M.K. the pictures because he thought "that's what my wife wanted." R. at 894.

Furthermore, contrary to the Government's claim that A1C Jones "shop[ped] [J.J.]'s photo around to other military members for potential partners," (Gov. Ans. at 32), A1C Jones only sent photos to one person, M.K., and he specifically told her *not* to show them to anyone else. Pros. Ex. 1. If A1C Jones had wanted to cause J.J. emotional distress, he very well could have sent her photos to several military members. Yet, that is *not* what he did. He approached one person, M.K., because he believed she may be interested in having a threesome with him and his wife.

The Government asserts that A1C Jones's argument "fails at the outset due to CAAF's analysis in *Hiser*[.]" Gov. Ans. at 34. However, procedurally, *Hiser* is distinguishable from A1C Jones's case in two ways. First, *Hiser* involved a guilty plea, not contested findings. 82 M.J. 60, 62 (C.A.A.F. 2022). Rather than reviewing for legal sufficiency, the CAAF's task on review is much more limited in the context of a guilty plea where "[they] simply must determine whether Appellant's guilty plea has a substantial basis in law and fact." *Id*. at 66. Second, the appellant in *Hiser* was charged with wrongful broadcasting of sexually explicit images, not wrongful distribution. Thus, the CAAF's analysis was focused on whether the stipulated facts and the appellant's *Care* inquiry supported the elements of wrongful broadcasting—not wrongful distribution—of sexually explicit images.

Furthermore, the Government conflates the CAAF's analysis of the phrase "connection to a . . . military environment" with the CAAF's analysis of whether this connection was sufficiently "direct and palpable" as required by Article 117a, UCMJ. Gov. Ans. at 35. While a connection may have been established when A1C Jones sent J.J.'s images to M.K., the Government failed to establish that there was a "*direct and palpable* connection to a . . . military environment." 2019 *MCM*, Appendix 2, Article 117a, UCMJ. In determining that "a direct and palpable connection to a . . . military environment" was met in *Hiser*, the CAAF catalogued several facts supporting this "direct and palpable" connection, including (1) SPC V.G. was a member of the military herself; and (2) "Appellant stipulated that there was a negative impact on the military community at Fort Drum." 82 M.J. at 67. Additionally, appellant also stipulated that at the time he posted the videos, he and his wife "were well-known as a dual-military couple within the Fort Drum military environment." *Id*. at 63. These facts are absent from A1C Jones's case.

Contrary to the Government's contention,[2] the facts of A1C Jones's case are *more* attenuated than the facts of *Hiser*, as the appellant in *Hiser* posted sexually explicit videos of his wife on the Internet, where numerous members of the military, including members of the Fort Drum military community (like SPC V.G.) could view the sexually explicit videos. *See United States v. Torello*, No. ACM S32691, 2022 CCA LEXIS 479, at *18 (A.F. Ct. Crim. App. 15 Aug. 2022) (in the context of the distribution of an indecent recording, noting, "Appellant's actions, *in the digital age*, risked the possibility of an unending exploitation of GK insofar as the video may still exist or individuals may remember its contents") (emphasis added). In contrast, A1C Jones distributed the intimate images of J.J. to one person, M.K., who remained in possession of the images and did not forward them.

The Government argues that "[J.J.]'s status as a military spouse and civilian employee of the military creates a reasonably direct and palpable connection to the military environment." Gov. Ans. at 35. However, as the Government acknowledges, J.J. worked from home. *Id.* Therefore, her work environment was her house, not an office. Additionally, the Government presented zero evidence that any of her co-workers were aware that A1C Jones had distributed intimate images of her. The Government also highlights that J.J. "developed friendships with fellow military spouses and military members." *Id.* Just as with her co-workers, the Government failed to call any fellow military spouses or military members—other than M.K.—who were aware of A1C Jones's actions. Her status as a spouse and civilian employee (who worked from home) does not automatically equate to a direct and palpable connection to a military environment. Nor does M.K.'s status as a servicemember automatically equal a direct and palpable connection to a military environment. These facts may establish a connection, but a connection is not sufficient.

[2] Gov. Ans. at 35.

Using the Government's logic, a direct and palpable connection is established by status alone—here, J.J.'s status and M.K.'s status. In the Government's telling, nothing else is required. Even in the context of a guilty plea, the CAAF required more. *Hiser*, 82 M.J. at 67 (detailing four facts which established a "direct and palpable connection to a . . . military environment."); *see also* App. Br. at 43-44.

A1C Jones's panel may have disapproved of his actions. A reasonable person might find his actions distasteful. However, regardless of whether his actions would be considered morally reprehensible, the Government was required to prove—beyond a reasonable doubt—that his conduct had a "reasonably direct and palpable connection to a . . . military environment." The Government failed to do so.

WHEREFORE, A1C Jones respectfully requests this Court set aside the findings for Charge III and its specification and the sentence.

IV.

THE MILITARY JUDGE ERRED IN FAILING TO EXCUSE LT COL E.W. FOR IMPLIED BIAS.

According to the Government, the military judge "did place her analysis on the record when she explicitly ruled she did not find implied bias and then went into the reasons why." Gov. Ans. at 42. As argued in A1C Jones's opening brief, the military judge's analysis was fairly limited and conclusory. App. Br. at 58-60; *see* R. at 476-77. Moreover, while the military judge briefly referenced the public when later granting a challenge for cause (R. at 483), the context in which she granted the challenge is significant. The trial counsel attempted to rehabilitate a member whose spouse was sexually assaulted just four years prior and who admitted that the phrase "sexual assault" was a trigger. R. at 433, 482-83. Given these facts, it seems apparent that leaving this member on the panel would lead to the perception that A1C Jones had not received a fair trial.

Thus, the military judge's decision to grant the Defense's challenge for cause speaks less to her application of the implied bias standard and more to the trial counsel's inability to appreciate that leaving First Lieutenant A.G. on the panel would cause others to question the legality, fairness, and impartiality of A1C Jones's panel.

WHEREFORE, A1C Jones respectfully requests this Court set aside the findings and sentence.

ISSUE V IS FILED UNDER SEAL (PAGES 12-17)

Respectfully submitted,

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Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 18 April 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR LEAVE TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ALEXANDER V. JONES,** United States Air Force *Appellant*	)	Case No. ACM 40226 18 April 2023

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

Pursuant to Rule 13(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file Issue V of his Reply Brief under seal. Issue V cites to pages found within the sealed portions of Appellant's transcript (83-86, 88-89, 91), and Appellate Exhibits (App. Ex.) II, IV, XX, XXXIV, which were ordered sealed by the military judge. Issue V relates to the military judge's ruling regarding whether certain aspects of the complaining witness's medical records were protected under Mil. R. Evid. 513. The inclusion of this information is necessary for this Court's consideration of the case. Pages 12 thru 17 of Appellant's reply brief, corresponding to Issue V, are filed under seal.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully Submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

GRANTED
26 APR 2023

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 18 April 2023.

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]