IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 2 May 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 **13 July 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 48 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]pt, 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 2 May 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

3 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 3 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 (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 6 July 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **12 August 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]
pt, 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 6 July 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

6 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 6 July 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
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 1 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **11 September 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his

right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]

ALEXANDRA K. FLESZAR, Capt, 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 1 August 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

1 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 1 August 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 (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 29 August 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **11 October 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his

right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel is currently assigned 15 cases, eight of which are pending initial AOE before this Court. Three cases have priority for filing an initial AOE before this Court ahead of Appellant's:

1. *United States v. Bousman*, ACM No. 40174 – The record of trial consists of 13 prosecution exhibits; six defense exhibits; and 37 appellate exhibits; the transcript is 566 pages. Counsel has completed record review in this case and is in the process of finalizing this Appellant's AOE for imminent submission to this Court.

2. *United States v. Garron*, ACM No. 40239 – The record of trial consists of six prosecution exhibits; thirteen defense exhibits; three appellate exhibits; and one court exhibit; the transcript is 69 pages. Counsel has begun but not yet completed record review and drafting of the AOE in this case.

3. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has not yet begun review of this Appellant's case.

Additionally, undersigned counsel anticipates filing two Replies before this Court in the following cases:

4. *United States v. Injerd*, ACM No. 40111 – Undersigned counsel anticipates drafting and filing a Reply to the Government's Answer before this Court between 6 and 13 September 2022.

5. *United States v. Tarnowski*, ACM No. 40110 – Undersigned counsel anticipates drafting and filing a Reply to the Government's Answer before this Court between 19 and 26 September 2022.

Finally, undersigned counsel anticipates preparing for oral argument in early October, arguing before the Court of Appeals for the Armed Forces in *United States v. Thompson*, ACM No. 40019, Dkt. No. 22-0098 on 13 October 2022.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]

ALEXANDRA K. FLESZAR, Capt, 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 29 August 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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

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 30 August 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 3 October 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **10 November 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his

right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel is currently assigned 15 cases, eight of which are pending initial AOE before this Court. Two cases have priority for filing an initial AOE before this Court ahead of Appellant's:

1. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun, but not yet completed review of this Appellant's case.

2. *United States v. Dunleavy*, ACM No. S32724 – The record of trial consists of three prosecution exhibits, three defense exhibits; and five appellate exhibits; the transcript is 90 pages. Given that Appellant's case is on the same delay as *United States v. Dunleavy*, and the relative sizes of the records, undersigned counsel anticipates completing the AOE in *United States v. Dunleavy* while working towards completion of record review and drafting of Appellant's AOE.

Additionally, undersigned counsel anticipates filing Replies before this Court in the following cases:

3. *United States v. Bousman*, ACM No. 40174 – Undersigned counsel anticipates drafting and filing a Reply to the Government's Answer before this Court between 13 and 20 October 2022. The Government's Answer is due 6 October 2022, however, undersigned counsel anticipates requesting a seven-day enlargement from 13 October, based on preparation and presentation of oral argument in *United States v. Thompson*, ACM No. 40019, before the CAAF on 13 October 2022, and corresponding approved leave through 16 October 2022.

4. *United States v. Garron*, ACM No. 40239 – Undersigned counsel anticipates drafting and filing a Reply to the Government's Answer before this Court between 23 and 30 October 2022.

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

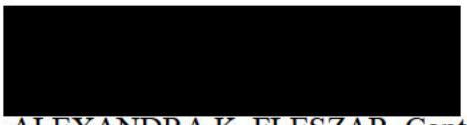
Respectfully submitted,

[redacted]
pt, 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 3 October 2022.

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

4 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 4 October 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 40258**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan R. LEE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 October 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 5th day of October, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **10 November 2022**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258
	)	2 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **10 December 2022**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his

right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel is currently assigned 18 cases, 9 of which are pending initial AOE before this Court. Two cases have priority for filing an initial AOE before this Court ahead of Appellant's:

1. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun, but not yet completed review of this Appellant's case. Counsel is just more than halfway through review of this record.

2. *United States v. Dunleavy*, ACM No. S32724 – The record of trial consists of three prosecution exhibits, three defense exhibits; and five appellate exhibits; the transcript is 90 pages. Given that Appellant's case is on the same delay as *United States v. Dunleavy*, and the relative sizes of the records, undersigned counsel anticipates completing the AOE in *United States v. Dunleavy* while working towards completion of record review and drafting of Appellant's AOE.

Additionally, undersigned counsel anticipates the following duties may also delay completion of review of Appellant's record of trial:

3. *United States v. Bousman*, ACM No. 40174 – Undersigned counsel anticipates drafting a response to the Government's Motion in Opposition for submission to this Court by 7 November 2022 and then drafting and filing a Reply to the Government's Answer before this Court by early December 2022.

4. *United States v. Bench*, Dkt. No. 21-0341/AF – Undersigned counsel anticipates drafting and filing a Petition for Writ of Certiorari due to the United States Supreme Court on 7 December 2022.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]pt, 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 2 November 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

2 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 2 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 (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 7 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **9 January 2023**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 237 days have elapsed. On the date requested, 300 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel is currently assigned 18 cases, nine of which are pending initial AOE before this Court. Three cases have priority ahead of Appellant's:

1. *United States v. Bench*, Dkt. No. 21-0341/AF – Undersigned counsel anticipates drafting and filing a Petition for Writ of Certiorari due to the United States Supreme Court on 7 December 2022.

2. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun, but not yet completed review of this Appellant's case. Counsel has reviewed motions, responses, and rulings as well as through page 346 of 871 of the transcript.

3. *United States v. Dunleavy*, ACM No. S32724 – The record of trial consists of three prosecution exhibits, three defense exhibits; and five appellate exhibits; the transcript is 90 pages. Given that Appellant's case is on the same delay as *United States v. Dunleavy*, and the relative sizes of the records, undersigned counsel anticipates completing the AOE in *United States v. Dunleavy* while working towards completion of record review and drafting of Appellant's AOE.

Additionally, Counsel anticipates work in *United States v. Bousman*, ACM No. 40174 may slightly delay review of this case. Counsel has filed a motion for reconsideration of this appellant's request to file a supplemental AOE and supplemental AOE. Should this Court grant that request, counsel anticipates filing a Reply to the Government's Answer within 30 days of this Court's ruling. Should the motion for reconsideration be denied, counsel anticipates filing an appropriate motion to supplement the original Reply in this case.

Finally, undersigned counsel recognizes this request for enlargement of time could be considered early, as there are four weeks remaining in the current time period for submission of Appellant's AOE. However, counsel currently anticipates undergoing surgery within the next

month for a recent unanticipated health diagnosis. [redacted] however, counsel anticipates losing a week of review and drafting time at minimum. Counsel is therefore requesting an enlargement of time in an abundance of caution in considering the foregoing information. Should additional requests for enlargement of time become necessary prior to return from convalescent leave, undersigned counsel will ensure completion through assignment of co-counsel.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]

ALEXANDRA K. FLESZAR, 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 7 November 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

8 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet started her 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 8 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 (EIGHTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 7 December 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **8 February 2023**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 267 days have elapsed. On the date requested, 330 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his

right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel is currently assigned 18 cases, nine of which are pending initial AOE before this Court. Since filing the last EOT in this case, counsel completed drafting a petition for certiorari to the United States Supreme Court in *United States v. Bench*, ACM 39797, which was filed with the Court on 6 December 2022. Approximately five days of review time were lost for medical appointments and procedures. One case has priority ahead of Appellant's:

1. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun, but not yet completed review of this Appellant's case. Counsel has reviewed motions, responses, and rulings as well as through page 392 of 871 of the transcript.

Undersigned counsel recognizes this request for enlargement of time could be considered early, as more than four weeks remain in the current time period for submission of the AOE. [redacted] Though counsel anticipates having access to email in this time, significant drafting and review time will be lost. [redacted] Appellant specifically consents to this request for enlargement of time and affirmatively seeks to maintain undersigned counsel as his defense

attorney. [redacted], undersigned counsel will ensure completion through assignment of new or co-counsel.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]
ALEXANDRA K. FLESZAR, 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 7 December 2022.

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

8 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. [redacted], the United States does not oppose this request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 30 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **10 March 2023**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Since filing the last EOT in this case, counsel reviewed and submitted an AOE in *United States v. Dunleavy*, ACM No. S32724, completed review of the record in *United States v. Stradtmann*, ACM No. 40237, and submitted a Petition for Grant of Review and Supplement to the Petition before the Court of Appeals for the Armed Forces in *United States v. Tarnowski*, ACM No. 40110. Approximately one day of review time since returning from convalescent leave on 9 January was lost for recent medical appointments. Undersigned counsel is currently assigned 20 cases, 11 of which are pending initial AOE before this Court. One case has priority ahead of Appellant's:

1. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has completed review of this case and begun drafting this Appellant's AOE, including potential issues being raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Counsel has identified 18 potential issues, including failures to state an offense, improper denial of character evidence, improper admission of character and sentencing evidence, factual and legal sufficiency, unconstitutional vagueness, and fatal variance. Counsel is in the process of researching and drafting these issues, with the Statement of the Case, Statement of Facts, and two issues currently fully drafted.

Additionally, given the relative sizes of Appellant's case and that of *United States v. Pelletier*, ACM No. 40277, counsel anticipates at least reviewing the record in *Pelletier* while in the process of reviewing Appellant's record.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started 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]
aj, 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 30 January 2023.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's 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 to the Air Force Appellate Defense Division on 30 January 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 1 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **9 April 2023**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has begun, but not completed her review of Appellant's case. Since filing the last EOT in this case, counsel submitted an AOE before this Court in *United States v. Stradtmann*, ACM No. 40237, and submitted a Petition for Grant of Review and Supplement to the Petition before the Court of Appeals for the Armed Forces in *United States v. Todd*, ACM S32701, Dkt. No 23-0093. Counsel will be submitting an AOE to this Court in *United States v. Thompson*, ACM No. 40019 prior to 7 March 2023, and has begun review in *United States v. Pelletier*, ACM No. 40277.

Undersigned counsel is currently assigned 21 cases, 12 of which are pending initial AOE before this Court. Two cases currently have priority for filing an AOE ahead of Appellant's:

1. *United States v. Thompson*, ACM No. 40019 – The record of trial consists of 20 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits; the transcript is 440 pages. Counsel has completed review of this case and is nearing completion of this Appellant's AOE. Counsel anticipates filing this AOE prior to 7 March 2023.

2. *United States v. Pelletier*, ACM No. 40277 – The record of trial consists of three prosecution exhibits; 21 defense exhibits; and five appellate exhibits; the transcript is 83 pages. Counsel has begun review of Appellant's case, identified at least one potential error, and begun drafting the AOE. Counsel anticipates filing a motion to examine sealed materials within the next week. Counsel anticipates filing this AOE no later than 30 March 2023.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet completed 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]
ALEXANDRA K. FLESZAR, 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 1 March 2023.

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

2 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 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]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40258**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan R. LEE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

On 6 March 2023, the court held a status conference with the parties to discuss Appellant's motion. During the status conference, counsel for Appellant indicated that she has already begun reviewing Appellant's case. She also indicated that if the current enlargement of time is granted, she hopes to file an assignments of error brief prior to the new deadline. Counsel for the Government reiterated the Government's opposition to 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 6th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 April 2023**.

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 (ELEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258
	)	24 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 12 days, which will end on **21 April 2023**. The record of trial was docketed with this Court on 15 March 2022. From the date of docketing to the present date, 371 days have elapsed. On the date requested, 402 days will have elapsed.

On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, NC, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence of this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Undersigned counsel has completed

her review of Appellant's case, absent sealed materials.[1] Undersigned counsel has identified and begun drafting seven potential assigned errors, including: preserved denial of unanimous verdict; record completeness; denial of a defense witness; improper admission of prior statements; legal and factual sufficiency; unreasonable multiplication of charges; and potentially the denial of certain Mil. R. Evid. 412 evidence. Counsel has not yet completed drafting of these assigned errors and must still review the sealed material, which is pertinent to the analysis of the potential Mil. R. Evid. 412 error.

Since filing the last EOT in this case, counsel submitted an AOE before this Court in *United States v. Thompson*, ACM No. 40019 and *United States v. Pelletier*, ACM No. 40277. Undersigned counsel is currently assigned 22 cases, 12 of which are pending initial AOE before this Court. No other cases currently have priority for filing an AOE ahead of Appellant's, however, Counsel will be filing briefs before this Court in the following cases prior to the current deadline for Appellant's AOE, 9 April 2021:

1. *United States v. Stradtmann*, ACM No. 40237 – Undersigned counsel filed an AOE in this case on 16 February 2023, the Government filed its Answer with a Motion to Exceed the Page Limit on 20 March 2023. This Court granted the Government's motion on 23 March 2023, and undersigned counsel anticipates filing the Reply to the Government's Answer on 29 March 2023. Undersigned counsel anticipates requiring all of the time allotted to finalize the Reply in this case, as the Government responded substantively to all of this appellant's five assigned errors.

2. *United States v. Thompson*, ACM No. 40019 – Counsel filed an AOE in this case on 2 March 2023. The Government's Answer is due on 1 April 2023; the day after undersigned

[1] Undersigned counsel filed a Motion to Examine which the Government did not oppose; this Court's decision on that motion is currently pending.

counsel's anticipated release from the hospital following an inpatient surgery. Undersigned counsel anticipates filing the Reply to the Government's Answer in this case on 8 April 2022, the day prior to when SSgt Lee's AOE is currently due. Due to counsel's follow-up medical appointments required after surgery, counsel anticipates requiring all of the time allotted to draft this Reply.

[redacted]

Undersigned counsel stated in the Status Conference held in this case that she intended to file Appellant's AOE prior to the current deadline of 9 April 2023. [redacted] Following the status conference, counsel discovered the full extent of the potential errors in this case to be larger and more complex than anticipated; several potential issues are fact-intensive and require significant research. Additionally, in the intervening time since the status conference, counsel obtained new employment and began the process of separating from military service, causing some review and drafting time to be lost for appointments related to separation and transition into Reserve service. Counsel endeavors to file the AOE by the current deadline in this case of 9 April 2023, but in an abundance of caution for the reasons cited above, counsel requests an additional 12 days.

[redacted]. Appellant understands his right to speedy appellate review, specifically consents to this request for enlargement of time, and still wishes to be represented by undersigned counsel. Counsel anticipates this will be the last requested enlargement of time, absent extraordinary circumstances. [redacted], undersigned counsel will ensure new counsel will submit any subsequent requests for enlargements of time, should they be necessary. Counsel will be available for a status conference as this Court may deem necessary, absent 30-31 March 2023.

Based on the exceptional circumstances detailed above, and through no fault of Appellant, an enlargement of time is necessary to allow undersigned counsel to adequately complete Appellant's AOE.

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

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, 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 Government Trial and Appellate Operations Division on 24 March 2023.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

24 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40258 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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. [redacted], the United States does not oppose this request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

WHEREFORE, the United States respectfully requests that this Court grants 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 24 March 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO EXAMINE**
Appellee	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40258
JORDAN R. LEE	)	
United States Air Force	)	22 March 2023
Appellant	)	

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the sealed portion of Appellate Exhibits X, XI and sealed portions of the transcript beginning at R. at 310.[1] On 31 August and 6-9 December 2021 at Seymour Johnson Air Force Base, North Carolina, Appellant was tried and convicted, contrary to his pleas, of one charge and three specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Staff Sergeant Jordan R. Lee* (EOJ). The military judge sentenced Appellant to 24 months confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad conduct discharge. *Id*.

Appellate Exhibit X is a Defense Motion and Motion *In Limine* Pursuant to Mil. R. Evid. 412; Appellate Exhibit XI is the United States' Response to the Defense's Mil. R. Evid. 412 motion. App. Ex. X, XI. These motions were reviewed by both trial and defense counsel and

[1] Appellate Exhibit XXII is sealed for inclusion of Personally Identifiable Information (PII), but contained elsewhere in a redacted version in the record as Defense Exhibit J. Undersigned counsel does not believe review of Appellate Exhibit XXII is reasonably necessary to fulfill her responsibilities at this time. *See* R.C.M. 1113(b)(3)(B)(i).

submitted to the court. R. at 39-40. The military judge sealed the motion and response. R. at 459. Following the complaining witness' testimony, Defense Counsel raised an issue regarding impeachment evidence, to which Trial Counsel responded "Your Honor, at this point we are getting into the [412] motion, we need to have a closed hearing on this." R. at 308 (alteration additional). Defense Counsel affirmed the Article 39(a) session would address "[n]ot the 412 motion as styled previously, but [] a different 412 issue . . . ." *Id*. (alteration additional). The military judge excused individuals from the gallery and began a closed session.[2] R. at 308-09.

In the closed session, the military judge ruled on a Mil. R. Evid. 412 issue that later partially limited the defense in their examination of witnesses during their case in chief. *See* R. at 426 ("DC: . . . we did talk about 412 earlier, and we haven't had the opportunity to discuss with the witnesses, the limits, the left and right limits of their testimony after that decision was made."). The military judge denied the defense the ability to examine witnesses with respect to specific conversations related to M.C. and SSgt Lee. R. at 431. Though Trial Counsel ultimately did not present the evidence the original Mil. R. Evid. 412 motions practice addressed, and Defense Counsel agreed this appeared to moot the motion and response, it is unclear what relation, if any, this bore to the Mil. R. Evid. 412 evidence discussed in the close session. (R. at 308, 458-59).

R.C.M. 1113(b)(3)(B)(i) requires a colorable showing that examination of this material is reasonably necessary to appellate counsel's responsibilities. Undersigned counsel asserts that review of Appellate Exhibits X and XI, as well as the entirety of the sealed portion of the

[2] The closed session portion of the transcript begins in the Record at page 310. R. at 310. It is not clear from the transcript how many pages are sealed as part of this session, however, because the Record at page 311 begins with the military judge calling the court to order and requesting the bailiff retrieve the members for cross examination of the complaining witness. R. at 311. Undersigned counsel is requesting to examine all pages of the transcript sealed as part of this closed session, however many exist.

transcript, is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

In order to provide competent representation, undersigned counsel must review the sealed material in order to, *inter alia*, adequately evaluate the military judge's ruling on the Mil. R. Evid. 412 at issue and the prejudice that may have resulted based on his limitation of the defense. *See* R. at 426, 431. Though Trial Counsel ostensibly did not offer the evidence which was the subject of the original Mil. R. Evid. 412 motions practice, undersigned counsel must be able to review the motions in order to evaluate Defense Counsel's competency in conceding that point, and whether and how the motions evidence is related to the Mil. R. Evid. 412 evidence argued during trial. *See* R. at 308-09.

Finally, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, appellate defense counsel must, therefore, examine "the entire record." The sealed material referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998). Accordingly, examination of these materials is reasonably necessary since counsel cannot fulfill her duty of representation under Article 70, UCMJ, without first reviewing the complete record of trial.

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

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, 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 Government Trial and Appellate Operations Division on 22 March 2023.

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

23 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JORDAN R. LEE, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS No. ACM 40258 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 Materials, dated 22 March 2023. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to the parties if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States respectfully requests that any order issued by this Court also permits appellate counsel for the United States to view the sealed materials.

The United States does 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]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
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 23 March 2023.

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 40258**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan R. LEE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 22 March 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Appellate Exhibits X, XI, and transcript pages 310–321.

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 her duty of representation, since counsel cannot perform her duty of representation without first reviewing the complete record of trial.

The Government responded to the motion on 23 March 2023. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial, as 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 has made a colorable showing that review of the sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 28th day of March, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits X, XI, and transcript pages 310–321**, 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
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE,** United States Air Force *Appellant*	)	No. ACM 40258 21 April 2023

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to file the following portions of Appellant's Assignments of Error under seal:

- Assignment of Error I, beginning on page 6 and ending on page 11.

The information contained therein is subject to the requirements of Mil. R. Evid. 412, was ordered sealed by the military judge, and due to its nature, should remain sealed. *See* R. at 310-322.

The above referenced portions will be delivered in hard copy to the Court and Air Force Trial and Appellate Government Operations Division. The remainder of the Assignments of Error and Appendix, redacted for ease of review and reference, will be filed separately via email on 21 April 2023.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant the motion.

Respectfully submitted,

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Air Force Trial and Appellate Government Operations Division on 21 April 2023.

Respectfully submitted,

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**ASSIGNMENT OF ERRORS**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 21 April 2023

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

Issues Presented

I.

WHETHER THE MILITARY JUDGE IMPROPERLY EXCLUDED CONSTITUTIONALLY REQUIRED STATEMENTS?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DECIDING SPECIFICATIONS 1 AND 2 OF THE CHARGE WERE NOT UNREASONABLY MULTIPLIED AT FINDINGS?

III.

WHETHER THE CHARGE AND SPECIFICATIONS ARE FACTUALLY SUFFICIENT?

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING RELEVANT AND NECESSARY CHARACTER EVIDENCE?

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN FAILING TO COMPEL THE DEFENSE'S CHARACTER WITNESS?

VI.

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

VII.

WHETHER THE CHARGE AND SPECIFICATIONS ARE LEGALLY SUFFICIENT?[1]

Statement of the Case

On 6-9 December 2021 at Seymour Johnson Air Force Base (AFB), North Carolina, Staff Sergeant Jordan R. Lee (SSgt Lee) was tried and convicted by a panel of officer and enlisted members, contrary to his pleas, of one charge and three specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ). Record (R.) at 36-37, 542. Each specification was alleged to have occurred on 25 December 2020.[2] R. at Vol. 1, Charge Sheet.

The military judge sentenced Appellant to 24 months confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad conduct discharge. *Id*. The convening authority took no action on the findings or sentence in this case. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Jordan R. Lee*, dated 18 January 2022.

Statement of Facts

SSgt Lee enlisted in the Air Force in 2016 from Montana after growing up in an abusive home. Defense Exhibit (Def. Ex.) K. Prior to joining, he had "struggle[ed] with a will to live" as well as his homosexuality, "because [he] was always taught that homosexuals were less than others and undeserving of a happy life." *Id*. He enjoyed enlisting in the Air Force "because it gave [him] the chance to challenge [him]self[.]" *Id*. He was assigned to Seymour Johnson AFB, arriving in 2017, and quickly became a "go-to" Airman. *Id*. SSgt Lee lived with his two married friends, K.P. and SSgt W.P., beginning in 2019. R. at 248-49.

In summer 2020, SSgt Lee was assigned to sponsor an Airman newly assigned to Seymour

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] All citations to the UCMJ, Rules for Courts-Martial (R.C.M.), or the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

Johnson AFB, M.C.[3] R. at 274. M.C. was being reassigned having been stationed abroad at Royal Air Force Base (RAF) Lakenheath for four-and-a-half years. R. at 274.

SSgt Lee and M.C. began talking by Facebook and email and were in regular contact ahead of M.C.'s arrival. R. at 275-76. When M.C. arrived in November 2020, SSgt Lee and M.C. saw other daily for a few weeks. R. at 278. The two began to see each other socially, as M.C. enjoyed SSgt Lee's company. R. at 313. M.C. and his roommate first attended a dinner with SSgt Lee, K.P., and SSgt W.P. at the P.'s home. R. at 279-80. M.C. and his roommate, SSgt C.N., went to Thanksgiving at W.P. and K.P.'s home, where M.C. drank with SSgt Lee and danced with him in the kitchen. R. at 264, 391. K.P. had difficulty shutting the party down, and C.N. had to convince M.C. to leave because M.C. was enjoying his time. R. at 264, 391-92. Several times when others tried to separate them, M.C. and SSgt Lee moved off and ignored the others. R. at 264. M.C. was aware SSgt Lee identified as homosexual, went out to a bar with SSgt Lee, and later accepted an invitation from SSgt Lee to attend a party at another Airman's house. R. at 281, 313, 331.

SSgt Lee and M.C. socialized together with K.P. and SSgt W.P. on four to five occasions. R. at 436. On each of those occasions, M.C. was drinking, and on each of those occasions, SSgt W.P. would take smoke breaks with M.C. and SSgt Lee. *Id*. During these conversations, M.C. "would change the subject [of the conversation] to those of a sexual nature, even if it wasn't the previous topic" of conversation. *Id*. SSgt W.P. observed this happened "every single time" M.C. and SSgt Lee hung out on the four or five occasions. R. at 437.

Despite having his father working close by in South Carolina, family in Texas, and having been abroad for the last four-and-a-half years when it was difficult to see family, M.C. chose not

[3] M.C. separated from the military prior to trial. R. at 274. In keeping with the trial transcript, he is hereinafter referred to as M.C. *See* R. at 273.

to spend Christmas 2020 with family. R. at 283-84, 314. He also declined an invitation from his supervisor to spend Christmas with his supervisor's family, instead accepting SSgt Lee's invitation to come over and spend Christmas with SSgt Lee, K.P. and SSgt W.P. R. at 285.

M.C. arrived late to the gathering, around "7:00 or 8:00 in the afternoon." R. at 251. M.C. and SSgt Lee were drinking more than either of K.P. or SSgt W.P. were. R. at 287. M.C. remembers starting with beers and moving on to mixed drinks, but claimed he did not feel intoxicated. R. at 288-89. The four played board and video games over the night for four to five hours. R. at 252, 289. SSgt W.P. and K.P. observed SSgt Lee and M.C. "were both really drunk, so [K.P.] and [SSgt W.P.] decided to go to bed." R. at 252, 266. SSgt W.P. also observed that M.C. changed the topic of conversation to that of a sexual nature on this evening as well. R. at 437. SSgt Lee and M.C. "were both very drunk on Christmas day" such that K.P. "did not want [M.C.] driving home." R. at 266. K.P. left pillows and a folded blanket in the living room for M.C. and let him know there was a guest room with a bed. R. at 260.

When K.P. and SSgt W.P. left, SSgt Lee and M.C. "were in the living room," "trying to figure out [] the next thing to do[.]" R. at 289. They were not ready to sleep, as "in [their] minds the night was still young." R. at 290. They "ended up deciding to pick a movie." *Id*. The two moved into SSgt Lee's bedroom to watch the movie and both sat on SSgt Lee's bed. R. at 290, 292. M.C. claimed this was to avoid making noise in the living room (R. at 290), however K.P. and SSgt W.P. affirmed SSgt Lee and guests were free to use the TV in the main room whenever they wanted, with no rules regarding being quiet at any certain time. R. at 265.

The two turned on the TV once in SSgt Lee's bedroom and turned the lights off. R. at 320. M.C. alleged at some point during the movie, he fell asleep. R. at 293. He claimed that when he woke up, "something didn't feel right in [his] head" and he "woke up with [his] eyes still closed,

kind of realizing something was going on." *Id*. M.C. stated he felt his right "hand was wrapped around" SSgt Lee's penis, with SSgt Lee's right hand over M.C.'s, and that SSgt Lee was "making [his] hand go up and down on his [erect] penis." R. at 294.

M.C. did not open his eyes, nor did he get up. *Id*.; R. at 324. "For however long that went on, as that was going on," M.C. felt SSgt Lee's "hand go over the top of [M.C.'s] pants[.]" *Id*. M.C. was wearing button down pants at the time, and alleged that while SSgt Lee continued to masturbate himself, he also unbuttoned M.C.'s pants with SSgt Lee's left hand, and proceeded to pull M.C.'s penis out. R. at 294-95. M.C. remained laying still in the bed as this allegedly occurred and did not get up. R. at 325-26. According to M.C., SSgt Lee "strok[ed] [M.C.'s] penis with his hand" for some amount of time. R. at 326.

SSgt Lee had not opened his eyes. R. at 295. He "pretend[ed] to wake up eventually," claiming "[a]s [his] eyes were opened, everything seemed to stop." *Id*. SSgt Lee was under [a] blanket; M.C. stated he "didn't really understand what was going on, [he] just had to look[,]" and lifted the blanket. *Id*. "[A]fter [M.C.] saw everything, that's when [he] kind of confirmed the things [he] needed to confirm" and realized he wanted to leave. R. at 297. M.C. "remove[d] [his] hand, [] removed [SSgt Lee's] hand, [] buttoned up, threw [his] shoes on," and went to his car. *Id*.

M.C. stated he "la[id] there with [SSgt Lee] touching [him]" for what "felt a lot longer," and estimated "the events happen[ed over] five-ish minutes." R. at 327. M.C. later agreed it was possible that his hand touched SSgt Lee's penis as M.C. woke up. R. at 323.

M.C. called a friend, Ms. M.H., from his car in the driveway. R. at 299. M.C. felt "like it was [his] fault" for putting himself in SSgt Lee's bedroom, feeling embarrassed and ashamed. R. at 329-30. SSgt Lee came out to the car and M.C. rolled his window down, asking SSgt Lee questions and yelling at him. R. at 301. According to M.C. and M.H., SSgt Lee responded either

"I'm sorry" or "I don't know." R. at 301, 378. M.C. then drove home. R. at 301. The next day, M.C. and his roommate, SSgt C.N., "woke up and were watching TV" and at some point, M.C. alleged SSgt Lee engaged in a sexual act with M.C. without M.C.'s consent. R. at 389-90.

On 6 January 2021, during his Airman Comprehensive Assessment with his supervisor, TSgt C.S., M.C. "broke down" and "told him everything that happened." R. at 305. TSgt C.S. then reported the incident. *Id*.; R. at 401.

Additional facts necessary to resolve individual assignments of error are included below.

Argument

I.

THE MILITARY JUDGE IMPROPERLY EXCLUDED CONSTITUTIONALLY REQUIRED STATEMENTS.

Additional Facts

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DECIDING SPECIFICATIONS 1 AND 2 OF THE CHARGE WERE NOT UNREASONABLY MULTIPLIED AT FINDINGS.

Additional Facts

The event M.C. described lasted "five-ish minutes." R. at 327. Three separate allegations arose from the event M.C. alleged took place on 25 December 2020. *See* R. at Vol. 1, Charge

Sheet. In Specification 1, the Government alleged SSgt Lee committed abusive sexual contact by causing M.C.'s hand to touch SSgt Lee's penis when M.C. was asleep. *Id*. In Specification 2, the Government alleged SSgt Lee committed abusive sexual contact by causing M.C.'s hand to touch SSgt Lee's penis without M.C.'s consent.[6] *Id*.

SSgt Lee requested Specification 2 be dismissed as an unreasonable multiplication of Specification 1 of the Charge. Appellate Exhibit (App. Ex.) IV. Trial counsel recognized "the nature of the abusive sexual contact remained identical throughout both specifications; only the consciousness of the victim changed[,]" yet argued "[b]oth Specifications should remain because the Accused continued the abusive sexual contact while he knew or reasonably should have known the victim was asleep and while the victim was awake." App. Ex. VI.

At trial, Defense Counsel (DC) argued that "[a]t no point does [M.C.] notify the accused that he is[] awake and then the accused continues to proceed on with the act[,]" adding,

> [w]hat [trial counsel is] doing here is trying to draw a[n] arbitrary line around the state of mind of the victim and when that changed, but that's not the element of the offense. The element of the specification is centered around what the accused knew or reasonably should have known. So [] what the victim was thinking or whether the victim was asleep or not asleep, does not really play into the elements of either of these offenses.

R. at 19-20. The maximum amount of confinement for each Specification was seven years. App. Ex. IV; R. at 552-53.

Trial Counsel (TC) at one point described:

> So, the basis for the charge is that the assault both occurred prior to him being awake, which he testified, ['']I woke up and this was already happening, and it wasn't happening when I fell asleep,['] so necessarily implied that it had to have happened when he was asleep; and then it continued when his eyes were still closed.

[6] Specification 3 alleged SSgt Lee committed abusive sexual contact by touching M.C.'s penis without his consent. *Id*.

R. at 422.

The military judge initially denied the motion for purposes of findings in a single paragraph of text, following it with a later written decision, the "Ruling" of which consisted of two substantive paragraphs. R. at 24; App. Ex. XXIV. In his written ruling, the military judge stated:

> In considering the relevant facts: (1) As noted above, each charge and specification is aimed at distinctly separate criminal acts; (2) The addition of one specification, making the distinction between when the alleged victim was asleep and when he was not based off of the facts, does not misrepresent or exaggerate the accused's criminality; (3) The number additional [*sic*] specifications does not *unfairly* increase the accused's punitive exposure (particularly here as the items are being merged for sentencing – see *infra*); and (4) there is no evidence of prosecutorial overreaching or abuse in the drafting of the charges.

App. Ex. XXIV. Ultimately, the military judge merged the two specifications for purposes of sentencing. R. at 552-53.

Standard of Review

This Court reviews a military judge's denial of relief for claims of unreasonable multiplication of charges (UMC) for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citations omitted); *see also United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46, at *34 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.).

Law and Analysis

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M 307(c)(4), UCMJ. "The underlying concept here is that the Government may not needlessly 'pile on' charges against an accused." *Massey*, 2023 CCA LEXIS at *34 (citation omitted).

As for military judges at trial, the multi-factor *Quiroz*/*Campbell* test assists this Court in evaluating UMC at either findings or sentencing. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). These factors include, but are not limited to:

a. whether each charge and specification is aimed at distinctly separate criminal acts;

b. whether the number of charges and specifications misrepresent or exaggerate the accused's criminality;

c. whether the number of charges and specifications unreasonably increase the accused's punitive exposure; and/or

d. whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

This list is non-exhaustive and no specific factor is determinative nor a pre-requisite; similarly, even a single factor may be sufficiently compelling, without more, to warrant relief. *Campbell*, 71 M.J. at 23. Issues related to multiple convictions have a long history; as the Court of Military Appeals explained:

> [Q]uite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions . . . . The number of convictions is often critical to the collateral consequences that an individual faces . . . . Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

United States v. Doss, 15 M.J. 409, 411-12 (C.M.A. 1983).

In evaluating this issue, "it first should be determined whether the charged offenses are based on '[o]ne transaction or what is substantially one transaction.'" *United States v. Baker*, 14 M.J. 361, 366 (C.M.A. 1983). "A 'transaction' generally means 'a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct.'" *United States v. Grubb*, 34 M.J. 532, 535 (A.F.C.M.R. 1991) (citations omitted). "A single, uninterrupted scuffle is substantially one transaction and should not be made the basis for an unreasonable multiplication

of charges." *United States v. Scilluffo*, No. ACM 39539, 2020 CCA LEXIS 62, *49 (A.F. Ct. Crim. App. 4 Mar. 2020) (citation omitted).

Recently, this Court again recognized the "splintering out" of multiple convictions from a single act does not support just outcomes. *Massey*, 2023 CCA LEXIS at *38. In *Massey*, the appellant sent a single text message to a woman he was involved with stating "I still.want a pic of your kid with his penis in your mouth." *Id*. at *4. For the single text request, he was charged with soliciting rape of a child, soliciting production of child pornography, and soliciting distribution of child pornography. *Id*. at *9. Based on the absence of controlling case law, this Court found the military judge did not abuse his discretion, but was not convinced that "allowing [the a]ppellant to stand convicted of three separate offenses [was] a just outcome." *Id*. at *38.

SSgt Lee's two convictions resulting from a single act reflect many of this Court's concerns regarding UMC. Just as arriving at separate convictions in *Massey* required "meticulous parsing" of a singular act, so too does arriving at separate convictions here. In describing the charge on the record, trial counsel stumbled into what could be used as a quintessential example to illustrate UMC: splitting a single, continuous act into multiple slivers or snapshots, based not on the act or offense but on M.C.'s *awareness* of the single act. R. at 422; *see also Scilluffo*, 2020 CCA LEXIS at *45. In this case, just as trial counsel described, these were not two distinct acts, but one act contemplated in two different ways under the UCMJ.

Here, even more so than in *Massey,* the two specifications fail utterly to "address[] a distinct criminal purpose" as the gravamen of each offense is abusive sexual contact. *Massey*, 2023 CCA LEXIS at *36. The nature of the offense did not *change* based on M.C.'s awareness of the event, nor does the evidence or law support exaggerating this single act into two offenses where there is only one intent of gratifying sexual desire. *See* Art. 120(b), UMCJ. As in *Massey*, this is

not "substantially one transaction"[7]—it is literally one transaction. To find otherwise—in a manner as facially conclusory as the military judge's ruling did—is an abuse of discretion that exaggerates SSgt Lee's criminality. *See* R. at 24; App. Ex. XXIV.

SSgt Lee objected at trial. App. Ex. IV. The punitive exposure *Quiroz* factor is not helpful in determining UMC for findings; moreover, the military judge merged for sentencing, mooting concerns about punitive exposure. R. at 552-53. And while no explicit evidence proves prosecutorial overreach, as DC argued, the two specifications not only exaggerate SSgt Lee's criminality, but also provide "a shock factor to any finder of fact who reads through the additional specification on the flyer, limiting [SSgt Lee's] ability to argue this as the one-time occurrence it is." App. Ex. IV. Two convictions, as opposed to one, represents prejudice in this case. *Doss*, 15 M.J. at 411-12 ("Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation"). Even if this Court finds no abuse of discretion, this case warrants granting Article 66 relief in the interests of justice. 2023 CCA LEXIS at *38, 40.

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss with prejudice Specification 2 of the Charge.

III.

THE CHARGE AND SPECIFICATIONS ARE FACTUALLY INSUFFICIENT.

Law and Analysis

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]

[7] *See Scilluffo*, 2020 CCA LEXIS at *45 (citation omitted).

convinced of [the Appellant's] guilt beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quotation omitted). This Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Wheeler*, 76 M.J. at 568 (quotation omitted).

The allegations rest on M.C.'s credibility as a witness; no other witness was in the room with SSgt Lee and M.C. at the time of the alleged conduct. R. at 320. M.C.'s testimony, however, does not hold water when placed in context of his choices and his relationship with SSgt Lee.

After four-and-a-half years abroad, when it was difficult for M.C. to see his family, he chose to spend his first Thanksgiving back in the United States with SSgt Lee. R. at 274, 283-85, 314. They spent "daily" time together on car rides and at squadron functions (R. at 278, 312), and they socialized outside of work as well. R. at 279. Prior to the allegations, M.C. enjoyed SSgt Lee's company. R. at 313. On Thanksgiving, K.P. had a hard time ending the party because it was difficult to separate M.C. from SSgt Lee at the end of the night. R. at 264.

After spending Thanksgiving with SSgt Lee, M.C. also chose to spend Christmas with him. R. at 285. He made this choice despite having his father working nearby in South Carolina, an offer from his supervisor for him to spend Christmas with their family, and family in Texas to whom he could have gone home. R. at 283-84, 314. According to the only two witnesses who observed him before the alleged incident, M.C. was "very drunk" by the end of the evening, so much so that they were worried about him driving home at the end of the night. R. at 263, 266. And according to his own testimony, he chose to watch a movie with SSgt Lee in SSgt Lee's bedroom, despite there being a TV in the living room. R. at 265, 290, 292.

M.C. knew SSgt Lee was interested in men. R. at 331-32. SSgt W.P. spent four to five nights with SSgt Lee and M.C., going out for smoke breaks with them two to three times each night. R. at 436. In every single conversation SSgt W.P. witnessed between SSgt Lee and M.C., M.C. felt the need to turn the conversation to topics of a sexual nature, even when this was not the original topic of conversation. R. at 436-37. This occurred *on the night of the alleged incident* (R. at 437); yet M.C. stated he had not had any conversations of a sexual nature prior to entering SSgt Lee's bedroom. R. at 297. This contradiction alone should give this Court concern regarding the credibility of M.C.'s testimony, yet there is more evidence introducing reasonable doubt.

No witness saw him fall asleep, and SSgt W.P. and K.P. both stated M.C. was "very drunk" by the end of the night, rendering it entirely possible M.C. was never asleep, but rather temporarily "blacked out" such that he only started remembering the alleged events in the middle of what had been a consensual sexual encounter. R. at 252, 263, 266. Assuming *arguendo* M.C. actually fell asleep as he claimed, M.C. stated it was possible that contact occurred at the moment he woke up. R. at 323. This is reasonable doubt sufficient to negate the element that contact occurred while M.C. was asleep. At trial, the Government seized on M.C.'s claim that there was a ".0001 percent chance" it was possible the contact occurred at the moment he woke up; yet this testimony only goes to show the degree of M.C.'s bias. *Id.* "There are few things in this world that we know what absolute certainty" (R. at 484); the degree of certainty M.C. ostensibly possesses on this point speaks more to bias and his degree of defensiveness or combativeness than it does to what actually happened in the bedroom between these young men. *See* R. at 323. This is all the more so given M.C.'s lie that he never had sexual conversations with SSgt Lee prior to the encounter. R. at 297.

Again, assuming *arguendo* M.C. was ever asleep, M.C. himself stated he was awake from the time SSgt Lee was alleged to have used M.C.'s hand to massage SSgt Lee's penis. He claims

to have given no sign of being awake, laying perfectly still, breathing with his eyes closed, while SSgt Lee continued to engage in masturbating himself for some amount of time before SSgt Lee reached over with his left hand and—unassisted with his right hand occupied—unbutton multiple buttons of M.C.'s pants. R. at 294-95. Again, allegedly unassisted and with his right hand occupied, M.C. claims SSgt Lee proceeded to pull his penis out of his pants in order to masturbate M.C. *Id*. M.C. himself stated this went on for what "felt a lot longer" and that the encounter lasted for "five-ish minutes." R. at 327. The length of this encounter indicates M.C. consented to the conduct, and the physical improbability of what he claims SSgt Lee was able to do further reduces the weight and credibility of his testimony, such that this Court cannot be convinced that SSgt Lee lacked consent beyond a reasonable doubt. *See Wheeler*, 76 M.J. at 568 (quotation omitted).

In the context all of the facts and circumstances, M.C.'s testimony alone is not sufficiently credible to establish he was either asleep or that he did not consent to the conduct in question. Applying neither a presumption of innocence nor of guilt, this Court cannot reasonably rely on M.C.'s testimony to establish all of the facts and circumstances of the allegations beyond a reasonable doubt. *Wheeler*, 76 M.J. at 568 (quotation omitted).

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

IV.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING RELEVANT AND NECESSARY CHARACTER EVIDENCE.

Additional Facts[8]

DC requested production of J.S., SSgt Lee's former live-in romantic partner, to testify as a witness in findings and presentencing. App. Ex. VII. DC intended to call J.S. as a character

[8] SSgt Lee also adopts and relies on the facts outlined in Issue IV for the resolution of Issue V.

witness for SSgt Lee, testifying to SSgt Lee's character for being sexually guarded, *inter alia*. *Id*. J.S. was originally interviewed by the Air Force Office of Special Investigations; during this interview he described SSgt Lee as "reserved," and "unassertive[.]" *Id*.

TC denied production of J.S. and DC moved to compel production, requesting the opportunity to present J.S.' testimony at a hearing on the motion. *Id*. TC responded in opposition and filed a counter motion requesting the military judge preclude the defense from introducing evidence of SSgt Lee's character. App. Ex. VIII.

The military judge denied the defense's motion and granted trial counsel's motion. App. Ex. IX. The military judge concluded, in pertinent part, that:

> It is irrelevant to the charges at hand that Mr. [J.S.] could testify that SSgt Lee was reserved, unassertive, and never initiated sexual intercourse, or could be said to have the characteristic of being "sexually guarded" in Mr. [J.S.]'s opinion. Mr. [J.S.]'s opinion appears to be limited [to] the confines of the relationship between Mr. [J.S.] and SSgt Lee. Mr. [J.S.] provides no personally observed or overheard factual assistance as to how Mr. [J.S.] acted in the context of his relationship with the alleged victim (or for that matter with other individuals) which in addition to lacking factual assistance, displays limited breadth of experience to the proposed character evidence. The proposed testimony tends to prove nothing of consequence when the question at hand is a determination of whether the alleged charged conduct occurred.

Id. No individual testified during findings to SSgt Lee's character. R. at 435-452.

Standard of Review

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Brewer*, 61 M.J. 425, 428 (C.A.A.F. 2005) (citation omitted).

Law

While evidence of a person's character is ordinarily not admissible to prove action in accordance therewith, Mil. R. Evid. 404(a)(2)(A) provides an "accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to

rebut it." "The word 'pertinent' is read as synonymous with 'relevant.'" *United States v. Clemons*, 16 M.J. 44, 47 (C.M.A. 1983) (citations omitted). Typically, "[w]hen evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion." Mil. R. Evid. 405(a).

"This rule of evidence favors an accused, as it permits him to bolster his defense with evidence of his character in general or of a pertinent character trait." *United States v. Gagan*, 43 M.J. 200, 202 (C.A.A.F. 1995) (citing *United States v. Brown*, 41 M.J. 1 (C.M.A. 1994)). The CAAF has consistently reaffirmed the right of an accused to present positive character evidence in his or her defense. *Id*. (citing *Brown*, 41 M.J. at 3 (appellant's strong opposition to use of drugs and alcohol as a matter of religious principle is "character evidence"); *United States v. Elliott*, 23 M.J. 1, 5 (CMA 1986) (evidence of accused's "trusting nature" is admissible character evidence pertinent to larceny charges); *United States v. Vandelinder*, 20 M.J. 41 (CMA 1985) ("good military character" is admissible character evidence pertinent to drug charges); *United States v. Kahakauwila*, 19 M.J. 60 (CMA 1984) (law-abidingness is admissible character evidence pertinent to drug charges); *Clemons*, 16 M.J. at 47 (lawfulness is admissible character evidence pertinent to larceny charges). CAAF held evidence of an appellant's heterosexual orientation qualified as character evidence admissible under Mil. R. Evid. 404 in defense of allegations of male-on-male forcible sodomy, indecent assault, and assault and battery. *Gagan*, 43 M.J. at 203.

"The power of character evidence cannot be underestimated. The Supreme Court long has recognized that, in some circumstances, character evidence alone 'may be enough to raise a reasonable doubt of guilt,' as 'the jury may infer that' an accused with such a good character 'would not be likely to commit the offense charged.'" *Id*. at 202 (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361 (1896)).

Where a military judge's erroneous exclusion of character evidence precludes a defense based on evidence of pertinent character traits, it is an error of Constitutional dimension, where the Government bears "the heavy burden to convince this Court that the error was harmless beyond a reasonable doubt." *Gagan*, 43 M.J. at 203 (citing *Brown*, 41 M.J. at 4). Prejudice is evaluated utilizing a four-pronged test:

> First: Is the Government's case against the accused strong and conclusive? . . .
> Second: Is the defense's theory of the case feeble or implausible? . . .
> Third: What is the materiality of the proffered testimony? Is the question whether or not the accused was the type of person who would engage in the alleged criminal conduct fairly raised by the Government's theory of the case or by the defense? . . .
> Fourth: What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial?

Gagan, 43 M.J. at 203 (citations omitted).

Analysis

1. J.S.'s character testimony was relevant and necessary to the presentation of a defense.

A "pertinent" trait is a "relevant" trait. *Clemons*, 16 M.J. at 47. Thus, all SSgt Lee needed show was that the character traits he sought rendered a fact of consequence in determining the action more or less probable than it would be without the evidence. Mil. R. Evid. 401. J.S.'s testimony that SSgt Lee was "reserved," "unassertive," and "sexually guarded" rendered it less likely that: 1) SSgt Lee was the one to initiate sex with M.C. at all, and 2) SSgt Lee touched M.C.'s penis without his consent or while asleep. *See* Mil. R. Evid. 401; R.C.M. 703(b)(1), Discussion.

A reserved, unassertive, sexually guarded person is not going to engage in sex without knowing where they stand in a relationship. A reserved, unassertive, and in particular, sexually guarded person is going to be less likely to initiate sex at all, and much less so against someone's consent. Having this character, as J.S. could attest SSgt Lee did, rendered it "less likely that SSgt Lee would act against that character on [25] December [] 2020" in order to touch M.C. without his consent or while he was asleep. App. Ex. VII. At base, this was the most important

fact of consequence in the trial: M.C. alleged SSgt Lee engaged in non-consensual sexual contact, including while he was asleep, but J.S.'s testimony rendered that allegation less likely to have occurred at all, and significantly less likely to have occurred as M.C. claimed it did. *See* Mil. R. Evid. 401. These traits were all thus "pertinent." *Clemons*, 16 M.J. at 47.

J.S.'s testimony was also necessary.[9] No other witness could testify to SSgt Lee's character in this respect, nor with the same foundation for his opinion, so there was no risk the testimony was cumulative. *See* App. Ex. VII; R. at 246-452. Having a former romantic partner testify to SSgt Lee's character for being reserved, unassertive, and sexually guarded would have enabled DC to argue the actions alleged to have taken place on 25 December were out of keeping with SSgt Lee's character. Unequivocally, this would have contributed to SSgt Lee's defense in a positive way on the ultimate matter in issue: whether or not he would have engaged in the conduct M.C. alleged. *See* R.C.M. 703(b)(1), Discussion.

2. The military judge erroneously applied the law to the facts.

The military judge's ruling concludes "[i]t is irrelevant to the charges at hand that Mr. [J.S.] could testify that SSgt Lee was reserved, unassertive, . . . or could be said to have the characteristic of being 'sexually guarded' in Mr. [J.S.'s] opinion." *See* App. Ex. IX. As discussed, these character traits are plainly relevant as they render it less likely SSgt Lee initiated sexual contact at all, let alone without invitation or prelude or while M.C. was asleep, rendering the military judge's application clearly erroneous. *See id*.

The military judge further relied on the conclusion that

[9] Testimony "is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(b)(1), Discussion.

> Mr. [J.S.'s] opinion appears[10] to be limited the confines [*sic*] of the relationship between Mr. [J.S.] and SSgt Lee. Mr. [J.S.] provides no personally observed or overheard factual assistance as to how Mr. [J.S.] [*sic*] acted in the context of his relationship with the alleged victim (or for that matter with other individuals) which in addition to lacking factual assistance, displays limited breadth of experience to the proposed character evidence."

Id. (emphasis added). This is not, however, what the law requires. M.R.E. 404(a)(2)(A)—a *broad* rule, *Gagan*, 43 M.J. at 202—provides that an "accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it." So long as that relevant and necessary character evidence is in the form of a reputation or opinion and not explicitly prohibited by the rule, it is admissible. *See* Mil. R. Evid. 405(a). That J.S.'s opinion might be limited to his relationship with SSgt Lee would certainly be a foundational issue TC would have been free to explore on cross-examination—but it does not render the evidence irrelevant, as the military judge concluded. App. Ex. IX. Had this been the case, *Gagan*—wherein the military judge erroneously excluded the appellant's fiancée's testimony regarding his heterosexual character—should have come out the other way on this point. *See* 43 M.J. at 203 (citing *Brown*, 41 M.J. 1; *Elliott*, 23 M.J. 1; *Vandelinder*, 20 M.J. 41).

Finally, the military judge, in conclusory fashion, stated "[t]he proposed testimony tends to prove nothing of consequence when the question at hand is a determination of whether the alleged charged conduct occurred." *Id*. Again, this is not what the law provides. Where character evidence *counters* the argument that the accused would engage in the conduct alleged—as J.S.'s testimony did in this case—it is a fact of consequence. *Brown*, 41 M.J. at 3 (appellant's strong

[10] Though both DC and TC requested to be heard on their opposing motions and DC requested to call J.S. to present testimony at the hearing (App. Ex. VII, VIII), the military judge ruled without a hearing or taking evidence. App. Ex. IX; *see Martinez,* 2022 CCA LEXIS at *83 ("the military judge decided the motion based upon the proffers of counsel, even though the better practice is to permit counsel to call witnesses and present actual evidence.")

opposition to use of drugs and alcohol as a matter of religious principle is "character evidence"); *Elliott*, 23 M.J. at 5 (evidence of accused's "trusting nature" is admissible character evidence and pertinent to larceny charges); *Vandelinder*, 20 M.J. 41 ("good military character" is admissible character evidence and pertinent to drug charges); *Kahakauwila*, 19 M.J. 60 (law-abidingness is admissible character evidence and pertinent to drug charges); *Clemons*, 16 M.J. at 47 (lawfulness is admissible character evidence and pertinent to larceny charges).

3. The military judge's exclusion of the character evidence denied SSgt Lee the ability to present a full and fair defense.

Addressing the four factors outlined in *Gagan*, the Government cannot prove the exclusion of this evidence harmless beyond a reasonable doubt. 43 M.J. at 203 (citations omitted). First, the Government's case against the accused was neither overwhelming nor conclusive. *Id*. The defense raised an R.C.M. 917 motion to dismiss mid-trial for the Government's failure to prove all of the essential elements of Specification 1, and as discussed in Issue III, *supra*, M.C. was the only witness able to testify to the facts of the allegation and evidenced significant bias in his testimony.

Second and third, the defense's theory of the case was neither feeble nor implausible; but was hamstrung without J.S.' highly material evidence. The defense's theory of the case was that M.C. consented to the sexual conduct in question, but began to regret his decision mid-way through the encounter. R. at 504-06. Though this was supported by SSgt W.P.'s testimony that M.C. turned the conversation to sexual topics anytime he was with SSgt Lee (R. at 436), it would have been infinitely more meaningful with J.S.'s testimony that SSgt Lee was reserved, unassertive, and sexually guarded. Without J.S.' testimony, the argument that M.C. was flirting with SSgt Lee only goes so far; with J.S.'s testimony, the defense is able to argue not only that M.C. was flirting with SSgt Lee—but that SSgt Lee did not have a character for asserting himself sexually, in the manner SSgt Lee appeared capable of doing. Without J.S.'s testimony, DC was left only the ability to

argue the choices M.C. made leading up to the alleged incident, the implausibility of his account, and an insinuation of consent. *See* R. at 496-510. Had J.S.'s testimony been admitted as it should have, the Defense would have been able to argue SSgt Lee, as someone who was sexually guarded, reserved, and unassertive was not one to engage in the conduct alleged here.

Finally, the quality of the proffered evidence was high, and there was no other substitute in the record. No other witness testified to SSgt Lee's character. R. at 435-452. No other witness had the foundation to testify to what J.S. could—SSgt Lee's reserved, unassertive, sexually guarded nature and character for not initiating sex. *See id*. No other witness knew SSgt Lee from the same perspective that J.S. did. *See id*. Thus, there was no other substitute for this evidence in the record. *See* R. at 246-452.

J.S.'s testimony at trial would have provided SSgt Lee the ability to meaningfully challenge the Government's key evidence, M.C.'s testimony, in what might have been the most powerful manner available to him. *See Gagan*, 43 M.J. at 202 (quoting *Michelson*, 335 U.S. at 476; *Edgington*, 164 U.S. 361). The Government cannot prove the exclusion of these pertinent—i.e., relevant—and necessary character traits harmless beyond a reasonable doubt. *See id*. at 203.

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

V.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN FAILING TO COMPEL THE DEFENSE'S CHARACTER WITNESS.

Standard of Review

This Court reviews a military judge's ruling on a motion to compel a witness for an abuse of discretion. *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996); *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 1999). "A military judge abuses his discretion when his

findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

Law

"In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Art. 46, UCMJ. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. R.C.M. 703(b)(1). "This includes 'the benefit of compulsory process.'" *Martinez*, 2022 CCA LEXIS at *75 (citing R.C.M. 703(a)).

"According to RCM 703(c)(2)(B)(i), the defense must set forth a 'synopsis of the expected testimony sufficient to show its relevance and necessity.'" *Breeding*, 44 M.J. at 450. "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(b)(i), Discussion. "It is well established that, upon a proper showing of necessity, an accused is entitled to production of witnesses to support a defense." *Gagan*, 43 M.J. at 203 (citation omitted).

This Court evaluates several factors in determining whether personal production of a witness was necessary, including: "the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; [] the availability of alternatives to [] personal appearance[;]" and the timeliness of the request. *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000). "[F]ailure of the judge to fully consider these factors in making the ruling will be considered in determining whether the judge abused his or her discretion." *United States v. Ruth*, 46 M.J. 1, 4 (C.A.A.F. 1997).

When a military judge erroneously denies production of a witness, this Court must determine whether the error materially prejudiced the appellant's substantial rights. *See* Art. 59(a), UCMJ, 10 U.S.C. § 859(a). Denying an accused "the resources necessary to prepare and present a defense" is prejudicial error. *See*, *e.g.*, *United States v. Lee*, 64 M.J. 213, 218 (C.A.A.F. 2006) (finding abuse of discretion where military judge denied expert assistance necessary to challenge Government evidence). Where this Court is not convinced of harmlessness beyond a reasonable doubt, erroneous denial of the production of a witness requires relief. *Martinez*, 2022 CCA LEXIS at *79 (citing *United States v. Shelton*, 62 M.J. 1, 3 (C.A.A.F. 2005) (internal citation omitted)).

Analysis

The military judge abused his discretion in denying production of J.S. as a relevant and necessary witness. *See* App. Ex. IX. The military judge's denial of J.S.' production denied SSgt Lee a witness crucial for his defense, and thereby substantially prejudiced SSgt Lee's ability to meaningfully challenge the Government's key evidence. Art. 59(a).

As discussed in Issue IV *supra*, J.S.'s testimony was relevant and necessary to disprove that SSgt Lee was the type of person to have engaged in the conduct M.C. alleged. His testimony rendered it less likely SSgt Lee initiated sexual contact at all, let alone without M.C.'s consent or while asleep. This testimony was not cumulative, as no other person could testify to SSgt Lee's character in this manner, and it would have contributed positively to the defense's ability to challenge M.C.'s allegations. *See id.*; R.C.M. 703(b)(i), Discussion.

Based on J.S.' relevance and necessity to the case and the balance of factors outlined in *McElhaney*, 54 M.J. at 127, it was an abuse of discretion to deny his production. *See id*. With respect to "the issues involved in the case and the importance of the requested witness to those issues[,]" J.S. would have perhaps been second only to M.C. *McElhaney*, 54 M.J. at 127. To be

sure, J.S. was not an eye-witness, but when it came to the question of whether SSgt Lee was a person capable of engaging in the alleged conduct, J.S. would have known SSgt Lee longer and more intimately than any other witness. *See* App. Ex. VII; R. at 246-452. DC filed a timely request for J.S. as a necessary witness for "the findings and/or pre-sentencing phase" of trial. *Id*. There was no substitute to the testimony J.S. would have provided in-person at trial.

Moreover, the military judge failed to specifically address or analyze the factors outlined in *McElhaney*, 54 M.J. at 127. App. Ex. IX. Though citing *McElhaney* in the his legal conclusions, the military judge did not cite, reference, specifically address or analyze the *McElhaney* factors in the single page of his ruling. *Id*. This further demonstrates his abuse of discretion. *See Ruth*, 46 M.J. at 4 ("[F]ailure of the judge to fully consider these factors in making the ruling will be considered in determining whether the judge abused his or her discretion.").

"In the present case, the judge's erroneous view that appellant's character evidence was inadmissible led to his erroneous denial of the defense request for . . . a witness." *Gagan*, 43 M.J. at 203 (citations omitted). J.S.'s testimony could have changed the outcome here. Even under an Article 59(a) standard, denying SSgt Lee the ability to challenge M.C.'s testimony with admissible character evidence substantially prejudiced his ability to prepare and present a defense meaningfully challenging the Governments' evidence. *See Lee*, 64 M.J. at 218.

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

VI.

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

Additional Facts

Prior to trial, the defense requested the military judge "instruct the panel members that they may only return findings of guilty on those specifications in which they render a unanimous verdict." App. Ex. II. The government opposed the motion. App. Ex. III. The military judge denied the motion. App. Ex. XXIII. In providing Appellant forum advice, he advised Appellant that he could be convicted if three-fourths of the members concurred as to guilt. R. at 11, 36. Later, the members received the same instruction. R. at 521. The members returned a finding of guilt with no indication of whether this finding was unanimous. R. at 541-542.

Standard of Review, Law, and Analysis

"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). The 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. 440 (C.A.A.F. 2022) (order granting review). As Appellant preserved this issue at trial by motion, this Court should—and must—decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

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

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Trial and Appellate Government Operations Division on 21 April 2023.

Respectfully Submitted,

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APPENDIX

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

VII.

THE CHARGE AND SPECIFICATIONS ARE LEGALLY INSUFFICIENT.

Standard

Under Article 66(c), UCMJ, this Court can only approve findings of guilty it determines to be correct in both law and fact. Issues of legal sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (quoting *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002)). This Court's assessments of legal sufficiency is limited to the evidence produced at trial. *Wheeler*, 76 M.J. at 568 (quoting *United States v. Dykes*, 58 M.J. 270, 272 (C.M.A. 1993)).

The Charge and Specifications are each legally insufficient because no reasonable factfinder could have found beyond a reasonable doubt that 1) M.C. was asleep as charged in Specification 1, and 2) M.C. did not consent to the conduct alleged in Specifications 2 and 3.

Specification 1 required that M.C. be asleep and that SSgt Lee knew or reasonably should have known him to be asleep. No witness besides M.C. could testify he was asleep and M.C. stated he and SSgt Lee watched the movie sitting upright in the bed. He also testified it was possible that the conduct happened at the exact moment he woke up. M.C. testified he was not

drunk, nor under the influence of drugs or narcotics. Taken together, the Government failed to establish that M.C. was asleep for Specification 1, and that SSgt Lee knew or reasonably should have known he was asleep at that point. Based on the evidence, no reasonable factfinder could have found these two elements proven beyond a reasonable doubt.

Specification 2 and 3 required the Government prove that M.C. did not consent to the conduct in question. M.C. went in SSgt Lee's bedroom with him to watch a movie having repeatedly turned multiple conversations with SSgt Lee to topics of a sexual nature. He lay awake, not leaving or getting up, for approximately five minutes during the alleged conduct. No reasonable factfinder could have found beyond a reasonable doubt that M.C. did not consent to the conduct in question based on the evidence presented at trial. *See Wheeler*, 76 M.J. at 568

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40258
JORDAN R. LEE,	)	
United States Air Force	)	5 May 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests an enlargement of time to file its Answer to Appellant's assignments of error. Currently, the United States' answer is due on 31 May 2023. The United States requests an enlargement for a period of 7 days, which will end on 7 June 2023. This case was docketed with the Court on 15 March 2022. Since docketing, Appellant has been granted eleven enlargements of time. Appellant filed his assignments of error with this Court on 21 April 2023, 403 days after docketing with this Court. This is the United States' first request for an enlargement of time. As of the date of this request, 417 days have elapsed. If this Court grants this request, 449 days will have elapsed.

There is good cause for the enlargement of time in this case. An enlargement of time is necessary to ensure that assigned counsel will have sufficient time to review the record of trial and draft and file the United States' answer. Appellant has raised 7 assignments of error in a 33-page brief. Undersigned counsel anticipates these issues will require significant time to research and draft answers to Appellant's assignments of error.

Undersigned counsel is striving to complete all necessary work as soon as possible. But undersigned counsel is currently only one of three available active duty appellate counsel

available due to the re-assignment of one to stand up the new Office of Special Trial Counsel, the month long TDY schedule of another to be trained for his upcoming role as a Special Trial Counsel, and the TDY schedule of a third as an instructor in various courses including the Advanced Sexual Assault Litigation Course, Special Trial Counsel Course, and Basic Trial Advocacy Course.

Undersigned counsel has only just returned from maternity leave today, 5 May 2023 and has only begun reviewing this case today. Between now and when this brief is due, undersigned counsel is tasked with attending the Court of Appeals for the Armed Forces Continuing Legal Education course on and is required to attend the Transition Assistance Program on for her upcoming separation. This is undersigned counsel's first priority answer brief, but undersigned counsel is also tasked with drafting a response to a motion in United States v. Cooley which is due next week. Due to heavy workload and office absences, there is no other JAJG attorney who could file a brief sooner. Reserve personnel have already been tasked with drafting answers for other briefs with earlier upcoming deadlines.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 5 May 2023.

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**DEFENSE OPPOSITION TO GOVERNMENT MOTION FOR ENLARGEMENT OF TIME**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE** United States Air Force *Appellant*	)	No. ACM 40258 8 May 2023

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

Pursuant to Rules 23.2 and 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby enters his opposition to the Government's Motion for Enlargement of Time dated 5 May 2023.

Appellant filed his Assignment of Errors Brief (hereinafter "Brief") on 21 April 2023 with a motion to file one issue under seal, which this Court granted on 1 May 2023. Rule 18(d) of this Honorable Court's Rules of Practice and Procedure provides the Government with "30 days after any brief and assignments of error have been filed on behalf of the accused" to file its Answer. In its motion for enlargement of time, the Government claims "the United States' answer is due on 31 May 2023" and requests an additional seven days from 31 May 2023.

Appellant opposes this motion for several reasons. Rule 17.3 of this Court's Rules of Practice and Procedure explicitly states that motions to exceed the page limit filed under Rule 23.3(q) "will toll the due date for any responsive filing for opposing counsel until the Court has ruled on such motion." A.F. CT. CRIM. APP. R. 17.3.

This language appears nowhere else in this Court's Rules, to include in the rules pertaining to filing matters under seal. *See* A.F. CT. CRIM. APP. R. 17.2(b), 23.3(o). Appellant's motion to file under seal therefore does not toll the filing deadline for the Government's Answer. Appellant submits the Government's Answer remains due on 21 May 2023, 30 days after Appellant filed the Brief. *See* A.F. CT. CRIM. APP. R. 18(d) ("[C]ounsel shall file an answer on behalf of the United States within 30 days after any brief and assignments of error have been filed on behalf of the accused").

Appellant further opposes any enlargement of time, even based on the Government's correct deadline of 21 May 2023. Appellant elects to be represented on appeal by undersigned counsel. With the 21 May 2023 deadline unchanged, undersigned counsel will be able to complete the Reply Brief, which would be due 28 May 2023, prior to her separation from active duty and departure on terminal leave beginning 1 June 2023. Granting the Government an enlargement of time would impede Appellant's ability to receive the effective assistance of his chosen undersigned counsel.

The Government cites the number of its appellate counsel temporarily assigned elsewhere as good cause for its motion. However, unlike defense counsel, trial counsel are fungible. *Compare United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995) (noting "prosecutors are fungible"), *with United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988) (noting "[d]efense counsel are not fungible"). Whereas appellate defense counsel are not transposable given the attorney-client relationships formed with each individual appellant, the Government has at their disposal a number of fungible counsel to assist with its caseload, including multiple

circuit trial counsel and reserve and civilian attorney support. The same cannot be said for defense counsel, particularly on Reply; Appellant would be forced to establish an attorney-client relationship with a new defense attorney who would be unfamiliar with the entire record, the filed issues, and Appellant.

Appellant respectfully maintains that the Government's staffing issues and its counsel's responsibilities in other cases do not establish good cause for an enlargement of time, and that any enlargement of time in this case would deprive Appellant of the effective assistance of counsel on appeal. *See United States v. Thompson*, 68 M.J. 308, 313 (C.A.A.F. 2010) ("As a general matter, factors such as staffing issues [and] responsibilities for other cases . . . reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision[.]).

WHEREFORE, undersigned counsel respectfully request that this Honorable Court deny the Government's motion.

Respectfully submitted,

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Government Trial and Appellate Operations Division on 8 May 2023.

ALEXANDRA K. FLESZAR, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40258**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan R. LEE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 May 2023, the Government submitted a Motion for Enlargement of Time (EOT) requesting an additional 7 days from the date of 31 May 2023 to submit its answer to Appellant's assignments of error brief. This is the Government's first request for an EOT.

On 8 May 2023, Appellant filed opposition to the motion citing two reasons. First, Appellant argues that the Government's answer is due 21 May 2023 and not 31 May 2023 because the court's Rules of Practice and Procedure do not toll the due date when a motion to file under seal is filed by an opposing party,[*] referencing A.F. Ct. Crim. App. R. 17.3. The court acknowledges that the due date of 31 May 2023 was a scrivener's error in the court records.

Second, Appellant's appellate defense counsel is separating from active duty and starting terminal leave on or about 1 June 2023, and therefore Appellant argues that any enlargement of time granted by the court beyond 21 May 2023 would push the due date for Appellant's reply brief beyond 28 May 2023.

The court has considered the Government's motion, Appellant's opposition, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 9th day of May, 2023,

ORDERED:

The Government's Motion for Enlargement of Time is **GRANTED IN PART and DE-**

[*] On 21 April 2023, Appellant filed a motion to file under seal which this court granted on 1 May 2023. The Government did not file opposition to this motion.

NIED IN PART. The Government shall file any answer to Appellant's brief not later than **26 May 2023**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40258**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan R. LEE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 9 May 2023, this court granted the Government's Motion for Enlargement of Time and ordered the Government to file any answer to Appellant's brief not later than 26 May 2023.

The court acknowledges that 26 May 2023 is designated a Family Day for active-duty personnel, and as part of its recent practice, the court will be closed on that date. The Joint Rules of Appellate Procedure allow appellate counsel to submit filings to the court on the following business day when a filing is due on "the next day that is not a Saturday, Sunday, holiday, or [a] day on which the Court is closed." *See* JT. CT. CRIM. APP. R. 15. After further review, and on consideration of Appellant's counsel pending terminal leave, the court hereby suspends the provisions of such rule pursuant to JT. CT. CRIM. APP. R. 32, and requires the Government to file its answer to Appellant's brief not later than 26 May 2023.

Accordingly, it is by the court on this 12th day of May, 2023,

ORDERED:

The Government shall file any answer to Appellant's brief not later than **26 May 2023**.

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN E. LEE**, United States Air Force	)	ACM 40258
Appellant.	)	26 May 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*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
Staff Sergeant (E-5) **JORDAN E. LEE**, USAF, *Appellant.*	)	Panel 2 No. ACM 40258

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE IMPROPERLY EXCLUDED CONSITUTIONALLY REQUEIRED STATEMENTS?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DECIDING SPECIFICATIONS 1 AND 2 OF THE CHARGE WERE NOT UNREASONABLY MULTIPLIED AT FINDINGS?

III.

WHETHER THE CHARGE AND SPECIFICATION ARE FACTUALLY SUFFICIENT?

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING RELEVANT AND NECESSARY CHARACTER EVIDENCE?

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN FAILING TO COMPEL THE DFENSE'S CHARCTER WITNESS?

VI.

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

VII.[1]

WHETHER THE CHARGE AND SPECIFICATIONS ARE LEGALLY SUFFICIENT?

STATEMENT OF THE CASE

On 22 June 2021, the convening authority referred the following charge and specifications against Appellant: one charge and three specifications of abusive sexual contact in violation of Article 120, UCMJ. (*Charge Sheet*, 22 June 2021, ROT, Vol. 1.)

At trial, Appellant pleaded not guilty to the charge and all specifications. (R. at 37.) Despite his pleas, Appellant was found guilty by members of the charge and specifications. (*Charge Sheet*, 22 June 2021, ROT, Vol. 1.) Appellant was sentenced to a bad conduct discharge, confinement for twenty-four months, total forfeitures of all pay and allowances, and reduction to the grade of E-1. (Id.)

STATEMENT OF FACTS

Relevant facts will be addressed within each response to Appellant's assignments of error.

[1] Appellant raised this Issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

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II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN RULING THAT SPECIFICATIONS 1 AND 2 WERE NOT UNREASONABLY MULTIPLIED.

Additional Facts

On 5 August 2021, Appellant filed a motion and contended that Specification 1 and 2 of the Charge constituted an unreasonable multiplication of charges. (App. Ex. IV.) Specification 1 of the Charge alleged that Appellant committed abusive contact by causing M.C. to touch

Appellant's penis while he was asleep. (*Charge Sheet*, 22 June 2021, ROT, Vol. 1.) Specification 2 of the Charge alleged that Appellant committed abusive sexual contact by causing M.C. to touch Appellant's penis without his consent. (Id.) The underlying facts of these specifications are as follows: After falling asleep while watching a movie with Appellant, M.C. woke up to his right hand over Appellant's penis and with Appellant's hand was over M.C.'s hand. (R. at 293-94.) Appellant was making M.C.'s hand go up and down on Appellant's erect penis. (Id.) When he woke up, M.C. was in shock and could not move while Appellant continued to cause M.C.'s hand to touch his penis. (R. at 294.) After a short period of time, M.C. lifted the blanket that was covering Appellant and confirmed that Appellant had caused him to touch Appellant's penis. (R. at 295.) The Government opposed Appellant's motion on 12 August 2022. (App. Ex. VI.)

The military judge who heard motions was not the same military judge who presided over the case at trial. The military judge at the motions hearing ruled on the issue and denied the motion for findings but withheld a ruling on whether there was unreasonable multiplication of charges for sentencing. (R. at 24.) The trial judge later issued a written ruling which denied Appellant's motion but merged the two specifications for sentencing. (App. Ex. XXIV.) The trial judge weighed the factors under United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001) and determined:

> (1) As noted above, each charge and specification is aimed at distinctly separate criminal acts; (2) The addition of one specification, making the distinction between when the alleged victim was asleep and when he was not based off of the facts, does not misrepresent or exaggerate the accused's criminality; (3) The number [of] additional specifications does not unfairly increase the accused's punitive exposure (particularly here as the items are being merged for sentencing . . .) and (4) there is no evidence of prosecutorial overreaching or abuse in the drafting of the charges.

(Id.)

Standard of Review

"A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion." United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012) (citation omitted). To prove an abuse of discretion, an appellant must show that the military judge relied on unsupported findings of fact, used incorrect legal principles, or unreasonably applied correct legal principles to the facts of the case. United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010).

Law and Analysis

Unreasonable multiplication of charges concerns "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." Quiroz, 55 M.J. at 337. A five-part test determines whether the prosecution has unreasonably multiplied charges:

> (1) Did the Accused object at trial to an unreasonable multiplication of charges or specifications?
>
> (2) Does each charge and specification address distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the Appellant's criminality?
>
> (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338.

In assessing unreasonable multiplication of charges, the Court looks to whether prosecutors are, essentially, overreaching. It is a principle of "reasonableness." Id.

Addressing the Quiroz factors, first, the only factor that weighs in favor of Appellant is that he objected to the charges being unreasonably multiplied at trial. (App. Ex. IV.) The remaining factors demonstrate that Appellant's convictions under Specification 1 and 2 of the Charge were not unreasonably multiplied.

Second, the specifications address distinctly separate criminal acts. Congress recognized that there is a difference between the sexual assault of a victim while they are asleep and when they are awake but do not consent and chose to separate the two offenses. The statute itself proves Congress intended to criminalize the different state of minds of the victim. A strict facial comparison of the elements of the charged offenses reveals they encompass distinct crimes. The details in the specifications demonstrate that Appellant was charged with committing two separate acts, one while M.C. was asleep and one when he was awake. (R. at 293-96.) Appellant contends the specifications split a single act based on M.C.'s "awareness of the single act," but this overlooks the purpose of the separate elements of the crimes. (App. Br. 15.) The specifications focus on whether M.C. was asleep or awake and whether Appellant perpetrated the act without consent. The evidence supports this charging scheme. (*Charge Sheet*, 22 June 2021, ROT, Vol. 1.) M.C. was initially asleep when Appellant caused M.C. to touch his penis and then when M.C. woke up the abusive sexual contact did not stop. (R. at 295.) After M.C. woke up and opened his eyes, Appellant had the opportunity to let go of the grip he had on M.C.'s hand over his penis but he did not. (R. at 295-96.) When M.C. lifted the blanket to confirm what was happening, Appellant had the opportunity to let go of M.C.'s hand but instead he continued to wrap M.C.'s hand around his penis. (R. at 296.) For Specification I, the charging scheme focused on whether Appellant "knew or reasonably should have known that [M.C.] was asleep." (*Charge Sheet*, 22 June 2021, ROT, Vol. 1.) Again, Appellant's theory that

the misconduct was a single act split based on M.C.'s awareness does not take into account that one specification required Appellant's knowledge of M.C.'s state of consciousness and the other did not. The two specifications were explicitly delineated to account for the vulnerability of the victim.

Appellant's analysis of the Quiroz factors relies heavily on the argument that this Court has found that one text message should not be the basis for three separate convictions of solicitation: distribution, production, and rape. United States v. Massey, No. ACM 40017, 2023 CCA LEXIS 46, at *42 (A.F. Ct. Crim. App. 30 January 2023) (unpub. op.) The facts of that case are distinctly different from this case. Massey sent a single text message, asking an ex-girlfriend to send a sexually abusive picture of her infant child. Id. at *38-39. Massey was found guilty of solicitation in three charges. On appeal, this Court used its Article 66, UCMJ, authority to merge the three specifications. Id. at *40-41. As the Court summarized, the crime of solicitation is in the request. Id. at *39. In this case, the crime of abusive sexual contact while M.C. was asleep and then awake, but without consent, are two separate crimes. Massey caused a single harm when he requested child pornography through a text message. But here Appellant caused two separate harms, and the trauma done to the victim was different. Sexual assault is profoundly traumatic regardless of the circumstances, but if a person is sexually assaulted while asleep, they may feel particularly powerless because they are unaware of their surroundings and this can lead to a disrupted sense of safety. A sexual assault against a conscious person is no less traumatic but the harm is different. A person sexually assaulted while awake will have to contend with the memories and their awareness of the sexual assault. Again, Appellant gratified his own sexual desires by sexually assaulting a sleeping person and then sexually assaulting a person who was awake but did not consent.

Third, the number of specifications did not misrepresent Appellant's criminality. To fully capture Appellant's criminal conduct – sexually assaulting M.C. while he was asleep and then awake – the Government had to charge the conduct in two separate specifications regardless of whether it was a continuing course of conduct or not. The crimes are enumerated separately in the Manual for Courts-Martial. Charging someone with abusive sexual contact while the victim was asleep focuses on the vulnerability of the victim because the person was asleep at the time of the charged offense, while charging someone with abusive sexual contact without consent emphasizes the lack of consent regardless of the victim's state. Appellant, in his brief, argues "the two specifications fail utterly to 'address[] a distinct criminal purpose.'" (App. Br. at 15.) The distinct criminal purpose reflects the vulnerability of the victim. Appellant could have stopped the abusive sexual contact when M.C. woke up. However, he chose to keep M.C.'s hand wrapped around his penis. (R. at 295-96.) By committing the abusive sexual contact while M.C. was asleep, Appellant committed one crime to gratify his sexual desires. By keeping M.C.'s hand on his penis when M.C. woke up, Appellant participated in a second crime to gratify his sexual desires. Appellant's criminality is accurately reflected in these charges.

Turning to the fourth and fifth Quiroz factors, Appellant concedes that because the military judge merged the specifications for sentencing any punitive concerns are moot and there is no explicit evidence of prosecutorial overreach. (App. Br. at 16.) Since the military judge merged the specifications for sentencing, Appellant was not prejudiced. The balance of the Quiroz factors favors the government, and Appellant is entitled to no relief.

III. and VII.

THE CHARGE AND SPECIFICATIONS ARE LEGALLY AND FACTUALLY SUFFIFICENT.[2]

Additional Facts

a. Background

Appellant and M.C. first met when Appellant was assigned to act as M.C.'s sponsor during his permanent change of duty station (PCS) from Royal Air Force Lakenheath, United Kingdom to Seymour Johnson Air Force Base, North Carolina. (R. at 275-76.) Appellant, as M.C.'s sponsor, had constant daily contact with M.C. upon his arrival at Seymour Johnson. (R. at 278.) Appellant helped him in-process into the installation, showed him around the base, and, for the first few weeks, drove him to and from work because M.C.'s vehicle had not yet arrived from overseas. (R. at 278.) Appellant was one of only three people M.C. knew at his new base and, in addition to his role as a sponsor, Appellant also invited M.C. to social events. (R. at 279.)

Prior to the sexual assaults, M.C., at Appellant's invitation, went to dinner at Appellant's home with his roommate, SSgt C.N. and Appellant's roommates, SSgt W.P. and K.P., to a party to watch a boxing match at co-worker's home, and to a bar. (R. at 280-82, 313.) At the boxing match event, M.C. said he drank alcohol and "reluctantly" stayed the night even though he wanted to go home. (R. at 282.) He explained that he wanted to leave but that Appellant "prevent[ed] [him] from leaving" by taking his car keys, and his roommate could not pick him up. (R. 282-83.)

[2] The answer for Issues III and VII is combined.

b. Night of the Sexual Assault

The next time M.C. socialized with Appellant outside of work was Christmas day 2020. (R. at 283.) M.C. had just traveled home to visit his family in Texas for Thanksgiving and planned to remain in the area for Christmas. (R. at 284.) M.C.'s father was in South Carolina for work, but M.C. was unsure if his father would still be in state on Christmas. (Id.) M.C. initially planned to spend the day with his roommate, SSgt C.N., but his roommate had other plans. (Id.) M.C. then received separate invitations for the holiday from his supervisor and Appellant to join them at their homes for the holiday. (R. at 284-85.) M.C. ultimately chose to spend Christmas with Appellant and Appellant's roommates because he wanted to be with his peers and not his supervisor. (R. at 285.) When M.C. arrived at Appellant's home, the group ordered Chinese food and played games together while enjoying alcoholic beverages. (R. at 287, 289.) M.C. recalled drinking approximately three beers and three mixed drinks. (R. at 288.) M.C. explained that he knew what it felt like to have too much alcohol and he did not feel like he had too much that night. (R. at 288-89.) He felt "pretty coherent" that night. (Id.)

Around 0100, SSgt W.P. and K.P. called it a night and went to their room for the evening. (R. at 252-53.) Appellant and M.C. decided to watch a movie in Appellant's room instead of the living room because it would "probably be too loud." (R. at 290.) The only seating in Appellant's room was his bed. (R. at 291.) M.C. sat upright on the left side of the bed and Appellant sat on the right side. (R. at 293.) M.C. chose the bed because if he sat on the floor, he would be unable to see the television which was propped up and level with the bed. (R. at 291-92.)

At some point, M.C. fell asleep while watching the movie. (R. at 293.) He then woke up with his eyes still closed and realized that his hand was covered by Appellant's and was wrapped

around Appellant's penis. (R. at 293-94.) Appellant was using M.C.'s hand to go and up and down on Appellant's penis. (R. at 294.) M.C. did not open his eyes right away because he was afraid and confused. (Id.) He did not know what to do and was in shock and felt frozen. (Id.) Once he woke up, M.C. felt Appellant's hand go over the top of his pants – he described his pants as "button pants" which can "pretty easily" be unbuttoned – and Appellant unbuttoned M.C.'s pants with Appellant's left hand. (R. at 295-95.) Appellant then pulled M.C.'s penis out from his pants and began to masturbate M.C.'s flaccid penis. (R. at 295-96.) Once that happened, M.C. explained he pretended to wake up by opening his eyes, and when he did, everything stopped; Appellant stopped moving. (Id.) M.C. believed that once he opened his eyes, Appellant "pretended to be asleep." (R. at 295.) M.C. tried to make sense of the situation, lifted the blanket and saw that while Appellant was dressed, his genitals were fully exposed and that M.C.'s hand was on Appellant's penis and Appellant's hand was wrapped around M.C.'s hand. (R. at 295-97.) Once M.C. confirmed what happened he immediately disentangled his hand from Appellant's hand and penis, removed Appellant's hand from his penis, buttoned his pants, put on his shoes, and left the home. (R. at 297.)

Once outside, M.C. got into his car, which was parked in the driveway, but could not leave right away because there was frost on his windows. (R. at 298.) While he waited for his windows to defrost, he called his close friend M.H. and told her, while crying, what Appellant had done. (R. at 300.) He explained that he had fallen asleep while watching a movie and he woke up with "his hand on [Appellant's] penis and [Appellant's] hand moving on his" penis. (R. at 376.) M.H. described M.C. as sounding "very upset, distraught, and frantic." (R. at 376-77.) While M.C. was on the phone with M.H., Appellant came out to M.C.'s vehicle. (R. at 301.) M.C. partially rolled down his window and confronted Appellant, and asked him, "how could

you? Why would you? What were you thinking?" (Id.) Appellant, while looking at the ground, responded, "I'm sorry, I'm sorry." (Id.) Appellant continued to talk to M.C. while M.C. continued to ask, "how could you?" (Id.) M.H. was still on the phone with M.C. and heard the conversation. (R. at 378.) M.H. testified that she heard Appellant respond to M.C., "I don't know" or "I'm sorry." (Id.) Appellant eventually went back into the residence, and M.C. went home. (Id.) The next day, M.C. was unable to "hold [his] emotions and told his roommate, SSgt C.N., what happened. (R. at 303.)

On 6 January 2021, M.C. had his initial feedback with his supervisor. (R. at 304.) During the feedback, his supervisor told him how important it was to take care of himself, and M.C. "broke down and started crying." (R. at 305.) M.C. explained that he had been sexually assaulted by Appellant. (Id.) His supervisor testified that while M.C. explained what happened, M.C. became quiet, and his lip started to quiver. (R. at 401.) His supervisor then reported the crime. (R. at 401.)

Both M.C.'s supervisor and his close friend, M.H. testified that M.C. had a character for truthfulness. (R. at 379, 402.)

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 and Analysis

"The court may affirm only such findings of guilty . . . as the Court finds correct in law and fact." Article 66, UCMJ. An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A 1993). In

Appellant's case, the evidence produced at trial is both legally and factually sufficient to affirm his convictions for the charge and specifications.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017). "[I]n resolving questions of legal sufficiency, [courts of criminal appeal] are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Legal sufficiency requires a very low threshold to sustain a conviction. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

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, [courts of criminal appeal] take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [their] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" Wheeler, 76 M.J. at 568 (quoting Washington, 57 M.J. at 399).

In his framed assignments of error, Appellant broadly argues M.C.'s "testimony alone is not sufficiently credible to establish he was asleep or that he did not consent" beyond a

reasonable doubt. (App. Br. at 19.) This is incorrect; M.C.'s testimony and Appellant's own admissions are sufficient evidence to prove the specifications beyond a reasonable doubt.

To prove Appellant committed Specification 1 of the Charge the Government had to prove: (1) that Appellant caused M.C. to touch Appellant's penis with M.C.'s hand with an intent to gratify Appellant's sexual desire; (2) that Appellant did so when M.C. was asleep; and (3) Appellant knew or reasonably should have known that M.C. was asleep. (R. at 476.) To prove Specification 2 of the Charge the Government had to prove: (1) that Appellant caused M.C. to touch Appellant's penis with M.C.'s hand with an intent to gratify Appellant's sexual desire; and (2) that Appellant did so without M.C.'s consent. (Id.) Finally, to prove Specification 3 of the Charge the Government had to prove: (1) that Appellant touched M.C.'s penis with Appellant's hand with an intent to gratify Appellant's sexual desire; and (2) that Appellant did so without M.C.'s consent. (Id.)

Appellant argues the charge and specifications are not factually sufficient because the "allegations rest on M.C.'s credibility as a witness," and he is not credible. (App. Br. at 17.) Appellant judges M.C.'s credibility by "his choices and his relationship with [Appellant]." (App. Br. at 17.) Specifically, Appellant implies that because M.C. chose not to travel home for Christmas, has spent time with Appellant, and chose to watch the movie in Appellant's room, his credibility should be questioned. (Id.) He also argues that M.C.'s testimony on direct that he had not "had any conversations of a sexual nature" with Appellant was later contradicted and that alone should cause this Court concern regarding M.C.'s credibility. (R. at 18.) However, when this Court takes "'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt'" this Court can be confident "the evidence constitutes

proof of each required element beyond a reasonable doubt.'" Wheeler, 76 M.J. at 568 (quoting Washington, 57 M.J. at 399).

Taking each argument in turn, first, M.C.' choices and relationship with Appellant did not diminish the credibility of his testimony. The inference from Appellant's argument is that because he chose not to travel home for Christmas and chose to spend time with Appellant, he consented to the sexual acts. There is no link that supports that conclusion, especially when the context of these decisions is explored. For instance, M.C. chose not to travel home for Christmas because he had just flown home for the Thanksgiving holiday which he described as a "big holiday" for his family where the "whole family gets together," and they make dozens of tamales. (R. at 284.) M.C. also explained that he did not visit his dad, who was traveling for work in South Carolina, because he was not sure whether his dad would remain there for the holiday or not. (Id.) M.C. chose to spend Christmas with Appellant because he was one of the only people Appellant knew in the local area who was available, had extended an invitation, and who was his peer, not a supervisor. (R. at 279, 285.) These choices do not make M.C.'s testimony any more or less credible. Nor do they suggest in any way that M.C. would have consented to sexual activity with Appellant.

Similarly, M.C.'s credibility is not diminished because they chose to watch the movie in Appellant's room. Even though K.P. testified that there was not a so-called quiet hour rule in the house, M.C. testified that both he and Appellant were being considerate when they decided to watch the movie in Appellant's room. (R. at 265, 290.) M.C. did not live in the home and did not know the etiquette, so when they "decided that it would probably be too loud in the living room" and Appellant suggested watching the movie in Appellant' room, he did not argue. (R. at 290.) Just as M.C.'s choice to stay local for Christmas did not diminish the credibility of his

testimony neither did the fact that he and the Appellant mutually decided to watch the movie in Appellant's room.

Appellant's reliance on M.C.'s testimony regarding conversations of a sexual nature is also misplaced. M.C. was asked on direct "prior to going back [to Appellant's] room that night, were there any conversations between you and [Appellant] that were sexual in nature or any discussions or conversations that were sexual in nature?" (R. at 297.) M.C. replied, "I don't think so, no." (Id.) SSgt W.P. later testified that on Christmas night, in a group setting, with Appellant, himself, and his wife present, M.C. "changed the subject to those of a sexual nature." (R. at 436.) M.C.'s response on direct examination was not absolute and should not cause this Court to doubt his credibility. He replied, "I don't think so, no" which is indicative that he was not sure if he had previously had a conversation of a sexual nature with Appellant that night. (R. at 297.) It is also possible that M.C. was confused by the question because, in line with SSgt W.P.'s testimony, there were not conversations between just M.C. and Appellant – SSgt W.P. and K.P. were there as well. (R. at 297, 436.) In any event, a reasonable trier of fact could conclude that M.C. was not lying when he said he did not think he had any sexual conversations with Appellant before going back to the bedroom.

Additionally, M.C.'s credibility was bolstered when two witnesses testified that M.C. had a character for truthfulness. (R. at 379, 402.) Their testimony can reinforce this Court's confidence that "the evidence constitutes proof of each required element beyond a reasonable doubt.'" Wheeler, 76 M.J. at 568 (quoting Washington, 57 M.J. at 399).

Appellant also argues that there is reasonable doubt as to Specification 1 of the Charge because (1) it is more likely that M.C. blacked out from alcohol consumption and only "started remembering the alleged events in the middle of what had been a consensual sexual encounter;"

and (2) even if M.C. was asleep it is "possible the contact occurred the moment [M.C.] woke up." (App. Br. at 18.) Neither of these claims amount to reasonable doubt in Appellant's case, and this Court "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," can be "convinced of [Appellant's] guilt beyond a reasonable doubt." Turner, 25 M.J. 324, 325. There is no evidence in the record to indicate that M.C. was blacked out as opposed to asleep during the sexual assault. M.C. testified regarding his alcohol consumption and stated he was not at the point where he had "had too much" alcohol, and he felt "pretty coherent for that night. (R. at 288-89.) Testimony from SSgt W.P. and K.P., that M.C. was "very drunk," is not enough to create reasonable doubt without more, and in light of the evidence presented. (App. Br. at 18.) And Appellant could have tried to present evidence that M.C. was in a blackout state. During opening statements, trial defense counsel told the members they would call a forensic psychologist to present evidence of Appellant's alleged blackout state. (R. at 244.) However, Appellant's expert did not testify, about Appellant or M.C., and that is indicative of how little evidence there was to support a theory of M.C. being in a blackout state. This Court can be confident when weighing the evidence in the record of trial that M.C. was asleep, rather than blacked out, when Appellant masturbated himself with M.C.'s hand. M.C. testified that he fell asleep during the movie and woke up to his hand around Appellant's penis, with Appellant's hand over M.C.'s "pleasing himself, masturbating while using [M.C.] to do it for him." (R. at 294.) And despite trial defense counsel persistence that M.C.'s hand could have made contact with Appellant's penis the moment he woke up, M.C. was clear that he "was asleep" and that it was "highly unlikely that that would have happened at the exact moment" he woke up. (R. at 323.)

Not only was M.C.'s testimony credible on its own, but there is additional evidence that directly points to Appellant's guilt – Appellant's own admissions. M.H. testified on direct examination that about a conversations she overheard while she was on the phone with M.C. directly after the sexual assault and while M.C. was sitting in his car in Appellant's driveway. (R. at 378.) She heard M.C. confront Appellant. (Id.) M.C. told her that Appellant had come out of the house, and she heard M.C. yell at Appellant and ask him, "why did you do this, why did you think this was okay?" (Id.) She then heard Appellant reply "I'm sorry" or "I don't know." (Id.) Not once during this encounter did Appellant deny or refute M.C.'s allegations. (R. at 301, 378.) Appellant's apology and response demonstrate his guilt.

Finally, Appellant argues, pursuant to Grostefon, that the Charge and Specifications are each legally insufficient because "no reasonable factfinder could have found beyond a reasonable doubt that 1) M.C. was asleep as charged in Specification 1, and 2) M.C. did not consent to the conduct alleged in Specifications 2 and 3." (App. Br. at Appendix.) Appellant's sole support for these claims is that the only evidence produced to prove that M.C. was asleep was M.C.'s testimony, that M.C. had conversations of a sexual nature with Appellant, and he consented to watching a movie in Appellant's room. (Id.) But corroboration is unnecessary for a conviction or to support the testimony of a witness at trial. United States v. Victoria, 2015 CCA LEXIS 276, at *3 (A.F. Ct. Crim. App. 3 Jun. 2015) (unpub. op.) Further, it is nonsensical to suggest that M.C. consented to sexual acts simply because M.C. had conversations of sexual nature in a group setting earlier in the evening and agreed to watch a movie in Appellant's room. Legal sufficiency requires a very low threshold to sustain a conviction and "any rational trier of fact could have found that Appellant sexually assaulted M.C. beyond a reasonable doubt. King, 78 M.J. at 221; United States v. Robinson, 77 M.J. at 297-98.

Appellant's arguments are unsupported by the evidence produced at trial. Dykes, 38 M.J. at 272. Drawing every inference in favor of the Government, a rational factfinder could find that Appellant sexually assaulted M.C. and, once awake, M.C. did not consent to the sexual acts. Barner, 56 M.J. at 134; Robinson, 77 M.J. at 297-98. And when "weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this Court should be convinced Appellant is guilty beyond a reasonable doubt. Turner, 25 M.J. at 325. For this reason, Appellant's argument for legal and factual insufficiency fails. This Court should deny Appellant's assignment of error.

IV.

THE MILITARY JUDGE DID NOT ABUSE HIS DSICRETION IN FINDING J.S.' TESTIMONY WAS NOT RELEVANT OR NECESSARY CHARACTER EVIDENCE.

Additional Facts

Prior to his trial, Appellant requested the Government produce seven witnesses pursuant to R.C.M. 703. (App. Ex. IX.) The Government agreed to produce six of the seven witnesses. The Government denied production of J.S. (Id. at 2.) Appellant's initial justification for J.S.' testimony was that he, as someone who lived with Appellant and was a previous partner of his, "can testify to [Appellant's] character, to include the fact [Appellant's] character is inconsistent with the allegations being investigated and his personal observations that [Appellant] had never done anything sexually inappropriate or illegal." (App. Ex. VII at 2.)

After the Government denied the request, Appellant then moved the military judge to compel production of J.S. (App. Ex. VII.) Appellant called J.S. an "essential witness" who would "present relevant and necessary testimony under both MRE 404(a)(2)(A) and MRE 405."

(Id.) Appellant stated J.S.' expected testimony would detail that J.S. and Appellant dated and lived together in 2018 and 2019 and consist of the following character evidence:

1. J.S.' description of Appellant as "selfless," "helpful," and that Appellant "puts others before himself;"

2. J.S.' description of Appellant as "reserved," "unassertive," and that he "never initiated sexual intercourse;" and

3. J.S.' statement that Appellant "had never masturbated [J.S.] while he was asleep or used [J.S.'] hand to masturbate himself."

(Id.)

Appellant explained that he was accused of having "inappropriately masturbated M.C.'s penis while M.C. was sleep in an attempt to initiate sexual intercourse with M.C." and J.S. will testify that Appellant never did that to him. (Id. at 4.) Appellant stated this testimony would be used to show that Appellant "has a character for being sexually guarded," which Appellant argued was permissible pursuant to M.R.E. 404(a)(2)(A). Appellant claimed J.S.' testimony was relevant because "a predisposition for being sexually guarded makes it less likely that [Appellant] would act against that character on December 25, 2020." (Id.)

Appellant also argued that since this character for being sexually guarded "is an essential element of M.C.'s claims and [Appellant's] defense, this character trait can be proven not only with opinion testimony by [J.S.], but also with specific instances of [Appellant's] conduct as observed by [J.S.]." (Id., *citing* M.R.E. 405(b).)

In its response, the Government agreed, for purposes of the motion, to the facts detailed above in Appellant's motion, including the content of J.S.' expected testimony. (App. Ex. at VIII.) The Government disagreed, however, with Appellant's belief that J.S.' testimony was either relevant or necessary.

First, citing Schelkle, the Government noted J.S.' testimony about his "personal observations" that Appellant "had never done anything sexually inappropriate or illegal" was "an attempt to have a witness testify that because he has never seen the accused act in a certain way, he is not guilty (or at least less likely to have committed the offenses for which he has been charged)." Consistent with Schelkle's "nonobservation" of criminal conduct holding, the Government argued this testimony was not proper character evidence. (Id. at 4.)

Moreover, the Government argued this testimony, plus J.S.' assertion that Appellant had never masturbated J.S. while he slept, was inadmissible under M.R.E. 405 because Appellant had "proffered no essential element of a defense or charge that relates to the accused's specific instance of a character trait in which they seek to admit." (Id. at 5-6.)

Finally, the Government argued that traits of "selfless," "helpful" and "put[ting] others before himself" were not pertinent character traits because they were "not relevant to whether [Appellant] committed the offense of abusive sexual contact." (Id. at 5.) Notably, the Government highlighted that Appellant had provided no connection as to how the traits were relevant to the charged offenses. (Id.)

The military judge denied Appellant's motion. (App. Ex. IX.) First, the military judge noted that all facts within his Findings of Fact section, which included the same synopsis above of J.S.' expected testimony, were agreed upon by the parties. The miliary judge ruled that since "[a]ll facts alleged have been agreed upon between the parties and thus the matter at hand is one of applying the law to the facts," there was no reason to believe that having a hearing under R.C.M. 905(h), which would include testimony from J.S., "would be of assistance to the Court in resolving the matter." (Id. at 3.)

The military judge ruled the traits of "being selfless, helpful, and putting others before himself" were inadmissible because they were not "'pertinent' character traits material to the charges at hand." (Id. at 4.)

The military judge also ruled that J.S.' testimony about Appellant being "reserved, unassertive, and never initiat[ing] sexual intercourse, or could be said to have the characteristic of being 'sexually guarded'" was irrelevant because J.S.' opinion was limited to the confines of his relationship with Appellant, adding that J.S. provided "no personally observed or overheard factual assistance" as to how Appellant acted in his relationship with the alleged victim or any other individuals. (Id. at 4.) The military judge noted that J.S.' testimony lacked factual assistance and involved a "limited breath of experience to the proposed character evidence" and, thus, tended to "prove nothing of consequence when the question at hand is a determination of whether the alleged charged conduct occurred." (Id.)

Next, the military judge also highlighted it was "irrelevant if another individual at another time, or for that matter, even if multiple individuals on multiple occasions, spent time with [Appellant] and never observed criminal behavior," adding the "absence of criminal behavior at times and/or places and/or with people (each of which are unrelated to the charges) fails to satisfy even the very low threshold of relevance under Mil. R. of Evid. 401." (Id.)

Finally, the military judge found "to the extent any of the proposed testimony arguably hold some relevance, such relevance is substantially outweighed by the confusing nature of introducing such evidence under Mil. R. of Evid. 403." (Id.)

Notably, the military judge specifically highlighted that while Appellant's initial request to the Government requested J.S.' production for both findings and pre-sentencing hearings, Appellant's motion to compel filed at trial addressed "only a claimed necessity for findings in

order to contradict the Government's asserted allegations" and that the motion contained "[n]o reference to any law, policy, statute, or case in relation to sentencing matters" that were put forth for the military judge's consideration. (App. Ex. IX at 4.) The military judge held, "As such, the present analysis and ruling has considered the Defense ruling for production of [J.S.] only insofar as testimony would be relevant and necessary for the trial on the merits." (Id.) In a footnote, the military judge concluded, "Despite this, and while not explicitly ruling on the matter for sentencing, the Court tends to find that [J.S.'] testimony would likely be admissible in some regard for sentencing and could certainly be accomplished telephonically if found admissible and is so requested." (Id.) At trial and on the record, the military judge highlighted this distinction, stating, "I will highlight however that, I believe the court footnoted at one point that it was not ruling on the issue, in so far as the witness's necessity for sentencing. And that was a matter that could be taken up, should the defense wish to do so at the appropriate time." (R. at 38-39.)

After he was found guilty, Appellant never again requested the production of J.S. for pre-sentencing purposes.

Standard of Review

A military judge's ruling to admit or exclude evidence is reviewed under an abuse of discretion standard. United States v. Roberson, 65 M.J. 43 (C.A.A.F. 2007).

Law

M.R.E. 401-404 set forth what is legally and logically relevant. M.R.E. 401 defines logically relevant evidence as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Even though the evidence is logically relevant, it may be excluded as not legally relevant if "its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the members or by consideration of undue delay . . . ." M.R.E. 403. M.R.E. 404(a)(1) states, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." However, M.R.E. 404(a)(2) allows an accused to "offer evidence of the accused's pertinent trait." "Pertinent" has been held to mean the same as "relevant" as defined in M.R.E. 401. *See* United States v. Clemons, 16 M.J. 44, 467 (C.M.A. 1983).

M.R.E. 405(a) states, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." M.R.E. 405(b), however, allows proof via specific instances of conduct when "character or a trait of character of a person is an essential element of an offense or defense."

"A mere assertion of nonobservation of criminal conduct does not equate to reputation or opinion evidence." United States v. Schelkle, 47 M.J. 110, 112 (C.A.A.F. 1997) (*citing* United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990); Fed. R. Evid. 405, 28 USC, Notes of Advisory Committee on Proposed Rules; 1 S. Saltzburg, M. Martin, _ D. Capra, *Federal Rules of Evidence Manual* 446-66 (6th ed. 1994); Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948); United States v. Midkiff, 15 M.J. 1043, 1051 (NMCMR 1983); United States v. Giles, 13 M.J. 669, 671 (AFCMR 1982)).

An abuse of discretion occurs when the military judge makes clearly erroneous findings of fact or when the military judge's legal conclusions are influenced by an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must

be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010).

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

Analysis

At trial, Appellant failed to articulate the logical and legal relevance of Appellant's character for being "selfless," "helpful," "putting others before himself," "reserved,' "unassertive," or being "sexually guarded." Moreover, Appellant failed to show how J.S.' planned testimony on specific acts overcame the prohibitions of R.C.M. 405. Each purported character trait will be analyzed in turn.

- ***Selfless, Helpful and Putting Others Before Himself***

At trial, Appellant failed to demonstrate the relevance and admissibility of these alleged character traits in relation to the issues raised by the case. Now, before this Court, Appellant makes no attempt to argue these traits are pertinent traits or that the military judge erred in finding they were not pertinent traits. Thus, any concerns for these traits can be easily dispelled.

- ***J.S.' contention that Appellant had never done anything sexually inappropriate or illegal and that Appellant had never masturbated J.S. while J.S. slept or used J.S.' hand to masturbate himself.***

Appellant also appears to make no attempt to argue this portion of J.S.' intended testimony was admissible or that the military judge erred in finding it was impermissible.

Here, Appellant sought to argue that he did not commit the offense against M.C. because J.S. had never seen Appellant do anything "sexually inappropriate" or "illegal" and that Appellant had never committed the offense for which he was charged on J.S. This testimony was inappropriate for multiple reasons. First, as our superior Court held in Schelkle, a mere non-observation of criminal conduct does not equate to reputation or opinion evidence. Schelkle, 47 M.J. at 112. This is the exact type of evidence Appellant sought to elicit from J.S. Here, just because J.S. had never seen Appellant do any of these or had them done upon him did not equate to proper reputation or opinion evidence consistent with M.R.E. 404(a). Thus, the military judge did not err.

Furthermore, the form in which this testimony would come – namely by way of specific instances of conduct under M.R.E. 405(b) – would violate M.R.E. 405(b) since these character traits are not an "essential element or defense" in this case. Notably, our superior Court in Schelke also held that "the failure to observe criminal activity, or the observation of general good conduct, is not probative of an 'essential element of a[] . . . defense.'" Schelkle, 47 M.J. at 112 (*quoting* Mil. R. of Evid. 405(b).

Further, Appellant provided no cases at trial and no cases, military or civilian, to this Honorable Court to support his contention that these types of character traits (or that Appellant's character overall) are an essential element of an abusive sexual contact offense or an essential element to a defense against such a charge.

- ***Reserved, Unassertive, and Sexually Guarded***

Finally, Appellant failed at trial to demonstrate the relevance and admissibility of these traits. Appellant now claims error, arguing that a "reserved, unassertive, sexually guarded person is not going to engage in sex without knowing where they stand in a relationship", and that "reserved, unassertive, and in particular, sexually guarded person is going to be less likely to initiate sex at all, and much less so against someone's consent." (App. Br. at 22.) Appellant believes this testimony would have shown it less likely that Appellant "was the one to initiate sex with M.C. at all" or that Appellant "touched M.C.'s penis without his consent or while asleep." (Id.) Thus, Appellant believes these traits are relevant and necessary and that the military judge erred in his decision. Appellant is incorrect.

To start, Appellant has failed to show any of these purported character traits are either relevant or pertinent. Appellant provided no cases at trial and no cases, military or civilian, to this Honorable Court to support his contention that this type of character evidence is permitted under M.R.E. 404(a) in a case involving sex offenses. Notably, Appellant offers no instances where any Court has held that a person being reserved, unassertive, guarded (or any other related adjectives such as modest, shy, or timid), either overall or in a sexual sense, has been held to be a pertinent character trait in a case involve sex offenses.

While Appellant references our superior Court's decision in United States v. Gagan, 43 M.J. 200 (C.A.A.F. 1995), that case involved charges of homosexual sodomy, and the pertinent character trait at issue was the appellant's heterosexual preference. That scenario is quite different from this case. Whereas Gagan dealt with an objective trait of whether a person's overall sexual orientation was either heterosexual or homosexual, the traits mentioned here

("reserved," "unassertive," "guarded," etc.) are highly ambiguous and subjective and, as the military judge held, limited to only one person with who Appellant interacted.

Further, the military judge expressly applied the balancing test in M.R.E. 403 and correctly concluded any arguable relevance for the testimony was outweighed by danger of confusion of the issues. The evidentiary purpose of Appellant's supposed reserved, unassertive or sexually guarded nature was not probative to the material issues in this case – whether the evidence established Appellant committed every element of every offense beyond a reasonable doubt. On the other hand, its admission risked the danger that the members would decide the case on.

Yet, even if error is assumed in Appellant's case, his claim should still be denied because it did not prejudice Appellant's substantial rights. United States v. Lopez, 76 M.J. 151, 156 (C.A.A.F. 2017) (citations omitted). Appellant argues the military judge's erroneous exclusion of character evidence is a constitutional error because it "precludes a defense based on evidence of pertinent character traits." (App. Br. at 22.) For constitutional errors, the Government has the burden to demonstrate the error was harmless beyond a reasonable doubt. Gagan, 43 M.J. at 203. However, [e]xclusion of such evidence is not per se prejudicial, and automatic reversal is not required by the exclusion of character evidence. Id. (citing to United States v. Vandelinder, 20 M.J. 41 (CMA 1985). For constitutional errors, the Government must show the error was harmless beyond a reasonable doubt using a four-part test which asks the following four questions: (1) Is the Government's case against the accused strong and conclusive?; (2) Is the defense's theory of the case feeble or implausible?; (3) What is the materiality of the proffered testimony/Is the question whether or not the accused was the type of person who would engage in the alleged criminal conduct fairly raised by the Government's theory of the case or by the

defense?; and (4) What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial? Gagan, 43 M.J. at 203 (citing to United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985)).

Each one of the four prongs of this analysis weighs in favor of the Government and against a finding of prejudice.

The first two factors favor the Government. As shown in Issue III above, the Government provided overwhelming evidence in this case of Appellant's guilt. M.C. credibly testified about the sexual assaults, a witness overheard Appellant apologizing for his misconduct, and two witnesses testified that M.C. had a character for truthfulness. Meanwhile, the Defense's case was weak – the defense only called two witnesses, SSgt W.P. to impeach M.C. and the investigating agent. SSgt W.P.'s testimony was of limited value, because, as discussed above, it did not definitively confirm that M.C. lied about having sexual conversations with Appellant. The agent's testimony was of a similar limited value because the cross-examination was directed at whether the agent collected DNA or camera footage from the driveway, but none of that evidence would have proven if the sexual were consensual or not. (R. at 447-49.)

The remaining two factors are the "materiality" and "quality" of the evidence in question. Lopez, 76 M.J. at 156. These considerations also weigh in favor of the Government, and they refute Appellant's specific arguments for prejudice. In examining "materiality" and "quality," the Court "considers the particular factual circumstances of each case." United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020).

Here, J.S.' testimony did not have direct relevance to the charges but was only inconclusive circumstantial evidence. Undoubtedly, past or even current "reserved," "unassertive," or "guarded" sexual activity with one person does not exclude possible

unreserved, *assertive*, or *unguarded* sexual activity with one or more other persons. In other words, the possibility that Appellant was "reserved" with J.S. while being the exact opposite with others rendered J.S.' testimony both equivocal and highly subjective.

Moreover, the quality of the evidence was quite low. As the military judge held, J.S.' opinion was limited to only the confines of his relationship with Appellant and provided "no personally observed or overheard factual assistance" as to how Appellant acted in his relationship with the alleged victim or any other individuals. (App. Ex. IX. at 4.) As the military judge correctly surmised, Mr. JS's testimony lacked factual assistance and a "limited breath of experience to the proposed character evidence" and, thus, tended to "prove nothing of consequence when the question at hand is a determination of whether the alleged charged conduct occurred." (Id.)

In sum, the military judge did not commit a clear abuse of discretion by excluding Appellant's character evidence. The military judge appropriately found the character traits Appellant sought to extract from Mr. JS were not pertinent character traits consistent with M.R.E. 404(a) and that Mr. JS's testimony would not be relevant and necessary. Moreover, the military judge determined the evidence did not survive a balancing test under M.R.E. 403. Finally, any presumed error is harmless beyond a reasonable doubt and there is no material prejudice to Appellant. Therefore, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

V.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL.

Standard of Review

A military judge's ruling on a motion to compel a witness is reviewed for an abuse of discretion. McElhaney, 54 M.J. 120, 126 (C.A.A.F. 2000).

Law

The Law discussed in Issue IV is also applicable for this issue. All parties to a court-martial have an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ. "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be *relevant and necessary*." R.C.M. 703(b)(1) (emphasis added).

"Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony." McElhaney, 54 M.J. at 127 (citations omitted).

A ruling that denies a witness should be reversed only if, "on the whole," denial was improper. McElhaney, 54 M.J. at 126 (*quoting* United States v. Ruth, 46 M.J. 1, 3 (1997)). A military judge's denial of a witness request will not be reversed "unless [a court of appeals has] a definite and firm conviction that the [military judge] committed a clear error of judgment in the conclusion [he or she] reached upon a weighing of the relevant factors." Id. (*citing* United States v. Houser, 36 M.J. 392, 397 (CMA 1993)).

Analysis

Here, Appellant essentially repeats his argument from Issue IV above, namely that the "military judge abused his discretion in denying production of [J.S.] as a relevant and necessary witness." (App. Br. at 28.) Appellant has failed to show the military judge clearly abused his discretion when denying Appellant's motion to compel.

R.C.M. 703(b)(1) requires proposed testimony to be "relevant and necessary." However, as previously discussed, the military judge correctly found J.S.' testimony was neither relevant nor necessary. Specifically, the military judge found the purported character traits of "being selfless, helpful, and putting other before himself" were inadmissible because they were not pertinent character traits permissible to the charges at hand. (App. Ex. IX at 4.) As to the purported traits of Appellant being "reserved," "unassertive," and "sexually guarded," the military judge correctly found the "proposed testimony tends to prove nothing of consequence" as it related to the issues at hand in Appellant's trial. (Id.) Finally, the military judge correctly held that J.S.' proposed testimony that he had never observed Appellant commit criminal behavior "fail[ed] to satisfy even the very low threshold of relevance under Mil. R. Evid. 401." (Id.)

As detailed in Issue IV, the military judge committed no clear of abuse of discretion in his ruling. Considering Appellant makes no unique arguments regarding this holding within this issue that were not already put forth in Issue IV above, this Court should find the military judge did not abuse his discretion in finding J.S.' testimony was not relevant or necessary. Consistent

with that finding, this Court should likewise find the military judge did not abuse his discretion in ultimately denying Appellant's motion to compel J.S.' testimony for findings.[3]

Finally, while Appellant claims error because the military judge did not "specifically address or analyze factors outlined in McElhaney,"[4] the military judge's ruling that the proposed testimony was not relevant to the case at hand shows the military judge considered "the issues involved in the case and the importance of the requested witness to those issues." *See* McElhaney, 54 M.J. at 127. In finding that the various pieces of proposed testimony did not meet the thresholds of R.C.M. 703, Mil. R. of Evid. 401, 404(a), or 405(a) or (b), as well as withstand a Mil. R. of Evid 403 balancing test, this Court can be assured the military judge considered all necessary factors in determining whether to compel J.S.

Finally, even if the military judge did err in finding J.S.' testimony not relevant and necessary and ultimately denying his production, Appellant faced no prejudice. The Government relies on the same prejudice analysis as detailed previously in Issue IV.

In sum, the military judge did not commit a clear abuse of discretion by denying Appellant's motion to compel the production of J.S. Moreover, any presumed error is harmless and there is no material prejudice to Appellant. Therefore, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

[3] As noted above, the military judge's ruling was limited to J.S.' proposed testimony as to findings. Appellant never requested or moved the military judge to compel J.S.' production for pre-sentencing.
[4] *See* App. Br. at 29.

VI.

THE APPELLANT WAS NOT ENTITLED TO A UNANIMOUS VERDICT.

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)).

Additional Facts

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 521.) Appellant did not object to this at his trial which was completed on 9 December 2021. (R. at 595.) 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 29-30.)

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. 5 Jul. 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 – especially under the plain error standard of review that is applicable considering Appellant's lack of objection.

CONCLUSION

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

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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 May 2023 via electronic filing.

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40258
JORDAN E. LEE	)	
United States Air Force	)	1 June 2023
Appellant	)	

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

COMES NOW, Appellant, SSgt (SSgt) Jordan E. Lee, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and files this reply to Appellee's Answer (Ans.) filed on 26 May 2023. SSgt Lee (Appellant) primarily rests on the arguments advanced in the Brief on Behalf of Appellant (Br.), filed 21 April 2023, but submits the following for this Court's consideration.

Argument

I.

THE MILITARY JUDGE IMPROPERLY EXCLUDED CONSTITUTIONALLY REQUIRED STATEMENTS.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DECIDING SPECIFICATIONS 1 AND 2 OF THE CHARGE WERE NOT UNREASONABLY MULTIPLIED AT FINDINGS.

In supporting the Government's charging scheme, Appellee falls prey to the precise pitfall on which the Government originally rested the charges: focusing not on the *criminal act*, but the potential ways of charging it, and unreasonably splintering Appellant's single act based on only seconds-long differences.

Appellee initially argues the evidence supports the charging scheme because:

> M.C. was initially asleep when Appellant caused M.C. to touch his penis and then when M.C. woke up *the abusive sexual contact did not stop*. [] After M.C. woke up and opened his eyes, Appellant had the opportunity to let go of the grip he had on M.C.'s hand over his penis but he did not. [] When M.C. lifted the blanket to confirm what was happening, Appellant had the opportunity to let go of M.C.'s hand but instead he continued to wrap M.C.'s hand around his penis.

Ans. at 12 (emphasis added). Not only does this argument itself *recognize* that the single act "did not stop[,]" it further attempts to bolster the unreasonable charging scheme by slicing the alleged conduct and Appellant's opportunities to withdraw nearly second-to-second. As M.C. described it, "after the panic, I decided you know, in a split second, I just need to show I'm awake," at which point he claims he opened his eyes, looked over, and lifted the blanket. R. at 295. That Appellee must strive to bolster the Government's charging scheme by splitting a short interaction in this manner only serves to reveal the unreasonableness of charging a single act two ways.

Appellee next argues that Appellant's argument "does not take into account that one specification required Appellant's knowledge of M.C.'s state of consciousness and the other did not." Ans. at 13. But here, Appellee conflates multiplicity—for which the *Blockburger* test is used—with the unreasonable multiplication of charges (UMC). Appellant does not dispute that the statute creates two potential crimes, nor does he contend multiplicity is at issue. *See* Br. at 11-16. But in relying solely on this statutory delineation, Appellee ignores the gravamen of UMC, where "[t]he underlying concept [] is that the Government may not needlessly 'pile on' charges against an accused." Br. at 13 (quoting *United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46, *34 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.)).

Appellee goes on to argue "the crime of abusive sexual contact while M.C. was asleep and then awake, but without consent, are two separate crimes" and that "Appellant caused two separate harms, and the trauma done to the victim was different." Ans. at 13. Such a description of two separate harms does not appear in M.C.'s testimony (R. at 273-335); moreover, even M.C. describes *a single event* throughout his testimony, telling M.H. "*this* is what happened" (R. at 300), stating he told Appellant "I can't believe you did *this*[.]" (R. at 301). Nowhere in M.C.'s testimony does *he* describe separate harm based on multiple acts.

Appellee engages in another error of attempting to split the gravamen of sexual assault to bolster the Government's charges, arguing:

> The distinct criminal purpose reflects the vulnerability of the victim. Appellant could have stopped the abusive sexual contact when M.C. woke up. However, he chose to keep M.C.'s hand wrapped around his penis. (R. at 295-96.) By committing the abusive sexual contact while M.C. was asleep, Appellant committed one crime to gratify his sexual desires. By keeping M.C.'s hand on his penis when M.C. woke up, Appellant participated in a second crime to gratify his sexual desires.

Ans. at 14. Here, Appellee stretches the statute past what it reasonably bears. Appellee's argument once again recognizes there is a single gravamen or purpose of sexual assault: *gratification of sexual desire*. *Id*. The gravamen *of the criminal act* is not focused on the alleged victim—it is focused on the accused and the alleged conduct. *See United States v. Quiroz*, 55 M.J. 334, 350 (C.A.A.F. 2001); *United States v. Massey*, 2023 CCA LEXIS 46, at *37 ("The gravamen of Appellant's statement is a stated desire for the picture."). Once more, Appellee's attempt to splinter this offense into multiple charges reflects the unreasonableness of the Government's charging scheme.

Finally, Appellee claims "[s]ince the military judge merged the specifications for sentencing, Appellant was not prejudiced." Ans. at 14. However, Appellant's case was preferred on 29 April 2021. R. at Vol. 1, DD Form 458, *Charge Sheet*. These multiple convictions for a single act will thus be publicly available pursuant to Article 140a, UCMJ, 10 U.S.C. § 940a. This is prejudice.

Where, as here, *a single act occurred*, that was *split* in a manner that unreasonably increased Appellant's punitive exposure and unreasonably exaggerated his criminality—the Government engaged in unreasonable multiplication of charges which warrants, at minimum,

Article 66 relief in the interests of justice. *See* Br. at 16 (citing *Massey*, 2023 CCA LEXIS 46 at *38, 40.

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss with prejudice Specification 2 of the Charge.

Respectfully submitted,

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email and redacted portions were hand-delivered to the Court and served on the Government Trial and Appellate Operations Division on 1 June 2023.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

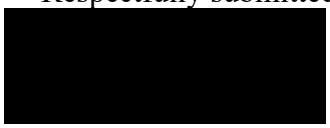
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), **JORDAN LEE,** United States Air Force, *Appellant.*	**NOTICE OF APPEARANCE** Before Panel No. 2 No. ACM 40258 2 June 2023

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

Pursuant to Rules 12 and 13 of this Honorable Court's Rules of Practice and Procedure, the undersigned, an attorney admitted to practice before this Court, hereby enters his appearance as the appellate counsel for the appellant in the above-captioned case.

Respectfully submitted,



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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 2 June 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JORDAN R. LEE,** United States Air Force *Appellant*	)	No. ACM 40258 1 June 2023

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to file the following portions of the Reply Brief on Behalf of Appellant under seal:

- Assignment of Error I, beginning on page 1 and ending on page 4.

The information contained therein is subject to the requirements of Mil. R. Evid. 412, was ordered sealed by the military judge, and due to its nature, should remain sealed. *See* R. at 310-322.

The above referenced portions will be delivered in hard copy to the Court and Air Force Trial and Appellate Government Operations Division. The remainder of the Reply Brief on Behalf of Appellant, redacted for ease of review and reference, will be filed separately via email on 1 June 2023.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant the motion.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, 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 Air Force Trial and Appellate Government Operations Division on 1 June 2023.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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