UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40583**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Vidarr SLAYTON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

This case was docketed with the court on 15 March 2024. On 26 April 2024 (42 days after docketing), counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 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 1st day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **13 July 2024.**

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	26 April 2024

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 2024**.[1] The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 42 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

[1] The initial submission of this motion for enlargement of time erroneously listed the requested period of enlargement to end on 4 July 2024. Undersigned counsel respectfully withdraws that motion and submits this one instead.

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 26 April 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **VIDARR SLAYTON**, United States Air Force *Appellant.*	))))))))))	**UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 ACM 40583 30 April 2024

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 (First) to file an Assignment of Error in this case.

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 April 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	5 July 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 August 2024**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836 page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its sixth enlargement of time. Counsel has completed an initial review of the record of trial from the remanded hearing.
3) *United States v. Johnson*, ACM 40537 – The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. This case is on its fifth enlargement of time. Counsel has completed an initial review of the record of trial and is working with civilian counsel on the completion of an assignment of errors, due to this Court on 11 July 2024.

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

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 July 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

8 July 2024

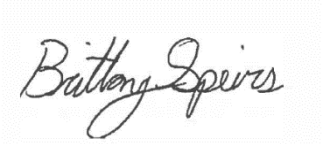
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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.



BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 July 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	2 August 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 September 2024**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836 page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its tenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its seventh enlargement of time. Counsel has completed an initial review of the remanded record of trial.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its sixth enlargement of time.

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

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

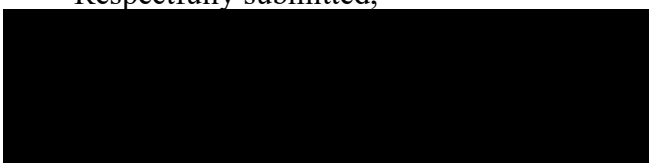
Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 August 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

5 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 5 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	4 September 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 October 2024**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836 page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress, but has not had a substantive update at this time. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its eleventh enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its seventh enlargement of time. Counsel has completed review of the record of trial.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its sixth enlargement of time.

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

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 September 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

5 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 5 September 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	4 October 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 November 2024**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836 page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress, but has not had a substantive update at this time. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its twelfth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors with civilian counsel.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Counsel has nearly completed an assignment of errors.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel has been working diligently to complete work on *United States v. Martinez*, while also lending support towards an assignment of errors for *United States v. Hilton* with civilian counsel. Counsel has had to balance this while preparing

for oral arguments in *United States v. Saul* which is before the Court of Appeals for the Armed Forces. 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]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 October 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

7 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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
(240) 612-4800

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 7 October 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	29 October 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 December 2024**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 228 days have elapsed. On the date requested, 270 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836 page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress, but has not had a substantive update at this time. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its thirteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel has been work-saturated over the past thirty days. Counsel was busy preparing for oral arguments before the Court of Appeals for the Armed Forces (CAAF) in *United States v. Saul*, ACM 40341. Additionally, counsel submitted assignments of error to this Court in both *United States v. Martinez* and *United States v. Cepeda*. Finally, counsel submitted a supplement to petition for review to the CAAF in

United States v. Schneider. Since completion of these, Counsel has been working through pending deadlines before the CAAF for *United States v. Bates* and *United States v. Vargo*, while attempting to take leave between 30 October 2024 and 5 November 2024. Counsel's top priority right now is completion of an assignment of errors for *United States v. Hilton* and *United States v. Jenkins*. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and begin work on an assignment of errors.

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

Respectfully submitted,

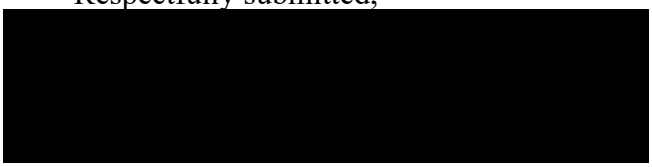
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 October 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

31 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 31 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40583**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Vidarr SLAYTON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 3 December 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

Appellant's case was docketed with this court on 15 March 2024.

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 December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **9 January 2025.**

Any subsequent motions for enlargement of time will likely require a status conference with all assigned counsel prior to the court's ruling on any such motion.

Appellant's counsel is reminded that at the expiration of this enlargement of time, 300 days will have elapsed from the docketing of this case with this court. Any future requests for enlargements of time that, if granted, would expire more than 360 days from date of docketing will not be granted absent *exceptional circumstances*.[*]

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[*] While filings should be computed from date of docketing, *see* A.F. CT. CRIM. APP. R. 23.3(m)(4), this court is amendable to considering delays incurred in the actual receipt of the record of trial as potential "good cause shown" to justify an enlargement of time.

Counsel should come prepared to discuss and substantiate any qualifying exceptional circumstances during any future status conference ordered by the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	3 December 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 January 2025**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of 28 appellate exhibits, 10 prosecution exhibits, one defense exhibit, one court exhibit, and an 836-page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned

counsel has been in communication with Appellant concerning the status of this case's progress, but has not had a substantive update at this time. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its fourteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting an assignment of errors along with civilian counsel.
2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its ninth enlargement of time. Counsel is working towards completion of an assignment of errors.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its ninth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete an in-depth review of Appellant's case. Counsel has been busy working towards completion of an assignment of errors for *United States v. Jenkins*. The brief for that case is due to this Court on 5 December 2024, and Counsel worked on it through the Thanksgiving weekend. Additionally, counsel has been working with civilian counsel in *United States v. Hilton*, which required him to dedicate time to coordinate the transmission of sealed exhibits. Counsel has

had to balance his work before this Court with other priorities before the Court of Appeals for the Armed Forces (CAAF). On 13 November 2024, counsel submitted a supplement for petition for review to the CAAF in *United States v. Bates*. This supplement addressed five issues. Additionally, counsel submitted a supplement for petition for review and a response to motion to dismiss to the CAAF in *United States v. Vargo* on 20 November 2024. Counsel worked through the weekend on 16 November 2024 in order to comply with the deadline set by the CAAF, while tending to a lingering illness that required him to go home from the office on multiple days. Additionally, counsel was on leave between 30 October 2024 and 5 November 2024. These circumstances and priorities have prevented counsel from being able to dedicate the time necessary for this case beyond a preliminary review. 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]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 December 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

5 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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 to file an Assignment of Error in this case.

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

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 5 December 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	30 December 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time to file a brief and assignments of error. Appellant requests an enlargement for a period of 30 days, which by operation of Rule 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals will end on Monday, **8 February 2025**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida, convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (Entry of Judgement). The members sentenced TSgt Slayton to nine months of confinement, reduction the pay grade of E-1, to receive a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial consists of twenty-eight appellate exhibits, ten prosecution exhibits, one defense exhibit, one court exhibit, and an 836-page transcript. Appellant is not currently in confinement. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time. Furthermore, undersigned counsel has been in communication with Appellant concerning the status of this case.

Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its seventh enlargement of time.
3) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Counsel was occupied with the completion of an assignment of errors for *United States v. Jenkins*, which counsel worked on through the Thanksgiving weekend and submitted to this Court on 12 December 2024. Additionally, counsel worked through his leave over the Christmas holiday to complete work on an assignment of errors for *United States v. Hilton*, which was submitted to this Court on 27 December 2024. Counsel is also occupied with the completion of a supplement for petition for review for the Court of Appeals for the Armed Forces in *United States v. Scott* which is due on 7 January 2025.

On 17 December 2024, Mr. Dwight H. Sullivan began employment as a civilian counsel with the Air Force Appellate Defense Division. On 18 December 2024, Mr. Sullivan was detailed to represent TSgt Slayton in conjunction with the undersigned counsel. This is one of five cases to which Mr. Sullivan has been detailed. He has begun to review the record of trial in this case but

has not yet completed that review. He is prioritizing this case—which has been pending before this Court the longest of any of the five cases to which he has been detailed—above all others. He is confident that, if this Court were to grant this motion, he will complete review of the record of trial within the requested period. 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]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 December 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

3 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly yearlong delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 January 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40583**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Vidarr SLAYTON	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 16 January 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Material, requesting both parties be allowed to examine pages 49–52 of the written transcript, the corresponding portion of the audio recording of the court-martial proceedings, and Appellate Exhibits V, VI, and VII, which were reviewed by trial counsel and trial defense counsel at Appellant's court-martial.

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* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 22d day of January, 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **pages 49–52 of the written transcript**, **the corresponding audio recording of the court-martial proceedings**, and **Appellate Exhibits V, VI, and VII**, 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]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL**
v.	)	
	)	Before Panel 3
Technical Sergeant (E-6)	)	
VIDARR SLAYTON	)	No. ACM 40583
United States Air Force,	)	
Appellant	)	16 January 2025

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

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

- Transcript, pages 49–52, in volume 3 of the original certified record of trial.
- Audio recording of closed 21 August 2023 Article 39(a) session corresponding to pages 49–52 of the transcript.[1]
- Appellate Exhibits V ("Defense Motion Pursuant to MRE 412"), VI ("Government Response to Defense Motion to Admit Evidence Pursuant to MRE 412"), and VII ("Victim's Counsel's Response to Defense Motion to Admit Evidence Pursuant to MRE 412"), in volume 2 of the original certified record of trial.

All parties at trial participated in the closed Article 39(a) session transcribed on pages 49–52 of the transcript and had access to Appellate Exhibits V, VI, and VII. Appellate defense counsel's review of the sealed material is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf. Such a review is necessary both to determine whether the record of trial is complete and to inform appellate defense counsel's

[1] Audio recordings of the vast majority of the trial are missing from appellate defense counsel's copy of the record. Counsel also request the Court's permission to examine the audio files in the original record of trial to determine whether those audio recordings are complete.

assessment of whether any error resulted from the military judge's consideration of Appellant's motion in Appellate Exhibit V.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine the entire record.

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

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *Id*.

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

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

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

[redacted]

Michael J. Bruzik, Capt, USAF
Appellate Defense Counsel
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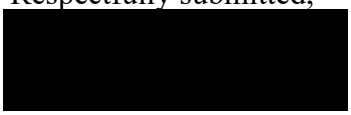
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 16 January 2025.

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	30 January 2025

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time to file a brief and assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on Monday, **10 March 2025**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida, convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice. (Entry of Judgment.) The members sentenced TSgt Slayton to nine months of confinement, reduction to the grade of E-1, a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial includes twenty-eight appellate exhibits, ten prosecution exhibits, one defense exhibit, and one court exhibit. The trial transcript is 836 pages. Appellant is not currently confined. Appellant has been advised of his right to a timely appeal, as well as this request for an enlargement of time. Appellant has agreed to this request for an enlargement of time and authorized counsel to transmit that agreement to this Court. Undersigned counsel have engaged in additional privileged communications with Appellant concerning the status of the case.

This is one of six cases pending initial briefing before this Court to which the undersigned government-employed civilian counsel is assigned. The average length of the trial transcript in those six cases is 999 pages. Four of the cases pending initial briefing to which he is assigned, including this, were contested courts-martial. This case is his highest priority. The undersigned government-employed civilian counsel has completed review of the transcript, exhibits, and other paper-copy documents in this case, including the sealed portions of the transcript and exhibits. He has identified issues requiring briefing and has begun to draft a brief. However, appellate defense counsel's progress has been hampered by the fact that, in apparent violation of Rule for Courts-Martial 1116(b)(1)(A), *Manual for Courts-Martial, United States* (2024 ed.), the copy of the record of trial provided to the Air Force Appellate Defense Division includes an audio recording of only the arraignment in this case. (Trial Tr. at 1–13.) It includes no audio recordings of the remainder of the court-martial. (Trial Tr. 14 –836.)[1] The original record filed with this Court appears to include audio recordings of the entire trial. Appellate defense counsel are seeking to obtain the complete record—with the exception of audio of the closed session—from the Government. With her characteristic exemplary civility, the Associate Chief, Government Trial and Appellate Operations Division is working with appellate defense counsel to resolve the issue.

An enlargement of time is necessary to allow for the completion of review of the audio recordings that constitute the record in this case and completion of Appellant's brief.

Undersigned military appellate defense counsel is currently assigned twenty cases; nine cases are pending initial AOEs before this Court. His top priorities are as follows:

[1] Appellate defense counsel noted this problem in footnote 1 of Appellant's motion to examine sealed materials filed on 16 January 2025, which this Court granted on 22 January 2025. *United States v. Slayton*, No. ACM 40583 (A.F. Ct. Crim. App. Jan. 22, 2025) (order).

1) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its tenth enlargement of time.

2) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its eighth enlargement of time.

3) *United States v. Licea*, ACM 40602 – The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are twelve prosecution exhibits, five defense exhibits, twenty-two appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.

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

Respectfully submitted,

[redacted]
Michael J. Bruzik, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Email: michael.bruzik@us.af.mil

[redacted]
Dwight H. Sullivan
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1500 West Perimeter Road, Suite 1100
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Email: dwight.sullivan.1@us.af.mil
Maryland Attorney ID No. 8612010505

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 2025.

Respectfully submitted,

Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division

31 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40583 Panel No. 3

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 to file an Assignment of Error in this case.

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 yearlong 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.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 31 January 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **VIDARR SLAYTON,** United States Air Force, *Appellant.*	)	No. ACM 40583
	)	3 March 2025

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth and final enlargement of time to file a brief and assignments of error. Appellant requests an enlargement for a period of ten days, which will end on **20 March 2025**. The record of trial was docketed with this Court on 15 March 2024. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 370 days will have elapsed. Counsel have completed their review of the case and have prepared a brief on behalf of Appellant. The additional time is requested to facilitate the inclusion of an appendix to the brief containing an assignment of error personally asserted by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

On 25 August 2023, a general court-martial convened at Patrick Space Force Base, Florida, convicted Technical Sergeant (TSgt) Vidarr Slayton, contrary to his pleas, of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice. (Entry of Judgment.) The members sentenced TSgt Slayton to nine months of confinement, reduction to the grade of E-1, a dishonorable discharge, and a reprimand. *(Id.*) The convening authority took no action on the findings or sentence. (*Id.*)

The record of trial includes twenty-eight appellate exhibits, ten prosecution exhibits, one

defense exhibit, and one court exhibit. The trial transcript is 836 pages. Appellant is not currently confined. Appellant has been advised of his right to a timely appeal, as well as this request for an enlargement of time. Appellant has agreed to this request for an enlargement of time and authorized counsel to transmit that agreement to this Court. Undersigned counsel have engaged in additional privileged communications with Appellant concerning the status of the case.

In accordance with A.F. Ct. Crim. App. R. 23.2(m)(6), the undersigned government-employed civilian counsel notes the following. This is one of six cases pending initial briefing before this Court to which he is assigned. This case is his highest priority among those six. He is also assigned to a case pending a supplement to petition for grant of review at the Court of Appeals for the Armed Forces (*United States v. Ericson*, USCA Dkt. No. 25-0096/AF). His participation in that case was caused by the extraordinary circumstance of the appellant's detailed military appellate defense counsel (a Reservist) being prohibited from performing military duty in light of the geographical distance between her home of record and assigned duty station at Joint Base Andrews, Maryland, and her status as a federal government employee in her civilian capacity, which prevents her from representing the appellant other than in a military duty status. *See* 18 U.S.C. § 205. That impediment to the Reservist's continued representation of the appellant in *Ericson* has been resolved, but the undersigned government-employed civilian counsel formed an attorney-client relationship with the appellant in the interim and remains detailed to that case. The supplement to petition for grant of review is due no later than 11 March 2025.

Undersigned military appellate defense counsel is currently assigned eighteen cases; seven cases are pending initial AOEs before this Court. His top priorities are as follows:

1) *United States v. Torres Gonzalez*, ACM 24001 – The record of trial consists of six volumes and a 608-page transcript. There are forty-six prosecution exhibits, eight defense exhibits, and twenty-five appellate exhibits. This case is on its eighth enlargement of time

2) *United States v. Licea*, ACM 40602 – The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are twelve prosecution exhibits, five defense exhibits, twenty-two appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.

3) *United States v. Quinones Reyes*, ACM 40636 – The record of trial consists of seven volumes with a 199-page transcript. There are four prosecution exhibits, nineteen defense exhibits, twenty-five appellate exhibits, and one court exhibit. This case is on its sixth enlargement of time.

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

Respectfully submitted,

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 March 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division

5 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) VIDARR SLAYTON, USAF, *Appellant.*	))))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 3 No. ACM 40583 5 March 2025

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 to file an Assignment of Error in this case.

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 370 days in length. Appellant's over 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 more than 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.

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

[redacted]
J USAF
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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 5 Ma[redacted]

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17 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Virdarr Slayton
Technical Sergeant (E-6),
United States Air Force
Appellant.

No. ACM 40583

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel 3
Technical Sergeant (TSgt) (E-6) VIDARR SLAYTON United States Air Force, *Appellant.*	)	No. ACM 40583
	)	17 March 2025

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

Assignments of Error

I.

The finding of guilty to the sole charge and its specification alleging a violation of Article 120(b)(2)(A), Uniform Code of Military Justice, is factually and legally insufficient because the evidence failed to establish that the alleged victim was capable of consenting during the sexual act.

II.

The military judge erred by failing to instruct the members that an element of the alleged Article 120(b)(2)(A), Uniform Code of Military Justice, offense was that the alleged victim was capable of consenting at the time of the sexual act.

III.

The prosecution violated Appellant's constitutional right to fair notice of the criminal charge against which he would need to defend by: (1) charging him with committing a sexual act without consent but advancing theories of criminal liability based on the alleged victim's lack of consciousness and lack of capacity; and (2) arguing that Appellant could be convicted on the sole basis that the alleged victim was asleep when penetrated.

IV.

Article 120(b)(2) and (g)(7), Uniform Code of Military Justice, are unconstitutionally vague because they fail to put those subject to the Code on fair notice of the specific actions those statutory provisions criminalize.

V.

Appellant's constitutional rights were violated when he was convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.[1]

Statement of the Case

Appellant, Technical Sergeant Vidarr Slayton, U.S. Air Force, was tried by a general court-martial convened by the Commander, Space Systems Command, at Patrick Space Force Base on 28 January and 21 to 25 August 2023. Contrary to Appellant's pleas, a panel consisting of officer and enlisted members found him guilty of one specification of committing a sexual act upon CL by penetrating her vulva with his penis without her consent in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[2] The members sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for nine months, and a dishonorable discharge.[3] The convening authority took no action on the findings or sentence.[4] The record of trial was docketed with this Court on 15 March 2024, 203 days after the sentence was adjudged.[5]

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[1] The defense raises this assignment of error for issue preservation purposes.

[2] Trial Tr. at 58, 793; App. Ex. XX. The version of the UCMJ in effect at the time of the alleged offense was that reprinted in Appendix 2 of the *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2019 ed.), as amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021); and the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021). None of those statutes amended Article 120, UCMJ, nor has that article been amended since. The version of the UCMJ in effect at the time of trial was that reprinted in Appendix 2 of *MCM* (2019 ed.), as amended by the three National Defense Authorization Acts noted above plus the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

[3] Trial Tr. at 835.

[4] Convening Authority Decision on Action (19 Oct. 2023).

[5] https://afcca.law.af.mil/docket.html, last accessed 24 February 2025. The docketing of Appellant's case more than 150 days after sentencing creates a presumption of facially unreasonable delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). Appellant does not contend that the facially unreasonable delay rose to the level of a due process violation.

Statement of Facts

A. Appellant was charged with committing a sexual act "without [CL's] consent"

The sole charge's only specification alleged that Appellant "did, at or near Biloxi, Mississippi, on or about 13 March 2022, commit a sexual act upon [CL[6]], by penetrating her vulva with his penis, without her consent."[7]

B. CL drank heavily during the night of 12–13 March 2022

The charge and its specification arose from a night that Appellant and CL spent together while both were students at a training course at Keesler Air Force Base.[8] Appellant lodged on-base while attending the course.[9] CL stayed at an off-base Econo Lodge.[10]

The two attended a concert together at the Beau Rivage Casino in Biloxi on the evening of Saturday, 12 March 2022.[11] Appellant picked up CL at her motel and drove her to the Beau Rivage.[12] CL drank heavily while the two were at the casino.[13] Afterward, they visited other bars in the area.[14] CL was in an alcohol-induced blackout state during large portions of the evening after the concert.[15] After visiting the bars, the two went to a Waffle House.[16] They arrived at the

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However, Appellant hereby invokes his constitutional and statutory rights to timely completion of his appeal.

[6] At both the time of the alleged offense and the time of trial, CL was an enlisted member of the United States military. In compliance with A.F. Ct. Crim. App. R. 17.2(c)(1)(B), this brief does not extend her the courtesy of referring to her by her rank.

[7] Charge Sheet.

[8] Trial Tr. at 425–26, 608.

[9] *Id.* at 619.

[10] *Id.* at 444–46; Pros. Ex. 6.

[11] Trial Tr. at 433–35, 611–12.

[12] *Id.* at 434–35, 479, 611–12.

[13] *Id.* at 435–36, 438–39.

[14] *Id.* at 441, 617; Pros. Ex. 2 at pages 1 and 3 of 6.

[15] *E.g.*, Trial Tr. at 481–83, 489–90.

[16] *Id.* at 618, 659–60.

Waffle House at approximately 0500 and left about an hour later.[17] However, because that was the night Daylight Savings Time began, for purposes of elapsed time, the visit to the Waffle House began at approximately 0400 and ended at about 0500.[18] The two then went to CL's motel room.[19] There, the two engaged in vaginal intercourse.[20]

C. The prosecution's opening statement repeatedly referred to CL being "asleep" when Appellant penetrated her

Within the first eight lines of the transcript of the prosecution's opening statement, the trial counsel told the members that during an exchange of online messages, CL asked Appellant, "So you're not disagreeing that I was asleep when you had sex with me"?[21] The trial counsel continued to quote Appellant as saying, "The second time, that may be what happened. I wasn't fully aware if you were or not."[22] The trial counsel then informed the members, "That is the charge in this case, that the accused penetrated her without her consent while she was asleep, lying on her side, facing away from him. And the evidence will show that she was asleep."[23] The trial counsel later told the members that when the concert at the casino "ended, you'll hear from [CL] that she was extremely intoxicated, that she was very drunk."[24] When discussing a sexual act later that night, the trial counsel told the members that during her electronic message exchange with Appellant, "[s]he asked him directly, 'If I'm not moving or facing you or touching you at all, why would you think it would be okay to have sex with me?"[25] After noting Appellant's response, the trial counsel

[17] *Id.* at 659.
[18] *Id.* at 726.
[19] *Id.* at 618, 660.
[20] *Id.* at 447.
[21] *Id.* at 409.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 410.
[25] *Id.* at 411.

said, "He claims that he wasn't fully aware if she was asleep or not, and he still made the decision to put his penis inside of her."[26]

The trial counsel concluded his opening statement by telling the members:

> At the end of his trial the United States will stand up in closing argument and tell you that the accused made a terrible judgement [sic], that he did the wrong thing when he wasn't fully aware, and when he stuck his penis inside [CL's] sleeping body, and we will ask that you find the accused guilty of sexual assault.[27]

D. The prosecution's direct examination of CL repeatedly incorporated the prosecution's theories of criminal liability that she was highly intoxicated on the night in question and was asleep when Appellant penetrated her

CL testified that when she and Appellant arrived at the casino on 12 March 2022, she drank a vodka and Red Bull and a Corona (a brand of lager beer) in a bar area.[28] As the two entered the theater, Appellant bought a bucket of five beers.[29] During the concert, CL drank one of the beers and part of "a double shot of Jack and Coke."[30] By the end of the concert, CL "felt very drunk."[31] After the concert ended and before leaving the casino, CL had at least one additional shot of alcohol and may have consumed additional alcoholic beverages.[32] She explained that three drinks were typically enough to make her feel drunk and considered four drinks "a lot."[33] She added, "I knew I was very drunk looking back at it because I was very just social, like just talking to a bunch of people. That's not normally how I am."[34] CL recalled that after leaving the casino, she went to a

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[26] *Id.* at 412.
[27] *Id.* at 413.
[28] *Id.* at 435.
[29] *Id.* at 436.
[30] *Id.* at 438. This appears to be a reference to a drink including two shots of Jack Daniel's whiskey and Coca-Cola.
[31] *Id.*
[32] *Id.* at 439, 480–81.
[33] *Id.*
[34] *Id.*

couple of bars and a Waffle House.[35] She did not recall whether she drank more at the bars.[36] Nor did she recall leaving the Waffle House or how she got back to her motel room.[37]

CL testified that the first thing she remembered after bits from the Waffle House was "waking up to [Appellant] thrusting his penis inside of me."[38] According to her testimony, CL then moved her body away from Appellant's, which ended the penetration.[39] CL became upset and started to cry.[40] According to CL, Appellant got up, walked to her side of the bed, knelt down, and asked her what was wrong.[41] She testified that she replied that she felt like he had raped her.[42] She recalled that Appellant looked worried and said he did not want her to feel that way and that he had been raped before.[43] When asked what happened next, CL testified, "So, then I think I just fell back asleep."[44] She explained, "I felt very just groggy and sleepy still."[45] She did not know what time she had returned to the hotel room or how long she had been in bed.[46] The next thing she remembered was waking up as Appellant opened the door to leave the motel room.[47] CL believed she may have been drugged that night, although a test of her blood performed by the Armed Forces Medical Examiner System was negative for drugs.[48]

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[35] *Id.* at 441.
[36] *Id.* at 442.
[37] *Id.* at 442, 447.
[38] *Id.* at 447.
[39] *Id.* at 452.
[40] *Id.* at 453.
[41] *Id.*
[42] *Id.* at 454.
[43] *Id.* at 455.
[44] *Id.*
[45] *Id.* at 456.
[46] *Id.* The report of CL's sexual assault examination includes a statement that "[p]atient arrived to ER to be examined following alleged assault that happened at approximately 0800 am today." Pros. Ex. 8 at page 8 of 10.
[47] Trial Tr. at 456.
[48] *Id.* at 488–89, 556–57, 561–62.

E. CL engaged Appellant in a pretextual electronic message exchange in which she wrote that she was "too drunk to do anything" and "was asleep when you had sex with me"

Eleven days after the alleged offense, CL engaged Appellant in a pretextual electronic message exchange.[49] CL was in an Air Force Office of Special Investigations (OSI) office at the time and received help from two OSI special agents.[50] The prosecution successfully moved the results of that pretextual exchange into evidence.[51] In one message, CL wrote to Appellant that "you know I was too drunk to do anything. So why would you?"[52] Later in the exchange, Appellant wrote, "I'm agreeing with you, like I did then – you can't consent if you're drunk."[53] At another point, CL wrote, "You can say whatever you want but I know you shouldn't have done anything or gotten into the bed at all. I was literally asleep and you had sex with me anyways at [sic] its [sic] incredibly fucked up."[54] She added, "Nothing was mutual in any moment because I don't remember it and there's no possible way I could have consented to it while I was sleeping."[55] CL later asked, "So you're not disagreeing that I was asleep when you had sex with me?"[56] After Appellant replied, CL wrote, "So you're saying we had sex twice and the second time was when I was asleep and that's when I woke up? But you just thought it was a continuation of the first time?"[57] After Appellant responded, "Correct," CL rejoined, "How could you not tell I was asleep if I was laying on my side not even facing you? And still have sex with me?"[58] She subsequently

[49] *Id.* at 467–69, 486; Pros. Ex. 2.
[50] Trial Tr. at 467–68, 487–88, 550–53, 562–65.
[51] *Id.* at 402; Pros. Ex. 2.
[52] Pros. Ex. 2 at page 2 of 6.
[53] *Id.* at page 3 of 6.
[54] *Id.* at page 4 of 6.
[55] *Id.*
[56] *Id.*
[57] *Id.* at page 5 of 6.
[58] *Id.*

wrote, "You completely took advantage of me while I was unconscious/asleep."[59] In another message, she added, "I've already told you I don't remember anything except waking up to you being inside of me."[60]

F. A defense expert explained the concepts of "alcohol blackout" and an alcohol-induced stupor

During its case, the defense called Dr. KR, a board-certified forensic psychologist.[61] Dr. KR explained that an "alcohol blackout is a period of time where a person is conscious and functioning, but . . . they're not going to remember it later."[62] He continued, "[T]hey're not storing anything in their long-term memory. They're not going to remember anything about the period of time, even though they're awake and walking and talking and engaging in behavior, they have no memory of it later on."[63] He also explained that an alcohol blackout "is caused by a precipitous or quick rise in a person's blood alcohol content."[64] Rapid alcohol ingestion "impacts a small area of the brain called the hippocampus," which "move[s] things from your short-term memory to your long-term memory."[65] He continued:

> In the case of an alcohol blackout, since the hippocampus is asleep or offline or not functioning, that transfer is not happening. So, you can engage and do anything that you knew how to do before you were in a blackout, but you can't learn anything new, and you won't remember anything later on when you try to retrieve information from that period of time because it won't be there because it didn't get moved into your long-term memory.[66]

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[59] *Id.*
[60] *Id.* at page 6 of 6.
[61] Trial Tr. at 577. Dr. KR was certified by the American Board of Forensic Psychology. *Id.* at 579.
[62] *Id.* at 583.
[63] *Id.*
[64] *Id.* at 584.
[65] *Id.*
[66] *Id.*

Dr. KR explained that there are two types of alcohol blackouts. One is an "en block blackout," which is a complete absence of long-term memory.[67] The second, more common, type is "fragmentary blackout," which is characterized by "bits and pieces" of long-term memory.[68] While explaining the distinction between blackouts and passing out, Dr. KR noted that "alcohol is a sedative."[69] He explained, "[I]f you keep drinking and drinking and drinking, eventually your brain functions are going to start shutting down. You're going to become unconscious."[70] During cross-examination, Dr. KR described a "stupor" state that some people experience after drinking excessively.[71] An individual in such a state is hard to wake up and, once awakened, may "fall right back asleep again. It can be very hard to keep them awake."[72]

Dr. KR also explained that there is no "hard and fast" blood alcohol content "that's associated either with going into a blackout or coming out of one. We just have a range of about where we know what happens."[73] He elaborated that "blackouts will start at around .2 but could be as low as .14."[74]

G. The prosecution's cross-examination of Appellant emphasized the criminality of having sex with someone too intoxicated to consent

Appellant testified during the defense case on the merits.[75] On cross-examination, the special trial counsel (STC)—the Government's lead representative at Appellant's court-martial—observed that "at the casino, you both get drinks."[76] He then stated, "Throughout the course of the

[67] *Id.* at 585–86.
[68] *Id.* at 586.
[69] *Id.* at 587.
[70] *Id.*
[71] *Id.* at 599.
[72] *Id.*
[73] *Id.* at 596.
[74] *Id.*
[75] *Id.* at 606–703.
[76] *Id.* at 651.

evening, you see whatever effects the alcohol has on her."[77] The STC then confirmed that Appellant was "familiar with what intoxicated people might do," including stumbling, acting uncoordinated, and "[b]ecoming social butterflies and talking with everyone around them."[78] Those descriptions corresponded to portions of videos of CL on the evening of 12–13 March 2022 that the prosecution had previously successfully moved into evidence.[79] The STC then established that Appellant had been trained "that people can drink to the point that they can no longer consent."[80] Appellant responded affirmatively to the STC's question, "Is there a point at which somebody is intoxicated to the point where you should no longer have sex with them?"[81] Appellant also responded affirmatively to the STC's observation that "it may be illegal" to have sex with someone who is "visibly, highly intoxicated."[82] Later during the cross-examination, the STC stated, "You knew that the alcohol [CL] was drinking was having an effect on her."[83] Appellant responded, "That's fair to say."[84]

During cross-examination concerning Appellant's pretextual electronic message exchange with CL, the STC highlighted that CL asked Appellant "whether you're disagreeing with her that you had sex with her while she was asleep."[85] The STC also obtained Appellant's agreement that during the electronic message exchange, he "adopted" CL's claim that Appellant "had been penetrating her in her sleep."[86] The STC subsequently highlighted another message from CL,

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[77] *Id.*
[78] *Id.*
[79] *Id.* at 422; Pros. Ex. 3.
[80] Trial Tr. at 652.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 656.
[84] *Id.*
[85] *Id.* at 672.
[86] *Id.* at 673.

which he characterized as referring to "when you penetrated her vagina with your penis as she slept."[87]

H. The defense objected to lack of notice that the accused could be found guilty based on the alleged victim being asleep at the time of the charged sexual act

Following the conclusion of the parties' cases on the merits, the military judge distributed draft instructions to counsel.[88] Those draft instructions included a provision stating, "A sleeping or unconscious person cannot consent."[89] At a subsequent Article 39(a) session, one of Appellant's civilian defense counsel challenged the instructions based on their incompatibility with the charged offense. He told the military judge, "The issue I have is the government has charged this as a consent, not as a sleeping or unconscious."[90] Noting that the defense was put on notice of only one theory of liability, he argued that "any discussions or any explanation as to whether she was asleep" would be inappropriate."[91] After noting that the *Manual for Courts-Martial* includes "two sample specifications, one dealing with consent and one dealing with asleep or unconscious," the civilian defense counsel objected that "the government is trying to pursue what I would consider to be a different theory at this time with the jury that was not clearly stated."[92]

In response, the STC argued that it would be permissible for the members to find Appellant guilty of the charged offense based on CL being asleep:

> [W]ith respect to notice, a part from everything that we've done in court to this point, especially in opening statement regarding exactly what the offense is, and from the very beginning, the victim's own report of waking up to being penetrated while asleep and the government's lack of charges with respect to anything that the accused said happened during consensual intercourse, like going down on the victim as the accused claims he did, the defense is certainly on notice regarding

[87] *Id.* at 675.
[88] *Id.* at 709; App. Ex. XXI.
[89] App. Ex. XXI at 2.
[90] Trial Tr. at 712.
[91] *Id.*
[92] Trial Tr. at 712.

> what the government actually charged. And with respect to without consent, without consent includes as part of . . . the statutory definition of the term consent, that a sleeping, unconscious, or incompetent person cannot consent. So, this should be given as part of the statutory definitions mandated by law in this case.[93]

The military judge subsequently informed the parties, "I decided to change the phrase in dispute that currently reads 'a sleeping, unconscious, or incompetent person cannot consent' to 'a sleeping or unconscious person, cannot consent.'"[94] The military judge asked both parties if they had "any objection to that."[95] Both responded, "No, Your Honor."[96] After denying a defense motion for finding of not guilty offered on an unrelated basis, the military judge addressed the defense's notice objection:

> As to the third issue, as to notice. The statutory language of Article 120 provides various mechanisms by which sex assault can be accomplished. Article 120(b)2 [sic] provides two methods here. One, without consent of the person, the manner by which the offense is charged in this case, 2(a) [sic]. And then 2(b) [sic], when a person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware of the sexual act occurring. That mechanism of offence was not charged in this case.
>
> The statutory definition of consent under the UCMJ, Article 120(g)(7) itself provides the language defining consent which is included now in the findings instructions. That language is consistent – that language is an accurate statement of law. It is raised by the evidence in this case. And there is no indication before me that the government intends to offer an alternate theory by which the offence was committed. So, defense counsel's objection is overruled.[97]

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[93] *Id.* at 713. The STC cited *United States v. Brassil-Kruger*, No. ACM 40223, 2022 CCA LEXIS 671 (A.F. Ct. Crim. App. Nov. 18, 2022), *petition denied*, 83 M.J. 316 (C.A.A.F. 2013), in support of this argument. Trial Tr. at 713.
[94] Trial Tr. at 717.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 717–18.

I. The military judge's instructions did not inform the members that the alleged victim's capability to consent was an element of the charged offense while suggesting that Appellant could be found guilty based on a theory that the victim could not consent if she was sleeping or unconscious

During the findings instructions, the military judge informed the members:

> I will first advise you of the elements of the offense alleged.
>
> In the specification of the Charge, the accused is charged with the offense of sexual assault in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> (1) That on or about 13 March 2022, at or near Biloxi, Mississippi, the accused committed a sexual act upon [CL] by penetrating her vulva with his penis; and,
>
> (2) That the accused did so without the consent of [CL].[98]

The military judge subsequently instructed the members, "A sleeping or unconscious person cannot consent."[99] He also instructed the members that "'[c]onsent' means a freely given agreement to the conduct at issue by a competent person."[100]

J. The prosecution's closing argument and rebuttal argument repeatedly referred to CL being asleep at the time of the charged sexual act

During his closing argument, the STC told the members, "These are the elements. There's two of them, and they're not particularly complicated or difficult to understand. Was the sexual act performed? That is, did the accused penetrate [CL's] vagina with his penis as she's described? And number two, did he do it without consent?"[101]

Addressing the first element, the STC referred to the charged sexual act as "[t]he one where the accused penetrated [CL's] vagina as she slept. That is a sexual act that is charged in this

[98] *Id.* at 722.
[99] *Id.* at 723.
[100] *Id.*
[101] *Id.* at 730.

case."[102] The STC also displayed to the members a PowerPoint slide that included, "What Sexual Act Is Charged?" answered by, "The one where the Accused penetrated [CL] as she slept . . ."[103] The STC then reiterated, "This is the act where the accused penetrated [CL's] vagina as she slept, while she's not moving, while she's not touching him, while she's not facing him, not speaking to him, not interacting with him at all."[104] The STC subsequently quoted CL asking Appellant in a pretextual electronic message, "So, you're not disagreeing that you had sex with me while I was asleep?"[105]

In discussing the second element, the STC told the members, "A sleeping or unconscious person cannot consent. That makes sense. You can't form agreements with a sleeping or unconscious person. A current or previous sexual relationship by itself does not constitute consent."[106] Again, the STC presented a PowerPoint slide that repeated his spoken words.[107] Another slide referred to CL's "clear intoxication" while at the casino.[108] The STC subsequently stated:

> The question for you, members, is what does all of this tell you about whether while she was laying on her left side on that bed, facing that window, around 8:00 AM in the morning, she had given the accused an agreement to penetrate her vagina as he lay behind her as she slept? That's the question you have to consider.[109]

The STC also argued:

> You could have one hundred percent consensual sex with another individual, and then go to bed in the same room as them, in the same bed as them, under the same sheets as them, but if you wake up and you begin penetrating their vagina, sexually

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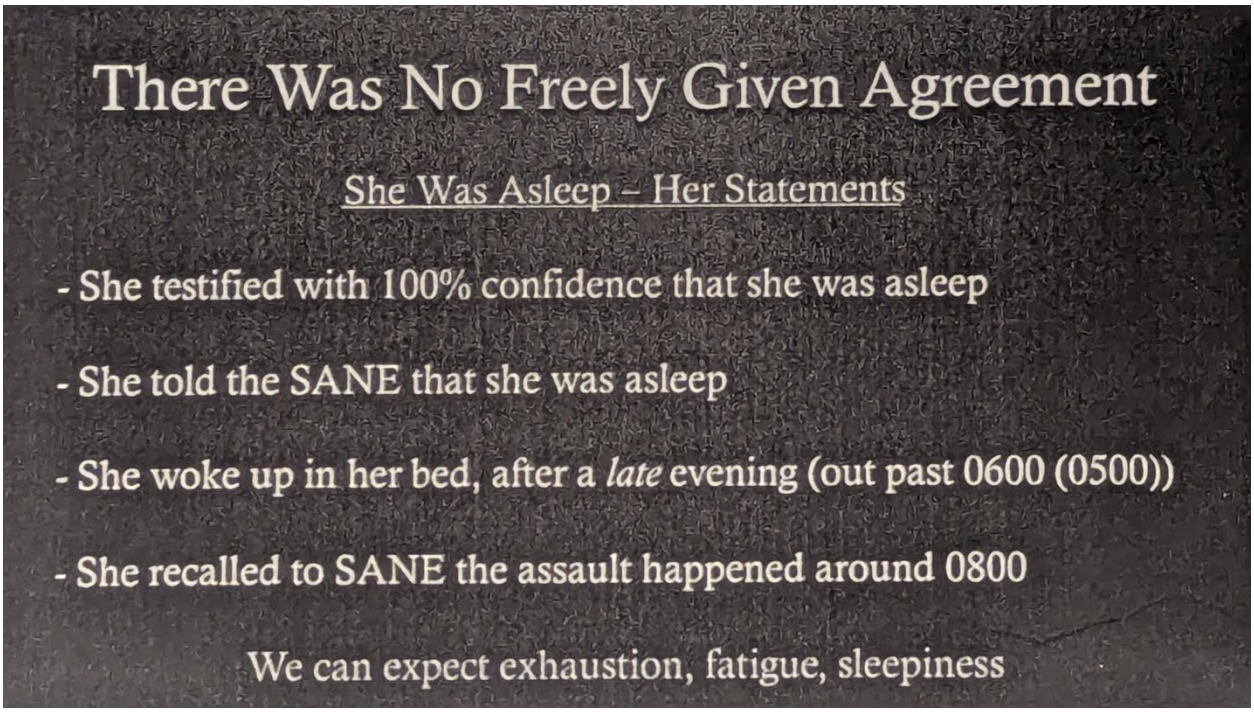
[102] *Id.* 731.
[103] App. Ex. XXII at page 3 of 12 (ellipsis in original). The order in which the slides on any given page of the exhibit were presented during the prosecution's closing argument is not apparent.
[104] Trial Tr. at 731.
[105] *Id.* at 732.
[106] *Id.* at 733.
[107] App. Ex. XXII at page 5 of 12 ("A sleeping or unconscious person cannot consent").
[108] *Id.* at page 6 of 12.
[109] Trial Tr. at 736.

> violating them in any way while they sleep, that is sexual assault. If you wake up and you initiate sex with a sleeping person, it doesn't matter if you've had sex once before, never before, or 10,000 times before. There is no freely given agreement to that sex.[110]

The STC also asked the members to "consider why there's no consent."[111] His answer: "[F]irst there's no consent because she was asleep. You can consider first her statements on this. She just testified that she's 100 percent confident that she was asleep. She told the [sexual assault nurse examiner] that she was asleep."[112] The STC displayed this PowerPoint slide[113]:



After discussing Dr. KR's testimony distinguishing blackouts from unconsciousness, the STC reiterated, "She was asleep."[114] He then reemphasized CL's electronic messages to Appellant asserting she was asleep when he penetrated her: "So you're not disagreeing that I was asleep when

[110] *Id.* at 737.
[111] *Id.*
[112] *Id.*
[113] App. Ex. XXII at page 6 of 12.
[114] Trial Tr. at 739.

you had sex with me?"; "How could you not tell I was asleep if I was laying on my side, not even facing you, and still had sex with me?"; and "You completely took advantage of me while I was unconscious, slash, asleep."[115] The STC then described Appellant waking "up next to a sleeping, motionless individual" and deciding whether he had consent to penetrate her vagina.[116] The STC also told the members that when CL stated in electronic messages that "she's asleep, [Appellant is] like, yeah, you were."[117]

The STC then argued:

> Members, here's the bigger point. It doesn't really matter if she was asleep in this context. It really does not matter. Yes, if she was asleep that means one hundred percent there was no consent. You cannot consent if you're asleep. Ultimately, it doesn't make any difference. She says, "Even if you were half asleep and drunk, if I'm not moving, or facing you, or touching you at all, why do you think it would be okay to have sex with me?" The accused responds, "I don't know why. I wouldn't if I was thinking it through." So, remove sleep from the situation. Remove black out from the situation. That is—this is the scenario. She is laying there not moving, not facing, not touching him at all. Why, under those circumstances, do you think it's okay to have sex with me? Why, under those circumstances, would it be okay to have sex with anybody? Awake, asleep, drunk out of their mind, tripping on acid, what difference does it possibly make if these are the conditions we're facing?[118]

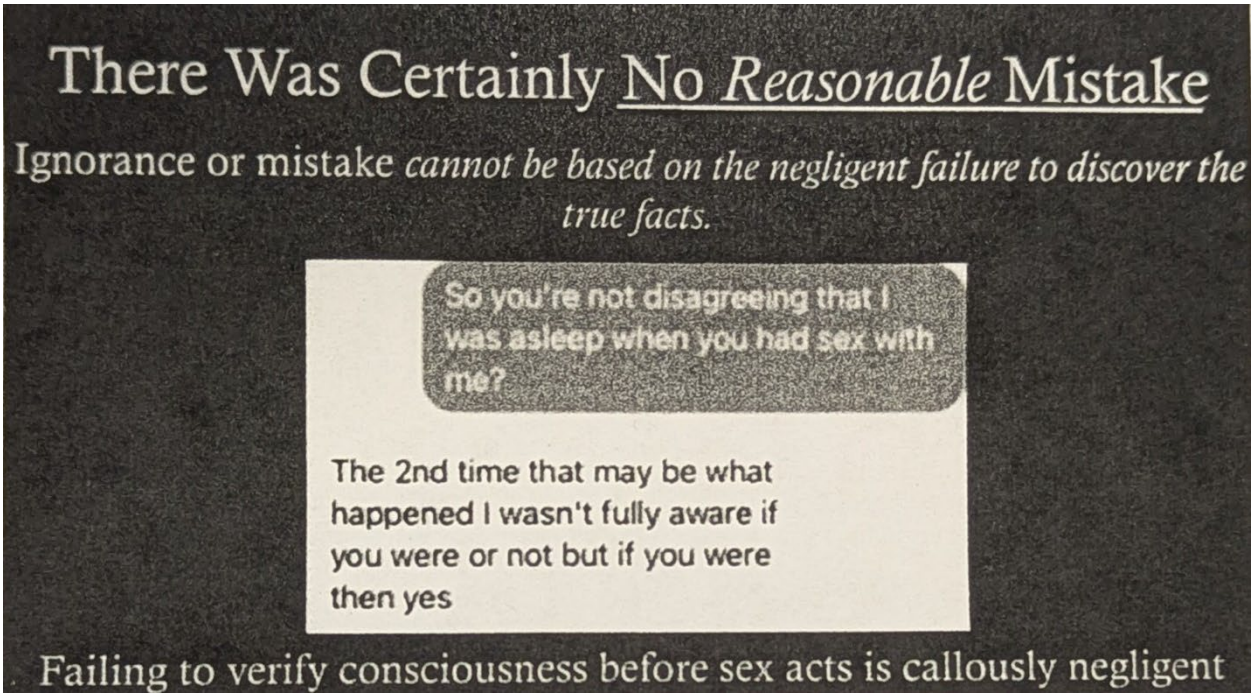
The STC later similarly argued that "if an individual is motionless, laying away from you, not communicating with you, you cannot get their agreement to do anything. Nothing. That is the case whether she was asleep or blacked out or wide awake. Makes no difference."[119] He reiterated that "it doesn't matter whether she was awake or asleep or blacked out," followed by: "So, the evidence shows you that she was asleep. The claim will be made that she was blacked out, but it

[115] *Id.* at 740.
[116] *Id.* at 741.
[117] *Id.*
[118] *Id.* at 741–42.
[119] *Id.* at 742.

doesn't matter if she was awake. There's no possible way in which consent could be reached here."[120]

While arguing against a mistake of fact defense, the STC described CL's account of Appellant's behavior and then told the members, "That's the behavior of somebody who just got caught, who just got caught with their penis in somebody else's vagina as they slept."[121] To portray any potential mistake as unreasonable, the STC argued, "Failing to verify consciousness before sex is grossly negligent, just callously negligent, recklessly negligent, like, you don't bother to check whether somebody is asleep or awake before you put your penis in them. That is not remotely reasonable. That is not acting with due care."[122] He emphasized that argument with a PowerPoint slide featuring the language, "Failing to verify consciousness before sex acts is callously negligent"[123]:

[120] *Id.* at 742–43.
[121] *Id.* at 745.
[122] *Id.* at 746.
[123] App. Ex. XXII at page 9 of 12.



The STC subsequently argued, "The extent of the accused's decision making here appears to have been here's a sleeping person next to me who I can penetrate with my penis, and then he proceeded to penetrate her with his penis and thrust into her until she woke up."[124]

At the culmination of his closing argument, the STC told the members:

> [H]e wasn't aware of whether she was awake or asleep, and he didn't bother to do the most basic check, because he didn't want to. He wanted to have sex with this sleeping person. So, he rammed his dick into her vagina and thrust in her until she woke up. And those are [the] circumstances that bring us here today.[125]

In his rebuttal argument, the STC returned to the subject of Appellant's messages during the pretextual exchange, emphasizing that they included "[n]o denials that he penetrated her while she was asleep."[126] The STC later returned to that theme, referring to

> the fact that the accused wrote in those messages repeatedly that there was a second time, that he didn't know whether or not she was awake or asleep, . . . that he knows,

[124] Trial Tr. at 747.
[125] *Id.* at 750.
[126] *Id.* at 767.

> in his own words, that last part while he penetrated her while she was asleep and motionless and not talking to him, that part he fucked up.[127]

The STC concluded his rebuttal argument by once again returning to the theme that CL was asleep when Appellant penetrated her:

> The defense spoke to this idea of [CL] saying I feel like you raped me and how telling that was. The government suggests that it's far more telling that when she suggested to the accused the exact circumstances in which something like, in colloquial terms, a rape would occur where she is asleep and he's penetrating her while she's asleep, motionless, not talking to him, the accused adopts the statements in these text messages over and over. So, if you want to believe the accused, find him guilty. Thank you, members.[128]

K. During deliberations, a member asked, "Should we consider whether the victim was too intoxicated to consent even if she was awake?"

During the findings deliberations, a member submitted a question to the military judge asking: "Should we consider whether the victim was too intoxicated to consent even if she was awake?"[129] At an Article 39(a) session following receipt of the member's question, the military judge said he intended to reread to the members the instruction "that defines consent as well as the section that says all surrounding circumstances are to be considered in determining whether a person gave consent."[130] During a follow-on Article 39(a) session, the defense asked the military judge to supplement those instructions by rereading the mistake of fact instruction.[131] The military judge declined that request.[132] After the members returned to the courtroom, the military judge addressed the member who asked the question:

> I'm not going to answer this question, yes or no. . . . I believe there are two sentences in the instructions which will answer your question somewhat indirectly, and so I'm going to reread those to you and then send you back into deliberations.

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[127] *Id.* at 768.
[128] *Id.* at 770 (paragraph break omitted).
[129] App. Ex. XXIII; Trial Tr. at 778–79.
[130] Trial Tr. at 779.
[131] *Id.* at 780.
[132] *Id.* at 781.

> Consent means a freely given agreement to the conduct at issue by a competent person. All surrounding circumstances are to be considered in determining whether a person gave consent.[133]

The members found Appellant guilty of the charge and its specification.[134]

Argument

I.

The finding of guilty to the sole charge and its specification alleging a violation of Article 120(b)(2)(A), UCMJ, is factually and legally insufficient because the evidence failed to establish that the alleged victim was capable of consenting during the sexual act.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo.[135]

Law and Analysis

A. Overview

For an accused to be guilty of violating Article 120 by committing a sexual act without consent, the evidence must prove beyond a reasonable doubt that the alleged victim was capable of consenting to the sexual act.[136] Here, the evidence fell far short of that standard. According to CL's testimony, when the penetration occurred, she was asleep.[137] A sleeping person cannot consent.[138] Concerning the brief moment when CL was awake before the penetration ended, the

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[133] *Id.* at 783.
[134] *Id.* at 793.
[135] *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 503, at *17 (A.F. Ct. Crim. App. Nov. 25, 2024), *recon. denied*, (A.F. Ct. Crim. App. Jan. 10, 2025) (order), *certificate for review filed*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025), *petition filed*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 184 (C.A.A.F. Mar. 11, 2025).
[136] *United States v. Mendoza*, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590, at *17, *20–21 (C.A.A.F. Oct. 7, 2024); *United States v. Serjak*, No. ACM 40392, 2024 CCA LEXIS 524, at *42 (A.F. Ct. Crim. App. Dec. 11, 2024), *recon. denied*, No. ACM 40392 (A.F. Ct. Crim. App. Jan. 22, 2025).
[137] Trial Tr. at 447.
[138] UCMJ art. 120(g)(7)(B), 10 U.S.C. § 920(g)(7)(B).

record contains copious evidence suggesting that CL was, as she herself wrote, "too drunk to do anything."[139] Accordingly, the evidence is factually and legally insufficient to support the finding of guilty to the only charge and its specification.

B. The legal standard for factual insufficiency

This Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof."[140] Appellant makes such a request and, as demonstrated below, makes a specific showing that proof of CL's capability to consent at the time of the sexual act was deficient.

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is 'proof beyond a reasonable doubt,' the same as the quantum of proof necessary to find an accused guilty at trial."[141] If this "Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding."[142] The Court of Appeals for the Armed Forces has explained:

> [F]or a [Court of Criminal Appeals (CCA)] to be "clearly convinced that the finding of guilty was against the weight of the evidence," two requirements must be met. First, the CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision.[143]

When conducting a factual sufficiency review, this Court may "weigh the evidence and determine controverted questions of fact subject to . . . appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."[144] No such deference is appropriate

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[139] Pros. Ex. 2 at page 2 of 6.
[140] UCMJ art. 66(d)(1)(B)(i), 10 U.S.C. § 866(d)(1)(B)(i).
[141] *United States v. Harvey*, __ M.J. __, No. 23-0239, 2024 CAAF LEXIS 502, at *10 (C.A.A.F. Sept. 6, 2024).
[142] UCMJ art. 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii).
[143] *Harvey*, 2024 CAAF LEXIS 502, at *12.
[144] UCMJ art. 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii).

in this case, however, because the members were not asked to determine whether CL was competent to consent to the sexual act and the record suggests that at least one member doubted she was.[145]

C. The legal standard for legal insufficiency

"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."[146]

D. A finding of guilty to a violation of Article 120(b)(2)(A) is factually sufficient only if the evidence proves beyond a reasonable doubt that the alleged victim was capable of consenting

In its landmark decision in *United States v. Mendoza*, the Court of Appeals for the Armed Forces held that Article 120(b)(2)(A)—the only offense with which Appellant was charged and the only offense of which he was convicted—"criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent."[147] This Court has explained that under *Mendoza*, "when charging under [a without consent] theory, the Government must prove the victim was capable of consenting but did not consent."[148] Thus, to obtain a conviction under that provision, the prosecution must prove beyond a reasonable doubt that the alleged victim was "capable of consenting."[149] Here, the prosecution failed to meet that burden.

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[145] *See* App. Ex. XXIII (member question during deliberation asking, "Should we consider whether the victim was too intoxicated to consent even if she was awake?").
[146] *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)).
[147] *Mendoza*, 2024 CAAF LEXIS 590, at *17.
[148] *Serjak*, 2024 CCA LEXIS 524, at *42.
[149] *Id. See also Mendoza*, 2024 CAAF LEXIS 590, at *20–21 ("nothing in the record indicates whether the military judge found that JW was *capable of consenting but did not*, or that JW was incapable of consenting and thus could not") (emphasis added); *United States v. Moore*, No. ACM 40442 (f rev), 2024 CCA LEXIS 485, at *16–17 (A.F. Ct. Crim. App. Nov. 13, 2024) ("to convict

According to the evidence presented by the prosecution, CL was asleep when the sexual act began.[150] If so, she was certainly incapable of consenting at that time.[151] She testified that she awoke to Appellant thrusting his penis inside her and immediately moved away, ending the penetration.[152] The key question for factual sufficiency purposes is not whether the evidence proved beyond a reasonable doubt that CL was incapable of consenting in that moment. Rather, the question is whether the evidence eliminated all reasonable doubt as to whether she was capable of consenting in that moment. It did not. Therefore, the evidence was factually insufficient to establish Appellant's guilt to the only charge and its specification.

The evidence proves that CL drank a significant quantity of alcohol on the night of 12–13 March 2022. She explained that three drinks were generally enough to make her feel drunk and four drinks would be "a lot."[153] The evidence established a reasonable possibility that she had far more than four drinks that night. She drank a vodka and Red Bull and a Corona beer upon arriving at the Beau Rivage casino.[154] While watching a concert, she drank at least one additional beer and portions of a mixed drink containing two shots of Jack Daniels whiskey.[155] By the end of the concert, she "felt very drunk."[156] After the concert and before leaving the casino, she had at least

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Appellant under a lack of consent theory the Government was required to show the victim was capable of consenting but did not"), *recon. denied*, No. ACM 40442 (f rev) (A.F Ct. Crim. App. Jan. 6, 2025) (order), *certificate for review filed*, __ M.J. __, No. 25-0110/AF, 2025 CAAF LEXIS 178 (C.A.A.F. Mar. 7, 2025).

[150] Trial Tr. at 447.

[151] UCMJ art. 120(g)(7)(B), 10 U.S.C. § 920(g)(7)(B).

[152] Trial Tr. at 450–52.

[153] *Id.* at 439.

[154] *Id.* at 435.

[155] *Id.* at 438.

[156] *Id.*

one additional shot of alcohol.[157] There is a reasonable possibility that CL drank far more, as she and Appellant visited at least two bars after leaving the casino.[158]

CL characterized her state immediately following the sexual act as "groggy and sleepy."[159] In fact, CL's condition was so severe that she thought she may have been drugged that night.[160] While toxicology tests indicated she was not,[161] her suspicion that she had been drugged suggests a degree of alcohol intake that resulted in a disoriented, drugged-like condition she had never previously experienced from drinking. Military law provides that "a person can be awake and conscious and still be incapable of consenting."[162] The evidence creates a reasonable possibility that in her self-described "groggy and sleepy" condition, CL was in such a state during the fleeting moment in which she was conscious during the sexual act. CL characterized herself as "too drunk to do anything."[163] The evidence thus strongly suggests that CL was incapable of consenting to the sexual act during the brief moment she was awake because she was impaired by an intoxicant.[164] The evidence does not establish beyond a reasonable doubt that in her disoriented, groggy state, she was capable of communicating unwillingness to engage in the sexual act in that instant.[165] In fact, CL testified that she said nothing at that point.[166] A reasonable inference is that

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[157] *Id.* at 439.
[158] *Id.* at 441 (CL testifying that "after the Beau Rivage, I recall going to a couple of bars"); Pros. Ex. 2 at page 1 of 6 (Appellant writing, "we went to some other bar which turned into a night of bar hopping"); *id.* at page 3 of 6 ("I think at the last place you had drinks with me").
[159] Trial Tr. at 456.
[160] *Id.* at 488–89.
[161] *Id.* at 556–57, 561–62.
[162] *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017). *See also United States v. Motus*, No. ACM 39841 (f rev), 2021 CCA LEXIS 484, at *26 (A.F. Ct. Crim. App. Sept. 23, 2021) ("A person can also possess some ability to communicate and still be incapable of consenting").
[163] Pros. Ex. 2 at page 2 of 6.
[164] UCMJ art. 120(b)(3), 10 U.S.C. § 920(b)(3).
[165] *See id*. at art. 120(g)(8)(B), 10 U.S.C. § 920(g)(8)(B).
[166] Trial Tr. at 452.

she did not say anything during her fleeting moment of consciousness during the sexual act because of her limited ability to process what was occurring in that instant. The evidence certainly does not exclude such a possibility beyond a reasonable doubt, which in itself precludes a conviction of the charged offense.

CL's actions after the penetration ended further suggest she was too intoxicated to consent at the time of the sexual act—and certainly provides reasonable doubt as to her capability to consent. After the penetration ended, CL testified, "I was feeling myself get upset, like crying a little bit, like kind of sniffling."[167] That is consistent with CL gradually becoming more conscious, more aware of what was occurring, and better able to comprehend it. "[A]fter a little bit of" CL sobbing, she recalled, Appellant got out of the bed and knelt in front of her.[168] After the two had a short conversation in which CL said that she felt like Appellant raped her, CL fell back asleep while Appellant remained in the room.[169] This strongly suggests that CL remained under the depressive effects of massive alcohol intake. She felt that she had just been raped by an individual in her sleep, yet immediately made herself vulnerable to that same individual by falling asleep with him still in the room. It is highly unlikely that she would have returned herself to that vulnerable condition unless she remained extremely intoxicated. Dr. KR testified that once someone who is in a "stupor" state from excessive drinking is awakened, the individual may "fall right back asleep again. It can be very hard to keep them awake."[170] The evidence strongly suggests that CL was asleep and then in such a drunken stupor during the sexual act. Her self-characterization as "groggy and sleepy"[171] is consistent with that reasonable possibility.

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[167] *Id.* at 453.
[168] *Id.*
[169] *Id.* at 454–56.
[170] *Id.* at 599.
[171] *Id.* at 456.

Without an evidentiary basis to show that CL was capable of consenting, the conviction cannot survive factual sufficiency review. This is because *Mendoza* requires proof beyond a reasonable doubt of capability to consent where the government has charged an accused with violating Article 120(b)(2)(A) by committing a sexual act upon another person "without the consent of the other person."

The evidence is also insufficient to pass the legal sufficiency threshold. The United States Court of Appeals for the Tenth Circuit recently helpfully summarized how an appellate court conducts a legal sufficiency review:

> First, we must consider the burden of proof in our sufficiency-of-the-evidence analysis. Our critical inquiry is to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt—*i.e.*, whether a factfinder could reasonably conclude the defendant's guilt has been established with utmost certainty. And we hold the government to its burden on each element of the offense.
>
> Second, we do not examine the evidence in bits and pieces, but instead consider the collective inferences to be drawn from the evidence as a whole. In doing so, we must consider the evidence and all reasonable inferences in the light most favorable to the government. We do not give the government the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial. An inference is unreasonable if it requires the jury to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility. Any inference must be made beyond a reasonable doubt if it goes to an ultimate conclusion underpinning criminal liability, e.g., satisfying an element of a crime necessary for conviction.
>
> Third, we may ask, *after* viewing the evidence and inferences from it in the government's favor, whether the evidence gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence—that is, whether the evidence is in *equipoise*. When the trial record—after it is properly construed for the prosecution—is in equipoise, we must reverse the conviction because under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt.[172]

[172] *United States v. Goldsberry*, __ F.4th __, No. 23-5008, 2025 U.S. App. LEXIS 3730, at *19–20 (10th Cir. Feb. 19, 2025) (cleaned up).

The court added that "every inference the government seeks must be reasonable—that is, there must be a reasonable probability that the conclusion flows from the proven facts. And an inference must be made beyond a reasonable doubt if . . . it goes to an element of the crime needed to convict."[173]

Here, even examining the evidence in the light most favorable to the government, no trier of fact could reasonably conclude that the evidence proved *beyond a reasonable doubt* that CL was capable of consenting during the sexual act—an element necessary for conviction. But because the evidence was factually insufficient to support a finding of guilty, there is no need for this Court to evaluate legal sufficiency.[174] This Court can and should hold that the evidence was factually insufficient to support the findings.

E. Remedy

Just as in *Hennessy*, "The evidence leaves significant questions unanswered related to whether [the alleged victim] was capable of consenting."[175] The outcome in *Hennessy* is thus appropriate here as well: setting aside the finding of guilty to the Article 120(b)(2)(A) offense and dismissing it with prejudice.[176]

Because the evidence failed to prove beyond a reasonable doubt that CL was capable of consenting to the sexual act, the correct outcome is to set aside the findings and sentence and dismiss the charge and its specification with prejudice.

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[173] *Id.* at *24–25 (cleaned up).
[174] *See Serjak*, 2024 CCA LEXIS 524, at *47 (observing that "we need not address legal sufficiency" of a finding of guilty that is factually insufficient).
[175] *Hennessy*, 2024 CCA LEXIS 503, at *21.
[176] *Id.* at *24. *Accord Moore*, 2024 CCA LEXIS 485, at *18; *Serjak*, 2024 CCA LEXIS 524, at *55.

II.

The military judge erred by failing to instruct the members that an element of the alleged Article 120(b)(2)(A), UCMJ, offense was that the alleged victim was capable of consenting at the time of the sexual act.

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed de novo."[177]

Law and Analysis

A. Overview

Military judges have a sua sponte duty to instruct on all elements of a charged offense.[178] The alleged victim's capability to consent is an element of an Article 120(b)(2)(A) offense. The military judge failed to instruct the members on that element. Regardless of whether that failure is tested for harmless error or plain error, the result is the same: the failure to instruct under these facts invalidated the conviction.

B. The legal standard for determining the consequence of failure to instruct on an element

Where a military judge fails to give a required instruction and the defense has preserved the issue, an appellate court tests for harmlessness beyond a reasonable doubt.[179] On the other hand, where the defense failed to preserve the issue, an appellate court tests for plain error.[180]

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[177] *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)).

[178] UCMJ art. 51(c), 10 U.S.C. § 851(c); Rule for Courts-Martial 920(e)(1), *MCM* (2019 ed.); *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014).

[179] *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017). *See also Neder v. United States*, 527 U.S. 1, 9 (1999) (evaluating whether a preserved error of omitting an element from the jury instructions was harmlessness beyond a reasonable doubt).

[180] *Davis*, 76 M.J. at 229. Waiver is inapplicable here because there was no "intentional relinquishment or abandonment of a known right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Nothing in the record establishes—or even suggests—that the defense knew it had the right to have the members instructed that Appellant could be convicted of the charged offense only upon a finding beyond a

Court of Appeals for the Armed Forces case law provides the test for determining whether the issue was preserved: "If the military judge omits a required instruction . . ., the accused may preserve the instructional error either by making an adequate objection or by requesting an instruction in a way that sufficiently signals to the military judge the existence of an error in need of correction."[181]

C. The military judge's failure to instruct on the element that the alleged victim was capable of consenting was reversible error under either a harmless beyond a reasonable doubt or plain error standard

The defense at trial challenged the military judge's draft instructions, arguing that no instruction should be given concerning CL allegedly being asleep because "the government has charged this as a consent, not as a sleeping or unconscious."[182] That was sufficient to "signal[] to the military judge the existence of an error" in his instructions "in need of correction."[183] But even if evaluated under a plain error standard, reversal is required. *A fortiori*, application of the harmless beyond a reasonable doubt standard would also compel reversal.

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reasonable doubt that CL was capable of consenting at the time of the sexual act. Here, there was no intentional relinquishment of such an instruction nor an abandonment of a *known* right. Unlike in *Davis*, where the appellate litigation concerned whether an instruction was plain and obvious in light of case law that had already been decided when the case was tried, *see id.* at 331–32, here the failure to instruct constituted plain and obvious error only after a post-trial decision: *Mendoza*. *Davis* states that a plain error analysis is appropriate in that scenario. *Id.* at 331 ("We previously have said that panel instructions are analyzed for plain error based on the law at the time of appeal. We generally only review the matter for plain error when a new rule of law exists, as an appellant gets the benefit of changes to the law between the time of trial and the time of his appeal. When there is a new rule of law, when the law was previously unsettled, and when the trial court reached a decision contrary to a subsequent rule it is enough that an error be plain at the time of appellate consideration." (cleaned up)).

[181] *Davis*, 76 M.J. at 229.

[182] Trial Tr. at 712.

[183] *Davis*, 76 M.J. at 229.

"Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused."[184] Here, all three conditions are satisfied.

The military judge's failure to instruct on the element that CL was capable of consenting at the time of the sexual act was erroneous. "An element of a crime is a fact which the prosecution must prove to sustain a conviction for that offense."[185] For punitive articles other than Articles 133 and 134, the President's identification of elements in Part IV of the *Manual for Courts-Martial* is "not binding" on military appellate courts when they "interpret the elements of substantive offenses."[186] As *Mendoza* makes clear, the alleged victim's capability to consent is a fact the prosecution must prove to sustain a conviction for an offense under Article 120(b)(2)(A).[187] Accordingly, as a fact that must be proven to obtain a conviction, such capability is an element of the offense. The military judge therefore erred by failing to instruct the members concerning that element.

The military judge's error was both plain and obvious. Whether the error was plain or obvious is evaluated "based on the law at the time of appeal" even if "the law at the time of trial was settled and clearly contrary to the law at the time of appeal."[188] Whatever the state of the law was at the time of trial, it is now clear that to convict under Article 120(b)(2)(A), the finder of fact must determine that the alleged victim was capable of consenting. Accordingly, the military judge's error was plain and obvious.

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[184] *Id.* at 230.
[185] *United States v. Zachary*, 61 M.J. 813, 817 (A. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006).
[186] *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988), *partially overruled on other grounds*, *Payne*, 73 M.J. at 25.
[187] *Mendoza*, 2024 CAAF LEXIS 590, at *17.
[188] *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

Finally, the error prejudiced Appellant's substantial rights. The right at issue—to be convicted only upon the members' determination that the evidence proved *every* element beyond a reasonable doubt—is substantial. The instructional error clearly prejudiced that substantial right. The record includes abundant evidence raising doubt as to whether CL was capable of consenting at the time of the sexual act, including her testimony and electronic messages stating she was asleep when the penetration occurred, her testimony that she consumed large quantities of alcohol that night, her electronic message stating she was "too drunk to do anything," her self-described "groggy and sleepy" condition immediately after the sexual act, and her testimony that she believed she might have been drugged.[189] Prejudice is further demonstrated by the fact that a member asked, "Should we consider whether the victim was too intoxicated to consent even if she was awake?"[190] That question strongly suggests that at least one member would have voted to acquit had the military judge properly instructed the members on the elements. The military judge compounded his error by failing to instruct on the missing capable-of-consenting element in response to the question, instead repeating that "[c]onsent means a freely given agreement to the conduct at issue by a competent person."[191] That answer suggested the exact opposite of the law: that Appellant could be—in fact, should be—convicted of the charge and specification if the members concluded that CL did not have the capability to consent at the time of the sexual act.

Even before that question during deliberations, the prosecution's closing argument had exacerbated the prejudice arising from the military judge's failure to instruct on the capable-of-consenting element. The STC expressly argued: "It doesn't really matter if she was asleep in this context. It really does not matter. Yes, if she was asleep that means one hundred percent there was

[189] Pros. Ex. 2 at page 2 of 6; Trial Tr. at 456, 488–89.
[190] App. Ex. XXIII; Trial Tr. at 778.
[191] Trial Tr. at 783.

no consent. You cannot consent if you're asleep. Ultimately, it doesn't make any difference."[192] The STC elaborated: "Awake, asleep, drunk out of their mind, tripping on acid, what difference does it possibly make if these are the conditions we're facing?"[193] The STC also argued that "whether she was asleep or blacked out or wide awake. Makes no difference."[194] He later returned to the same theme: "And it doesn't matter whether she was awake or asleep or blacked out. So, the evidence shows you that she was asleep. The claim will be made that she was blacked out, but it doesn't matter if she was awake."[195]

That persistent prosecution argument directly asked the members to find Appellant guilty even if they did not find that CL was capable of consenting. Contrary to the STC's argument, it mattered very much whether CL was awake and capable of consenting. Without that capability, a necessary element was missing. Not only did the military judge fail to require the members to determine whether the evidence proved that element beyond a reasonable doubt, the STC erroneously told the members that the element "doesn't matter."[196]

The military judge's failure to instruct the members that they could convict only if they found beyond a reasonable doubt that CL was capable of consenting during the sexual act was manifestly prejudicial under the facts of this case. Thus, regardless of whether evaluated for harmlessness or plain error, the military judge's failure to instruct on that element requires reversal.

[192] *Id.* at 741.
[193] *Id.* at 742.
[194] *Id.*
[195] *Id.* at 742–43.
[196] *Id.*

D. Remedy

The proper remedy for an instructional error at the findings stage is to set aside the affected findings and authorize a rehearing.[197] In this case, because the error affected the only offense of which Appellant was convicted, setting aside the sentence is also required. Accordingly, the appropriate remedy is for this Court to set aside the findings and sentence while authorizing a rehearing.

III.

The prosecution violated Appellant's constitutional right to fair notice of the criminal charge against which he would need to defend by: (1) charging him with committing a sexual act without consent but advancing theories of criminal liability based on the alleged victim's lack of consciousness and lack of capacity; and (2) arguing that Appellant could be convicted on the sole basis that the alleged victim was asleep when penetrated.

Standard of Review

This Court "review[s] questions of constitutional law de novo. If a constitutional error is found, whether it is harmless beyond a reasonable doubt is also reviewed de novo."[198]

Law and Analysis

A. Overview

In *Mendoza*, the Court of Appeals for the Armed Forces stated emphatically that the "Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial. Doing so robs the defendant of his constitutional

[197] *United States v. McDonald*, 73 M.J. 426, 439 (C.A.A.F. 2014).
[198] *United States v. Chero*, 76 M.J. 688, 691 (A.F. Ct. Crim. App. 2017) (quoting *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016)).

'right to know what offense and under what legal theory he will be tried and convicted.'"[199] Just such a robbery occurred in this case.

B. The legal standard for a constitutional fair notice violation

The Sixth Amendment guarantees the right of an accused "to be informed of the nature and cause of the accusation."[200] The Court of Appeals for the Armed Forces has observed that the Fifth Amendment's Due Process Clause also prohibits "convicting an accused of an offense with which he has not been charged."[201] The constitutional right to fair notice is one of the most fundamental protections for a criminal accused. The Supreme Court has emphasized:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.[202]

That fundamental protection is equally applicable to the military justice system. The Court of Appeals for the Armed Forces has long recognized that "[t]he Constitution requires that an accused be on notice as to the offense that must be defended against."[203] That constitutional protection includes an accused's right to know "under what legal theory he will be convicted."[204] In this case, the prosecution and military judge deprived Appellant of that sacrosanct Fifth and Sixth Amendment right to fair notice.

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[199] *Mendoza*, 2024 CAAF LEXIS 590, at *18 (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)).
[200] U.S. CONST. amend. VI.
[201] *Girouard*, 70 M.J. at 10.
[202] *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).
[203] *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009).
[204] *United States v. Tunstall*, 72 M.J. 191, 192, 196 (C.A.A.F. 2013) (internal quotation marks omitted).

C. The prosecution violated Appellant's constitutional right to fair notice by presenting evidence in support of and arguing for a conviction based on uncharged offenses and legal theories

Appellant was charged with committing a sexual act "without [CL's] consent"—an allegation of a violation of Article 120(b)(2)(A).[205] That was the only offense and theory of criminal liability of which the Government provided Appellant notice. Yet from the start of its opening statement to the end of its findings rebuttal argument and at myriad points in between, the prosecution presented a case based on CL being asleep, intoxicated, or both. During litigation over the findings instructions, the defense made a due process notice objection.[206] Yet the military judge allowed the Government to persist with its three-card-monte approach of charging one offense but seeking conviction by relying on two uncharged, unnoticed theories.

In *Mendoza*, the Court of Appeals for the Armed Forces observed that "Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, establish separate theories of liability."[207] The Court emphasized that the latter provision differs from the form by requiring

> the Government to prove both that [the accused] committed a sexual act on [an alleged victim] when [the alleged victim was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance and that [the accused] know or should have known that [the alleged victim] was incapable of consenting.[208]

Article 120(b)(2)(A) and Article 120(b)(2)(B) also differ. The former forbids committing a sexual act "without the consent of the other person" while the latter forbids committing a sexual act upon an individual known to be or who should reasonable be known to be "asleep, unconscious, or otherwise aware that the sexual act is occurring." Significantly, Article 120(b)(2) presents the

[205] Charge Sheet.
[206] Trial Tr. at 712.
[207] *Mendoza*, 2024 CAAF LEXIS 590, at *21.
[208] *Id.* at *2.

"without consent" and the "asleep, unconscious, or otherwise unaware" offenses in the disjunctive. Under the "ordinary meaning" canon of statutory construction, the use of the disjunctive "or" indicates that Article 120(b)(2)'s two subparts present separate theories of liability.[209]

In *Mendoza*, the Court of Appeals for the Armed Forces noted that the Government's conflation of "two different and inconsistent theories of criminal liability . . . raises significant due process concerns."[210] Judge Sparks took the majority opinion's reasoning to its logical end point, concluding that the Government violated "Appellant's due process right to fair notice by charging Appellant with sexual assault without consent, but arguing at trial that he was guilty because [the alleged victim] was incapable of consent."[211] That is precisely what occurred in this case.

The Government charged Appellant with "commit[ting] a sexual act upon [CL], by penetrating her vulva with his penis, without her consent."[212] Yet in the Government's opening statement, the trial counsel offered an alternative theory of criminal liability: "That is the charge in this case, that the accused penetrated her without her consent while she was asleep, lying on her side, facing away from him. And the evidence will show that she was asleep."[213] The trial counsel also referred to CL as "extremely intoxicated" and "very drunk" at an earlier point in the evening.[214] He then concluded his opening statement by reiterating the Government's uncharged, unnoticed theory of criminal liability:

> At the end of his trial the United States will stand up in closing argument and tell you that the accused made a terrible judgement [sic], that he did the wrong thing

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[209] *United States v. Sager*, 76 M.J. 158, 161–62 (C.A.A.F. 2017) (construing the phrase "asleep, unconscious, or otherwise unaware" as presenting separate theories of liability).
[210] *Mendoza*, 2024 CAAF LEXIS 590, at *3.
[211] *Id.* at *27 (Sparks, J., concurring in part and dissenting in part).
[212] Charge Sheet.
[213] Trial Tr. at 409.
[214] *Id.* at 410.

> when he wasn't fully aware, and when he stuck his penis inside [CL's] sleeping body, and we will ask that you find the accused guilty of sexual assault.[215]

That opening statement flagrantly violated the constitutional prohibition against the Government charging "one offense under one factual theory and then argu[ing] a different offense and a different factual theory at trial."[216] But the opening statement was far from the only time the Government engaged in such unconstitutional behavior.

Throughout the prosecution's direct examination of CL, the STC elicited evidence indicating that at the time of the sexual act, she was asleep, intoxicated, or both. For example, the STC questioned CL about her drinking that night, resulting in two statements from CL characterizing herself as "very drunk" at the casino and "groggy and sleepy" immediately after the sexual act.[217] The prosecution entered into evidence an exhibit in which CL repeatedly stated that she was asleep when Appellant penetrated her and that she was "too drunk to do anything."[218]

During his cross-examination of Appellant, the STC advanced the theme that Appellant's sexual act with CL was illegal because she was incapable of consenting due to impairment by alcohol. The STC first established that "[t]hroughout the course of the evening," Appellant saw "whatever effects the alcohol has on" CL.[219] After cataloguing some of those effects,[220] the STC directly advanced a theory of criminal liability based on incapacity. He observed:

- "And you've received training about sexual assault during your time in the Air Force."[221]

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[215] *Id.* at 413.
[216] *Mendoza*, 2024 CAAF LEXIS 590, at *18.
[217] Trial Tr. at 438, 456.
[218] Pros. Ex. 2.
[219] Trial Tr. at 651.
[220] *Id.*
[221] *Id.*

- "Over the course of the 8 years you've been in the Air Force, you've been trained on this many times."[222]
- "And the training has included a discussion of alcohol consumption."[223]
- "And you've been informed that people can drink to the point that they can no longer consent."[224]
- "Somebody can drink to the point that you should no longer have sex with them."[225]
- "And if somebody is visibly, highly intoxicated, it is at least unwise to have sex with them."[226]
- "And it may be immoral."[227]

The STC then reached the crescendo of that portion of his cross-examination, stating, "And it may be illegal."[228] Appellant responded, "Yes."[229] The STC followed up by asking a series of questions pointing to signs that CL was heavily intoxicated on the night in question, culminating with the observation, "You knew that the alcohol she was drinking was having an effect on her."[230] Appellant responded, "That's fair to say."[231] The implication was unmistakable: the prosecution was presenting a theory of criminal liability to the members based on CL's incapability to consent due to impairment by alcohol—a theory of which the prosecution failed to provide the defense with fair notice. Later in his cross-examination of Appellant, the STC highlighted evidence

[222] *Id.*
[223] *Id.*
[224] *Id.* at 652.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.* at 653–56.
[231] *Id.* at 656.

suggesting CL was asleep at the time of the sexual act, advancing yet another uncharged, unnoticed theory of criminal liability.[232]

The STC reemphasized the uncharged, unnoticed theories during closing argument. Both in spoken word and visual aids, the STC repeatedly referred to CL being "asleep" or "sleeping" at the time of the sexual act, as well as CL's statements that the sexual act occurred "as she slept."[233] The STC expressly invited the members to convict on that unnoticed, uncharged theory, giving that theory primacy: "[F]irst there's no consent because she was asleep."[234] The closing argument also emphasized CL's "clear intoxication,"[235] harkening back to the STC's observations while cross-examining Appellant that having sex with a "highly intoxicated" individual "may be illegal."[236] During his rebuttal argument, the STC again argued for criminal liability based on the unnoticed, uncharged theory that CL was asleep.[237]

The military judge's instructions exacerbated the STC's repeated violation of Appellant's constitutional right to fair notice. Over defense objection based on lack of fair notice, the military judge instructed the members, "A sleeping or unconscious person cannot consent," facilitating the STC's invitation to convict on that uncharged, unnoticed theory.[238] The military judge further enhanced the risk of conviction based on an unnoticed, uncharged theory by instructing the members, "'Consent' means a freely given agreement to the conduct at issue by a competent person."[239] Even without the STC's repeated arguments based on CL purportedly being asleep

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[232] *E.g.*, *id.* at 672–73, 675.
[233] *Id.* at 731–33, 738–43, 745–47; App. Ex. XXII.
[234] Trial Tr. at 737. *See also id.* at 741 ("Yes, if she was asleep that means one hundred percent there was no consent. You cannot consent if you're asleep.").
[235] App. Ex. XXII at page 6 of 12.
[236] Trial Tr. at 652.
[237] *Id.* at 767–68, 770.
[238] *Id.* at 723.
[239] *Id.*

when the sexual act occurred, that instruction sanctioned convicting Appellant on the unnoticed, uncharged theory that CL was asleep. That itself constituted reversible error.[240] The military judge did still more harm when responding to a member's question asking, "Should we consider whether the victim was too intoxicated to consent even if she was awake?"[241] The constitutionally required answer to that question was "No," the members could not convict Appellant based on the unnoticed, uncharged theory that CL was too intoxicated to consent. The military judge invited a constitutionally violative conviction by instead responding, "Consent means a freely given agreement to the conduct at issue by a competent person. All surrounding circumstances are to be considered in determining whether a person gave consent."[242]

The robbery of which the Court of Appeals for the Armed Forces warned in *Mendoza* occurred in this case. The prosecutors robbed Appellant "of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'"[243] The military judge aided and abetted that robbery. The resulting conviction is constitutionally invalid.

D. Remedy

The remedy for a violation of an accused's constitutional right to fair notice is to set aside the affected conviction.[244] Because the error in this case affected the only offense of which

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[240] *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) ("A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. . . . [A] reviewing court finding such error should ask whether the flaw in the instructions had substantial and injurious effect or influence in determining the jury's verdict." (quotation marks omitted)); *accord United States v. Marin*, 83 M.J. 626, 631 (N-M. Ct. Crim. App. 2023).
[241] Trial Tr. at 778; App. Ex. XXIII.
[242] Trial Tr. at 783.
[243] *Mendoza*, 2024 CAAF LEXIS 590, at *18 (quoting *Riggins*, 75 M.J. at 83).
[244] *See*, *e.g.*, *Dean v. United States*, 418 F. Supp. 2d 149, 155 (E.D.N.Y. 2006).

Appellant was convicted, the correct remedy is to set aside the findings and sentence while authorizing a rehearing.[245]

IV.

Article 120(b)(2) and (g)(7), UCMJ, are unconstitutionally vague because they fail to put those subject to the UCMJ on fair notice of the specific actions those statutory provisions criminalize.

Standard of Review

Military appellate courts review the constitutionality of a statute de novo.[246]

Law and Analysis

In *United States v. Casillas*, the Court of Appeals for the Armed Forces granted review of, among other issues, "WHETHER ARTICLE 120(b)(2) AND (g)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 920(b)(2) AND (g)(7), ARE UNCONSTITUTIONALLY VAGUE BECAUSE THEY FAIL TO PUT DEFENDANTS ON FAIR NOTICE OF THE SPECIFIC CHARGE AGAINST THEM."[247] The court subsequently ordered additional briefing on the effects of *Mendoza* on that issue, as well as on two other granted issues in the case.[248] The court heard oral argument in *Casillas* on 14 January 2025.[249] This case presents the same constitutional vagueness issue as that pending before the Court of Appeals for the Armed Force in *Casillas*. Accordingly, Appellant preserves that issue pending its resolution in *Casillas*.

The appropriate remedy where an appellate court finds that an accused was convicted of a statute that is void for vagueness is to reverse the finding of guilty in a manner that precludes

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[245] UCMJ art. 66(f)(A)(ii), 10 U.S.C. § 866(f)(A)(ii).
[246] *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).
[247] *United States v. Casillas*, 84 M.J. 477 (C.A.A.F. 2024) (mem.).
[248] *United States v. Casillas*, __ M.J. __, No. 24-0089/AF, 2024 CAAF LEXIS 666 (C.A.A.F. Oct. 29, 2024) (mem.).
[249] *United States v. Casillas*, __ M.J. __, No. 24-0089/AF, 2025 CAAF LEXIS 120 (C.A.A.F. Jan. 14, 2025) (mem.).

retrial.[250] This Court can adopt that remedy here by setting aside the findings and sentence and dismissing the charge and its specification without authorizing a rehearing.[251]

V.

Appellant's constitutional rights were violated when he was convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.

Additional Facts

While delivering findings instructions, the military judge informed the members, "As the findings do not require a unanimous agreement, no one will ever know how you voted in this case or whether you concurred with the finding ultimately announced."[252] He later expressly instructed the members:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty. If you have at least six votes of guilty of the offense then that will result in a finding of guilty for that offense.[253]

The members found Appellant guilty of the charge and its specification.[254] It is unknown and unknowable whether that conviction was based on a vote of 6-2, 7-1, or 8-0.

Standard of Review

The standard of review for questions of constitutional law is de novo.[255]

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[250] *See, e.g., United States v. Cardiff,* 344 U.S. 174, 175–77 (1952) (affirming 9th Circuit ruling reversing conviction and instructing the district court to enter a judgement of acquittal).
[251] UCMJ art. 66(f)(1)(B), 10 U.S.C. § 866(f)(1)(B).
[252] Trial Tr. at 721; App. Ex. XXI at 1.
[253] Trial Tr. at 772; App. Ex. XXI at 6. There are some minor non-substantive formatting and style differences between the findings instructions in the trial transcript and those in Appellate Exhibit XXI. The quotation above is the version in the transcript.
[254] Trial Tr. at 793; App. Ex. XX.
[255] *Busch*, 75 M.J. at 91.

Law and Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights.[256] Appellant acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, Appellant maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review. This Court should remedy the violation of Appellant's constitutional right to be found guilty only upon a unanimous verdict by reversing the findings of guilty to the charge and its specification and the sentence while authorizing a rehearing at which Appellant may be found guilty only upon a unanimous vote of the members.

Respectfully submitted,

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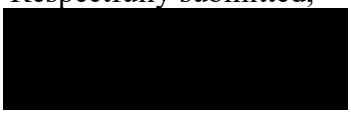
[256] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

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 17 March 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Technical Sergeant (E-7) **VIDARR SLAYTON** United States Air Force *Appellant.*	)	No. ACM 40583 9 April 2025

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 that it be allotted seven additional days to file its answer brief in the above captioned case with this Court, making the new due date Wednesday, 23 April 2025. The United States' answer brief was originally due on Wednesday, 16 April 2025.

This case was docketed with this Court on 15 March 2024. (*Notice of Docketing*, dated 15 March 2024). On 17 March 2025, Appellant filed his brief with this Court, after receiving nine enlargements of time. As of the date of this filing 390 days have elapsed since docketing. From date of docketing until the original due date (16 April 2025) 397 days will have elapsed, and from the date of docketing to the new due date (23 April 2025), 404 days will have elapsed. This is the United States' first request for an enlargement of time.

There is good cause for the enlargement of time in this case. Undersigned counsel was writing a brief for the Court of Appeals for the Armed Forces (CAAF) in United States v. Braum, 2025 CAAF LEXIS 83 (C.A.A.F 2025) that was due to our superior court on 27 March 2025. Undersigned counsel was not able to dedicate time and attention to this case until Braum was filed. In addition, she assisted and will be assisting two other government appellate counsel

during four moots in preparation for two upcoming oral arguments before CAAF and this Court: United States v. Patterson, USCA Dkt. No. 25-0073 (C.A.A.F. 2025); United States v. Gale, ACM 2025-01. She is also responsible for standing up a new litigation training effort from JAJG – at the direction of TJAG – that requires writing scripts, coordinating volunteers, and filming twelve JAG Corps wide CLEs that will be released in May 2025.

Appellant's brief raises five issues, including legal and factual sufficiency, and complex issues under United States v. Mendoza, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024), which will require a thorough review of the entire case on the merits.

Undersigned counsel has reviewed Appellant's brief, the record of trial, and 300 pages of the 839-page transcript. This case is now undersigned counsel's top priority. The additional seven days will accommodate the additional time needed to balance the filming for JAG Corps wide training and writing the government's brief in this case. No other counsel can provide a response in this case sooner, as they have been assigned other cases.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time of seven days to file an answer brief in the above captioned case.

[redacted]

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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 April 2025.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERRORS
v.	)	Before Panel No. 3
Technical Sergeant (E-7) **VIDARR SLAYTON** United States Air Force *Appellant.*	)	No. ACM 40583
	)	23 April 2025

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 ERRORS**
v.	)	Before Panel No. 3
Technical Sergeant (E-7) **VIDARR SLAYTON** United States Air Force *Appellant.*	)	No. ACM 40583
	)	23 April 2025

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

ISSUES PRESENTED

I.

THE FINDING OF GUILTY TO THE SOLE CHARGE AND ITS SPECIFICATION ALLEGING A VIOLATION OF ARTICLE 120(B)(2)(A), UNIFORM CODE OF MILITARY JUSTICE, IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THE EVIDENCE FAILED TO ESTABLISH THAT THE ALLEGED VICTIM WAS CAPABLE OF CONSENTING DURING THE SEXUAL ACT.

II.

THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS THAT AN ELEMENT OF THE ALLEGED ARTICLE 120(B)(2)(A), UNIFORM CODE OF MILITARY JUSTICE, OFFENSE WAS THAT THE ALLEGED VICTIM WAS CAPABLE OF CONSENTING AT THE TIME OF THE SEXUAL ACT.

III.

THE PROSECUTION VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO FAIR NOTICE OF THE CRIMINAL CHARGE AGAINST WHICH HE WOULD NEED TO DEFEND BY: (1) CHARGING HIM WITH COMMITTING A SEXUAL ACT WITHOUT CONSENT BUT ADVANCING THEORIES OF CRIMINAL LIABILITY

BASED ON THE ALLEGED VICTIM'S LACK OF CONSCIOUSNESS AND LACK OF CAPACITY; AND (2) ARGUING THAT APPELLANT COULD BE CONVICTED ON THE SOLE BASIS THAT THE ALLEGED VICTIM WAS ASLEEP WHEN PENETRATED.

IV.

ARTICLE 120(B)(2) AND (G)(7), UNIFORM CODE OF MILITARY JUSTICE, ARE UNCONSTITUTIONALLY VAGUE BECAUSE THEY FAIL TO PUT THOSE SUBJECT TO THE CODE ON FAIR NOTICE OF THE SPECIFIC ACTIONS THOSE STATUTORY PROVISIONS CRIMINALIZE.

V.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY.

STATEMENT OF CASE

A general court-martial comprised of officer and enlisted members convicted Appellant – contrary to his plea – of one charge and one specification of sexual assault (in violation of Article 120, UCMJ). (*Entry of Judgment*, dated 6 November 2023, ROT, Vol. 1.) The members also sentenced Appellant to a dishonorable discharge, nine months confinement, reduction to the grade of E-1, and a reprimand. (Id.) The convening authority took no action on the findings or sentence in Appellant's case. (*Convening Authority Decision on Action Memorandum*, dated 10 October 2023, ROT, Vol 1.)

STATEMENT OF FACTS

Appellant met CL on 7 March 2022 when they were TDY to Keesler Air Force Base, Mississippi, for training. (R. at 425-426.) They talked about their common interest in working out, and they ended up going to the gym at the same time after class. (R. at 427.) Appellant

added her on social media, and the two started communicating on 10 March 2022 via Facebook messenger. (Pros. Ex. 1.) CL asked Appellant if he knew anyone who would be interested in going to a concert at the Beau Rivage Casino in Biloxi, Mississippi, and Appellant stated he wanted to go with CL. (R. at 430; Pros. Ex. 1.) Appellant bought two tickets for the show, even though CL explained she wanted to buy her own and less expensive tickets. (R. at 432.) She testified, "I didn't want him to think it was a date, and I could see that was probably where he was going with that." (R. at 432.) She was not romantically interested in Appellant. (R. at 433.)

Appellant picked CL up to go to the concert at 1900 hours on Saturday. (R. at 434, 650.) Appellant drove them to the casino and parked the car at which point they went to one of the bars in the casino complex. (R. at 435, 650-651.) CL recalled drinking a vodka and Red Bull and a Corona. (R. at 435.) Appellant also had a vodka and Red Bull and a beer. (Id.). Before heading into the theater for the concert, the two bought a bucket of five beers to share – CL had one and Appellant drank four. (R. at 436, 438.) The two sat next to each other. (Id.). During the concert CL bought a Jack and Coke with two shots of Jack Daniels in it, and she and Appellant drank some of it, but she did not recall finishing it. (R. at 438.)

Appellant testified that he and CL were flirting all night and dancing together – although the casino video footage does not indicate reciprocal affection from CL because she pushed him away when he tried to kiss her in the elevator. (R. at 614, 621; Pros. Ex. 3.) Appellant testified that CL had no issues walking, she was not slurring her words, and he did not need to hold her up at any point. (R. at 615.)

As they were leaving the concert, CL felt "very drunk." (R. at 438.) She knew she was drunk because she was "very just social, like just talking to a bunch of people. That's not normally how I am." (R. at 439.) She recalled sitting on the floor of the casino foyer talking

with another woman that she met at the casino. (R. at 439-440.) CL remembered having one shot while in the casino area after the concert. (R. at 439.) Appellant testified that CL was very talkative and interacted with multiple strangers throughout the evening. (R. at xx.). He even explained that "we were interacting on the way to the car, and then she excitedly just jumped up in my arms and kind of wrapped her legs around me." (R. at 616.)

Eventually, CL and Appellant left the casino, CL recalled going to a couple of bars and going into Waffle House. (R. at 441.) Security camera footage from Waffle House shows CL walking into the restaurant first – and unassisted – and a minute later Appellant enters. (Pros. Ex. 4, 5.) Appellant testified that CL got out of the car on her own and ordered her own food at Waffle House. (R. at 618; Pros. Ex. 4.) CL walked up the stairs without issue to her second-floor hotel room, Appellant testified that CL was multitasking by getting out her room key and discussing that Appellant should not drive onto base after drinking. (R. at 616, 619.). She offered to let him sleep on her floor. (R. at 619.) While he took off his boots, CL went into the bathroom to change. (R. at 620.)

Special Trial Counsel asked CL what she next remembered after going to the Waffle House, and CL testified, "The next thing I remember is waking up to him thrusting his penis inside of me." (R. at 447.) When CL awoke on Sunday, she was lying on her side, facing the window, and the room was almost completely dark except for some light coming in around the closed blinds. (R. at 450.) CL wore a T-shirt and nothing else – not even underwear. (R. at 450.) CL did not feel Appellant touching any other part of her body, but he was behind her, and she felt his penis penetrating her vulva. (R. at 451.) She explained that "the only thing I could feel was him thrusting himself inside of me." (R. at 452.) When asked about her mental state in that moment, CL testified, "My mental state, I was scared, confused, felt violated, felt – I just felt

like I didn't know what to do." (R. at 451.) In response to feeling the penetration CL stated, "I had just woken up, so when I had woke up from it and felt it, I moved my body over away from him . . . So, I just stayed in the same position but just moved over further on the bed" toward the window. (R. at 452.) Appellant's story diverges from CL's account on the issue of penetration the morning after the concert. He claimed that he woke up, and CL was 4-6 inches from him, he was "flaccid," and then she "recoiled" from him when he touched her shoulder and he was confused why she did that. (R at 627.) But he claimed he was not penetrating her. (R. at 673.) He also testified that he lied to CL on a dozen different occasions to avoid responsibility, a court-martial, and a conviction. (R. at 684, 685, 702.)

During direct examination, trial counsel asked CL, "Did you tell the accused that he could penetrate [your] vagina while you slept?" CL said, "No." (R. at 474.) On cross examination, CL confirmed that when she woke up, Appellant was still inside of her. (R. at 483.) When she moved away, Appellant stopped penetrating her. (R. at 452.)

After she moved away from Appellant, CL began to cry, and Appellant got out of the bed, came around to CL's side of the bed, and asked CL what was wrong. (R. at 453.) CL told Appellant that she thought he raped her. (R. at 455.) Appellant made additional statements that CL could not recall, and she fell asleep again. (R. at 455.) CL was still tired, but she woke up again when Appellant left her room. (R. at 456.)

After Appellant left, CL evaluated her room. She did not notice a condom or condom wrapper. (R. at 484.) And she found her pajama shorts somewhere in her room. (R. at 484.) She saw that her concert clothes were in the bathroom, and that indicated to her that she had not changed in front of Appellant. (R. at 460.) She realized she was missing her car keys, and she asked Appellant if he had seen them. (R. at 460.). She did not want to see him, but she needed

her keys, so she told him to put them on the hood of her car and he did. (R. at 460.) Once she had her keys, she eventually drove to the emergency room and requested a sexual assault forensic examination (SAFE). (R. at 461-462.)

CL described the SAFE stating, "I mean they – they ask you what happened. And they like – they get stuff under your fingernails. They like swab everything. They take a sample in the vagina. They took a piece of hair. They took a lot of blood. And it took a really, really long time." (R. at 462.) During the SAFE, the nurse annotated CL's statements. "Patient states she woke up in a side-lying position, alleged assailant was behind her with his penis in her vagina." (Pros. Ex. 8 at 3.) "Patient states she woke up – was unsure of what happened only knew male's penis was in her vagina." (Pros. Ex. 8 at 3.) "I don't remember going back to my room, and I woke up with him inside of me." (Pros. Ex. 8 at 8.)

On Monday, CL was still distraught, and she told her instructors that she was sick, and she participated in the class online. (R. at 467.) On Tuesday, CL went to class, but when she saw that Appellant was supposed to sit closer to her during the class, she pulled an instructor – TSgt RL – aside and reported the sexual assault. (R. at 466, 540.) SSgt RL drove CL to the SARC to report the incident. (R. at 466, 540.) CL made an unrestricted report and then went to OSI for an interview. (R. at 466.) CL agreed to reach out to Appellant through pretext messages with OSI in the room, and she provided the conversation to OSI. (R. at 468; Pros. Ex. 2.)

When describing his text messages with CL after the sexual assault, Appellant said, "I'm just kind of being evasive." (R. at 636.) "So, I do give her like double speak, and I start placating her and just working around the answers. But I never directly address a lot of things that she's saying or asking." (R at 636.) Appellant agreed with Special Trial Counsel that he

started the conversation with CL using deception and continued with the deception throughout the conversation. (R. at 702.)

> [STC:] But you lied before she ever said anything to you in response after that first message, right?
>
> [Appellant:] Correct.
>
> [STC:] You had to evade her, right?
>
> [Appellant:] Correct.
>
> [STC:] You attempted to evade her repeatedly.
>
> [Appellant:] Correct.
>
> [STC:] And avoid responsibility.
>
> [Appellant:] Correct.
>
> [STC:] And in your own words, "The real truth wasn't going to get anywhere."
>
> [Appellant:] Correct.

(R at 702.)

ARGUMENT

I.

APPELLANT'S SEXUAL ASSAULT CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

When reviewing factual sufficiency, a CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." 10 U.S.C. §

866(d)(1)(A). If all offenses occurred on or after 1 January 2021,[1] factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 85 M.J. 127 (C.A.A.F. 2024). If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The CCA must also give "appropriate deference to findings of fact entered into the record by the military judge." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 85 M.J. at 130. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." 10 U.S.C. § 866(d)(1)(B)(iii).

Law and Analysis

A. Appellant's conviction was legally and factually sufficient because CL woke up to Appellant's penal penetration and manifested nonconsent by moving away from Appellant.

The government proved beyond a reasonable doubt that Appellant penetrated CL's vulva without her consent the morning after the concert at the casino. The elements for sexual assault without consent are: "(i) That the accused committed a sexual act upon another person; and (ii) That the accused did so without the consent of the other person." Manual for Courts-Martial, United States, pt. IV, ¶ 60.b.(2)(d) (2019 ed.); 10 U.S.C. § 920(b)(2)(A). "The term 'sexual act' means the penetration, however slight, of the penis into the vulva or anus or mouth." MCM, pt. IV, ¶ 60.a.(g)(1)(A). "The term 'consent' means a freely given agreement to the conduct at issue

[1] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

by a competent person." MCM, pt. IV, ¶ 60.a.(g)(7)(A). "An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A). "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." MCM, pt. IV, ¶ 60.a.(g)(7)(C).

The surrounding circumstances support that CL did not give Appellant consent to penetrate her vulva with his penis. CL and Appellant both testified in this case, and their accounts largely line up – until the sexual act the morning after their night out together. Both CL and Appellant testified that, after knowing each other for only a week, CL asked if he thought anyone would be interested in attending a concert at the local casino, and he said that he was interested. (R. at 430; Pros. Ex. 1.) The initial invitation was not for Appellant alone but for a group of people. (Pros. Ex. 1.) Neither party believed that attending the concert together constituted a date, and CL specifically testified that she did not want Appellant to believe it was a date. (R. at 476, 479, 611.) Appellant purchased the tickets, but he testified buying them was not an attempt to make the outing a date. (R. at 476, 611.) Appellant picked CL up from her hotel on the evening of the concert. (R. at 434, 650.) Then they attended the concert and drank several alcoholic beverages throughout the evening. (R. at 436, 438.) Video camera footage shows the two of them walking throughout the casino – without assistance from each other although they walked with interlocked arms at points. (Pros. Ex. 3.) Appellant claimed that their behavior was flirtatious, (R. at 616.), but the video camera footage does not show an affectionate pair. (Pros. Ex. 3.) In the elevator on the way to the parking garage, Appellant presses CL's

back against the elevator wall and goes in to kiss her. (Id.) CL avoided a kiss on the lips by turning her head away from Appellant, and he kissed her neck instead. (Id.) Then she pushed him off of her and walked out of the elevator. (Id.) In addition, the video footage at the Waffle House does not support the idea that the two were physically affectionate – they sat on opposite sides of the table and did not appear to touch each other at all. (Pros. Ex. 5.)

The surrounding circumstances support that CL was capable of consenting throughout the entire evening. And the video footage at the casino and at the Waffle House show that she walked unassisted throughout the evening and into the early morning hours. (Pros. Ex. 3, 4, 5.) After the casino, they went to a few bars, CL recalled walking around and talking with people, but she did not remember the conversations or whether she drank more alcohol. (R. at 442.) The entire time CL was capable of walking on her own without assistance from Appellant. She was talking and interacting with others and Appellant, and she did not appear unsteady at all. (Pros. Ex. 3, 4, 5.) Appellant testified that they continued drinking outside of the casino and eventually ate at the Waffle House – this was corroborated by video footage from the restaurant. (R. at 441, 618; Pros. Ex. 4, 5.) The Waffle House video footage shows CL walking into the restaurant, sitting at a table and eating – without issue – and then walking out without assistance. (Pros. Ex. 4, 5.). Then the two returned to CL's hotel room – this was corroborated by CL's testimony that she woke up in her hotel room the next morning. (R. at 450.)

Appellant then testified – without corroboration – that he and CL engaged in sexual activity that evening, and CL was passionate and engaged in the activity. (R. at 695.) CL does not recall this. Then Appellant testified that he drifted off to sleep. (R. at 627.) Even if events unfolded in the hotel room as Appellant claimed, a previous sexual encounter does not mean that CL gave consent for a sexual encounter in the morning. MCM, pt. IV, ¶ 60.a.(g)(7)(A). In fact,

CL testified that she did not tell the accused that he could penetrate her vagina while she slept. (R. at 474.) Appellant did not testify to some mistaken belief that he could wake her up with sex – in his testimony he denied penetrating her at all upon waking up. (R. at 627-628.)

The sexual activity at issue occurred the morning after the concert – after Appellant woke up. Appellant committed a sexual act upon CL by penetrating her vulva with his penis on Sunday morning after the concert at the casino. (R. at 447.) "The term 'sexual act' means the penetration, however slight, of the penis into the vulva []." MCM, pt. IV, ¶ 60.a.(g)(1)(A). CL testified that she woke up on her side facing away from Appellant towards the window, and she remembered seeing the morning light around the edges of the blinds. (R. at 450.) Upon waking up she felt Appellant's penis already inside of her – a fact finder could reasonably conclude that she meant his penis in her vulva. The moment that CL was awake but before she pulled away from Appellant, the sexual act was complete.

In contrast, Appellant testified that in the morning, he was "flaccid" and was not penetrating CL. (R. at 627.) He claimed that he put his hand on her back, and she "recoiled" away from him. (Id.) This is the key difference between Appellant's story and CL's account. But on the issue of culpability, Appellant's testimony is untrustworthy because Appellant admitted under oath that he lied to CL on at least a dozen occasions about their sexual interactions that night to avoid responsibility, a court-martial, and a conviction. (R. at 683, 685, 686.) Appellant testified that "I engaged in double speak with her." (R. at 636.) Meanwhile, CL's credibility was not challenged, and evidence was presented that she reported the assault almost immediately. (R. at 466, 540.) She submitted to a SANE the day of the sexual assault; she attended her training virtually the Monday after the sexual assault; and then reported the sexual assault to her instructor the Tuesday after the assault. (R. at 466, 540.) Thus, a fact finder

and this Court could decide CL's testimony was credible, and Appellant's uncorroborated testimony was not dependable.

In addition, Appellant claims that he did not penetrate CL the morning after the concert. (R. at 673.) But he felt compelled to lie to her about what happened between them. (Pros. Ex. 2.) He lied to her because he knew that he lacked her consent to have sex with her that morning. CL testified that she never gave Appellant permission to penetrate her while she was asleep or wake her up with penetration. (R. at 474.) And Appellant did not testify that he thought he was allowed to penetrate her while she was asleep. Had the interaction been consensual, Appellant would not have been compelled to lie to CL, or fear repercussions like a court-martial or a conviction. Appellant lying to downplay his culpability, is circumstantial evidence that he understood he needed her consent for penetration, but he knew that he did not have it. (Pros. Ex. 2.)

The government proved beyond a reasonable doubt via CL's testimony that Appellant penetrated CL with his penis. In addition, the government thwarted Appellant's attempts to contradict CL by highlighting the lies Appellant told CL to diminish his culpability. The government proved the first element beyond a reasonable doubt.

Appellant penetrated CL's vulva without her consent. "The term 'consent' means a freely given agreement to the conduct at issue by a competent person." MCM, pt. IV, ¶ 60.a.(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." MCM, pt. IV, ¶ 60.a.(g)(7)(C).

Hours before the sexual act occurred, video evidence from the casino showed CL and Appellant walking arm in arm and Appellant attempted to kiss CL in the elevator until she pushed him away. (Pros. Ex. 3.) But even if this behavior is flirtatious that is not an invitation to

engage in sex because "[a] current or previous dating or social or sexual relationship by itself . . . does not constitute consent. MCM, pt. IV, ¶ 60.a.(g)(7)(A). And neither Appellant nor CL testified to some kind of freely given agreement that Appellant could have sex with CL in the morning or that Appellant could wake her up using sex.

CL woke up, and upon registering that she was being penetrated by Appellant, moved away from Appellant to stop the penetration. "An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." MCM, pt. IV, ¶ 60.a.(g)(7)(A). By pulling away from Appellant, CL manifested her nonconsent. Appellant started the sexual act while CL was asleep, but the minute she woke up she was capable of consenting, she did not grant Appellant consent, and she manifested her nonconsent. Thus, Appellant's penetration of CL from the moment she woke up to the moment she pulled away was a nonconsensual sexual act. The government proved beyond a reasonable doubt via CL's testimony that Appellant's penetration of CL's vulva was not consensual. The government proved the second element – and the entire offense – beyond a reasonable doubt.

B. A rational fact finder could find, beyond a reasonable doubt, that Appellant penetrated CL's vulva with his penis without her consent.

All the essential elements of the offense are met; thus, Appellant's sexual assault conviction is legally sufficient. The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted.) This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather, whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). Any rational trier of fact "draw[ing] every reasonable inference from the

evidence of record in favor of the prosecution" could find that Appellant began penetrating CL's vulva while she was asleep, but the moment she woke up, she was able to consent and did not. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted.) Legal sufficiency is a very low threshold, but the government exceeded that threshold in this case. King, 78 M.J. at 221 (internal citations and quotations omitted.)

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

Both CL and Appellant testified in this case. Appellant testified that he did not penetrate CL the morning after the concert – instead he claimed he was "flaccid" and only touched her back. (R. at 627.) This conflicts with CL's account that she woke up to his penis inside of her. (R. at 447, 451.) When Appellant's explanation of the morning's events differed from CL's account, it was reasonable for the fact finder to decide that Appellant's statements were not trustworthy because Appellant admitted to lying to CL on a dozen occasions to diminish his culpability and avoid a court-martial. (R. at 684, 685, 702.) Even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted.) This Court should decline to disturb the conviction here because a reasonable fact finder viewing the evidence in the light most favorable to the prosecution, would draw the conclusion that CL's account of the

penetration was accurate, and the penetration occurred without her consent. Thus, the offense is legally sufficient.

C. Appellant failed to demonstrate a deficiency in proof, so this Court should decline to conduct discretionary factual sufficiency review.

An appellant must show a specific deficiency in proof before this Court may conduct factual sufficiency review. 10 U.S.C. § 866(d)(1)(B)(i); Harvey, 85 M.J. at 130. Citing to United States v. Serjak, No. ACM 40392, 2024 CCA LEXIS 524, at *42 (A.F. Ct. Crim. App. Dec. 11, 2024), *recon. denied*, No. ACM 40392 (A.F. Ct. Crim. App. Jan. 22, 2025), Appellant claims that CL's capacity to consent is a required element that the government must prove, and the government failed to prove it. (App. Br. at 26.) The government disagrees that this is a required element because the plain language of the statute does not include it as one. 10 U.S.C. § 920(b)(2)(A). Even if it were an element, Appellant's claim fails due to the proof provided at trial through *his own testimony*.

Appellant attempts to shoehorn his case into United States v. Mendoza, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024), by claiming that CL was incapable of consenting due to alcohol impairment throughout the evening and then upon waking up in the morning. Incapable of consenting means that a person is "incapable of appraising the nature of the conduct at issue; or is physically incapable of declining participation in, or communicating [unwillingness] to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8). Although Appellant makes the claim on appeal that CL was incapable of consenting when he penetrated her, Appellant's own trial testimony frustrates this argument. His own evidence does not support the claim that CL was so intoxicated by alcohol that she was incapable of consenting at any point in her interactions with Appellant.

No evidence supports the claim that she was incapable of consenting due to alcohol intoxication during the evening. The casino video footage from that night shows that CL was walking without assistance and talking. Appellant testified that she engaged in long coherent conversations with strangers, and she was even able to jump into his arms and wrap her legs around him – he stated it was not because she was too drunk to walk. (R. at 616.) She was capable of dancing and walking on her own. (R. at 617.) The casino video footage and the Waffle House video footage supports this assertion as well. (Pros. Ex. 3, 4, 5.) She did not need any help walking, and she walked with purpose, made transactions at the bar, and talked with people. (Pros. Ex. 3) She even ordered her own food at the Waffle House before they went back to her hotel room. (R. at 618.) He went onto explain that once at her hotel room door, she was able to find the key to her door, and unlock it without assistance. (R. at 616, 619.) Her ability to navigate stairs and her door shows that she was physically capable and was physically able to control her body. She also had a discussion with Appellant about how Appellant should stay the night and not drive onto base after he was drinking. (R. at 616, 619.) Her ability to discuss the consequences if Appellant drove onto base after driving demonstrates that she could appraise the nature of conduct occurring around her.

No evidence supports the claim that she was incapable of consenting due to intoxication upon waking up in her bed. Appellant argues that because CL was in a groggy state in the morning, and she said she was "too drunk to do anything" that she was incapable of consenting. (App. Br. at 24.) Here CL's testimony thwarts Appellant's argument on appeal. She physically responded to Appellant's penetration by pulling away from him. (R. at 452.) And she understood what was going on because she started crying and then had a short conversation with Appellant almost immediately after pulling away from him. (R. at 453-455.) And the testimony

of Appellant's forensic psychologist further frustrates his claim on appeal. As the defense's forensic psychologist explained, after a person stops drinking, the alcohol metabolizes, and the alcohol's effects wear off. (R. at 600-601.) No evidence was presented that CL consumed alcohol after 0500 hours. No evidence was presented that she drank more alcohol at the Waffle House or that CL drank in her hotel room. Appellant essentially testified that CL ate food at the Waffle House, and she got ready for bed once she returned to her room, and she got into bed. (R. at 620.)

Appellant's claim that CL was incapacitated due to alcohol and the government's failure to prove she was capable of consent was a deficiency in proof is unsupported by the evidence. According to Appellant's own testimony, CL had the capacity to walk, talk, jump into his arms, navigate stairs, and she had the cognitive ability to discuss the dangers of him driving back to base after drinking. His claim does not constitute a deficiency in proof, it is a mere disagreement with the fact finder's conclusion. And our sister services have determined that mere disagreements with the fact finder are insufficient to establish a deficiency of proof. *See* United States v. Valencia, 2024 CCA LEXIS 515, at *12 (N-M Ct. Crim. App. 5 December 2024) (holding that a general disagreement with a verdict falls short of a specific showing of a deficiency in proof); United States v. Brassfield, 2024 CCA LEXIS 497, *12-13 (A. Ct. Crim. App. 20 November 2024) (finding contrary testimony by the appellant and inconsistencies in the victim's testimony to be insufficient to establish a specific showing of a deficiency in proof).

Appellant's claim fails to trigger this Court's factual sufficiency review. Because Appellant failed to meet his burden, this Court cannot review for factual sufficiency.

D. Even if Appellant met his burden to trigger factual sufficiency review, the finding of guilty is not against the weight of the evidence.

If this Court decides that both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." 10 U.S.C. § 866(d)(1)(B)(ii). This Court should find that the evidence supports a conviction beyond a reasonable doubt and the finding of guilty is not against the weight of the evidence.

The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. The evidence about the sexual assault came from CL's and Appellant's testimony. "[T]he degree of deference will depend on the nature of the evidence at issue," and in a case where the credibility of a witness is at issue – like Appellant's in this case – more deference could be given to the trail court since this Court could see the witness testimony. Harvey, 85 M.J. at 130. Because testimonial evidence forms the foundation for the conviction, this Court should give greater deference to the fact finder – the panel members – because they saw and heard the testimony, and they determined which of the witnesses was more credible based on that testimony. Appellant testified under oath that he lied to CL a dozen times to avoid responsibility. But CL's credibility was not challenged, she submitted to a SANE the same day, and she reported the offense within three days of the sexual assault occurring. (R. at 466, 540.) If the panel believed Appellant's testimony, then the panel would have acquitted Appellant because he testified that he did not penetrate CL the morning after the concert – so no sexual act occurred, and no consent was required. By deciding Appellant was guilty of the offense, the panel determined CL was the credible witness, and penetration did occur, and CL did not consent to it.

The conviction may only be disturbed if this Court is "clearly convinced that the finding of guilty was against the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii). This Court

should not be convinced by Appellant's arguments and should decline to disturb the conviction. This Court should deny this assignment of error.

II.

APPELLANT WAIVED ANY CLAIM TO AN INSTRUCTION ABOUT THE VICTIM'S CAPACITY. EVEN IF THERE IS NO WAIVER, THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS.

Additional Facts

Appellant never requested a special instruction that proof of a victim's capacity to consent is required element under Article 120(b)(2)(A). The military judge asked if there were any additional requests for instructions, and trial defense counsel answered, "No, Your Honor." (R. at 709.) The military judge then asked if there were any objections to the instructions, and trial defense counsel answered, "No, Your Honor." (R. at 709.)

Standard of Review

"Whether an appellant has waived an objection is a legal question that this Court reviews de novo." United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002).

"Questions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed de novo." United States v. Voorhees, 79 M.J. 5, 15 (C.A.A.F. 2019) (citation omitted). But a military judge's denial of a requested instruction is reviewed for an abuse of discretion. United States v. Carruthers, 64 M.J. 340, 346 (C.A.A.F. 2007).

Law and Analysis

A. Appellant waived this issue when he failed to request a special instruction on the victim's capacity, and he agreed that no other instructions were necessary.

Appellant relinquished a known right to request special instructions when trial defense counsel stated that he did not want to request any additional instructions, and trial defense counsel had no objections to the instructions as written. (R. at 709-710.) "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal quotation marks omitted) (citation omitted).

Appellant argues in a footnote that this issue was not waived because there was no intentional relinquishment of such an instruction nor an abandonment of a *known* right. (App. Br. at 28, n.180). "Nothing in the record establishes—or even suggests—that the defense knew it had the right to have the members instructed that Appellant could be convicted of the charged offense only upon a finding . . . that CL was capable of consenting at the time of the sexual act." (Id.). This argument fails because the relinquishment was intentional and the right to request an additional instruction was known.

First, the military judge specifically asked if trial defense counsel wanted to request any additional instructions, and they explicitly stated that they did not. (R. at 709.) This was an intentional relinquishment. Trial defense counsel chose to forgo any requests for additional instructions. (R. at 709.) And trial defense counsel affirmatively stated that he did not have any objections to the instructions as written. (R. at 710.) This meets the first prong of the waiver test.

Second, the trial defense counsel would have known of the right to request additional instructions. In addition, whether the victim's ability to consent is an element under Article

120(b)(2)(A) has been an issue raised at courts-martial for some time. *See* United States v. Casillas, 2024 CAAF LEXIS 329, *1 (14 June 2024). The instruction is not novel and is often requested in sexual assault cases with hybrid facts where a victim was asleep and woke up to penetration – at which point she did not consent. Our superior court granted on this issue in Casillas, 2024 CAAF LEXIS 329, *1. In that case, trial defense counsel preserved the issue by making the request at the court-martial in 2022 – the offense at issue in that case occurred in 2020. Brief for the United States at 2-3, Casillas, 2024 CAAF LEXIS 329, *1, U.S.C.A. Dkt. No. 24-0089. Appellant's court-martial occurred in 2023. (*Entry of Judgment*, ROT, Vol. 1.) Meaning that a year before Appellant was court-martialed, this tailored instruction was in the minds of military defense counsel. In other words, defense attorneys knew about this argument as a potential avenue in sexual assault cases with hybrid fact patterns like this one. So, trial defense counsel would have known about this instruction and the right to request it. This meets the second prong of the waiver test. Because both prongs are met, this Court should find that Appellant waived the right at trial.

Appellant alleges that "[t]he defense at trial challenged the military judge's draft instructions, arguing that no instruction should be given concerning CL allegedly being asleep," and that challenge was sufficient to preserve this instruction issue on appeal. (App. Br. at 29.) It was not. The argument trial defense counsel made was based on the elements found in Article 120. (R. at 712.) Asleep and a lack of consent are two different theories of liability, and trial defense counsel was parsing out the elements of each theory of liability. (R. at 712.) But trial defense counsel was not asking the military judge to add new elements to the statute – he was arguing the theories of liability that applied in this case, and he was focusing on the elements that already exist in the statute – he was not asking the military judge to add an element. Thus, the

trial defense counsel's arguments about the elements was insufficient to preserve this instruction issue on appeal.

B. Even if waiver does not apply, whether a victim had the capacity to consent is not an element under the plain language of Article 120(b)(2)(A).

A victim's capacity to consent is not an element under the plain language of Article 120(b)(2)(A). Thus, the military judge did not err when he did not instruct the panel on whether the victim needed to have capacity to consent. Congress does not require evidence of the victim's capacity to prove the offense. 10 U.S.C. § 920(b)(2)(A). The plain language of the statute requires the government to prove that an accused "commits a sexual act upon another person" "without the consent of the other person." 10 U.S.C. § 920. Mendoza does not create a new element and the opinion never states that proof of the victim's capacity to consent is required to prove lack of consent. 2024 CAAF LEXIS 590.

Required elements are those that are "listed in the statute that define[] the crime." Richardson v. United States, 526 U.S. 813, 817 (1999). And Congress holds the power to define criminal offenses and their elements, "particularly in the case of federal crimes, which are solely creatures of statute." U.S. CONST. art. I, § 8, cl. 10; Liparota v. United States, 471 U.S. 419, 424 (1985). Thus, "[i]n determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive." McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986); United States v. Evans, 333 U.S. 483, 486 (1948). Congress determines the crime and their elements, and the courts "uphold legislative choices." United States v. Kennedy, 682 F.3d 244, 260 (3d Cir. 2012).

Appellate courts have recently declined to add elements to offenses considering the separation of powers. "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending

statutes outside the legislative process reserved for the people's representatives." Bostock v. Clayton Cty., 590 U.S. 644, 654-55 (2020). The Court of Appeals for the Armed Forces stated, "it is for Congress to define criminal offenses and their constituent parts." United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010); *See also* United States v. Valentin-Andino, 2025 CAAF LEXIS 248, *11 (C.A.A.F. 31 March 2025) (stating the same); United States v. Roderick, 62 M.J. 425, 432 (C.A.A.F. 2006) (declining to "create an element that is unsupported by the statute").

The military judge in this case declined to sua sponte add an element – not found in the statute – to the instructions. But he did not err. He followed the precedent of our superior courts, and he articulated the congressionally mandated required elements when instructing the panel. (R. at 722-723.) Because the statute did not mandate proof of the victim's capacity and the courts are not permitted to create new elements, the military judge's decision to provide the standard sexual assault instructions was proper and not an abuse of discretion. No relief is warranted. This Court should deny Appellant's assignment of error.

III.

APPELLANT'S RIGHT TO CONSTITUTIONAL FAIR NOTICE WAS NOT VIOLATED.

Standard of Review

The constitutionality of a statute is a question of law and is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

A. Mendoza does not apply in this case because the charged offense under Article 120(b)(2)(A) required proof of consent that (b)(2)(B) did not require.

Mendoza does not apply to all theories of liability under Article 120, UCMJ. 2024 CAAF LEXIS 590. And Mendoza does not apply to this case where Appellant began penetrating

CL while she was asleep; she woke up to his penetration; and she manifested nonconsent by moving away from him to stop the penetration. The conflict in Mendoza arose because (b)(2)(A) (without consent) and (b)(3)(A) (incapable of consent) each require some proof surrounding the element of consent and surplusage within the statute was at issue. *See* 10 U.S.C. § 920(b). But the other subsections of Article 120(b) do not discuss consent; subsections (b)(1) (threatening, fear, fraudulent representation, artifice, etc.) and (b)(2)(B) (asleep, unconscious, otherwise unaware) do not require a consent element. In this case, CL testified that she was asleep when the sexual assault initially began, but she woke up and manifested her nonconsent by moving away from Appellant. (R. at 452.) The theories of liability here are (b)(2)(A) (without consent) and (b)(2)(B) (asleep), and unlike in Mendoza, surplusage is not an issue because (b)(2)(B) (asleep) does not require proof of consent.

In Mendoza, CAAF was concerned that although the appellant was charged under subsection (b)(2)(A) (without consent), he might have been convicted under a subsection (b)(3)(A) (incapable of consenting) theory of liability. 2024 CAAF LEXIS 590, at *17. But this same concern does not exist when evidence of both (b)(2)(A) (without consent) and (b)(2)(B) (asleep) are presented at trial. When subsection (b)(2)(A) (without consent) is charged, and the military judge instructs on all the elements of a "without consent" offense, a servicemember cannot be convicted under a (b)(2)(B) (asleep) theory of liability because consent is not an element or consideration under that theory.

In this case, the military judge instructed the panel that they must find beyond a reasonable doubt that Appellant committed a sexual act upon CL without her consent. (R. at 722.) The judge also instructed the panel that a sleeping person cannot consent. (R. at 723.) The panel returned a guilty verdict, thus, Appellant cannot claim he was actually convicted under

a subsection (b)(2)(B) (committing a sexual act upon a sleeping person) theory of liability, because the members found the accused guilty of the extra "without consent" element not included anywhere in section (b)(2)(B). Considering the "reasonable presumption that Congress did not intend [an interpretation of a statute] which raises serious constitutional doubts," Clark v. Suarez Martinez, 543 U.S. 371, 381 (2005), this Court should be unpersuaded that subsection (b)(2)(A) permits conviction on an uncharged theory of liability in this case or any other case.

Appellant cites to Mendoza for the proposition that the government cannot charge one theory of liability and then argue a different theory of liability at trial. (App. Br. at 34) (citing Mendoza, 2024 CAAF LEXIS 590, at *18 (citation omitted). But that is not what happened here. The government did not change theories of liability between charging Appellant and trial. The government charged and proved one theory of liability – without consent – but argued all the surrounding facts and circumstances associated with Appellant's actions. (R. at 741-743.) As CAAF stated in Mendoza, Article 120, UCMJ, does not bar "the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent" the government just cannot depend solely on that evidence to prove its case. 2024 CAAF LEXIS 590, *22. Here, trial counsel did more than "prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent." Id. He argued:

> Remove black out from the situation. This is – this is the scenario. She is laying there not moving, not facing, not touching him at all. Why, under those circumstances, do you think it's okay to have sex with me? Why, under those circumstances, would it be okay to have sex with anybody? Awake, asleep, drunk out of their mind, tripping on acid, what difference does it possibly make if these are the conditions we're facing? There cannot have been a freely given agreement in these circumstances because she's not moving, she's not touching him, she's not facing him, not speaking to him, not interacting with him at all. ***That equals no agreement and no consent.***

(R. at 742.) (emphasis added). Then he went on to argue:

> She could be laying there wide awake, one hundred percent cognizant of everything that's happening. But if she's not speaking, she's not facing him, they're not communicating, this is just a matter of one individual jamming his penis in another individual with no prior interaction, no discussion, no foreplay, nothing, nothing whatsoever. And it doesn't matter whether she was awake or asleep or blacked out. So, the evidence shows you that she was asleep. The claim will be made that she was blacked out, but it doesn't even matter if she was awake. There's no possible way in which consent could be reached here.

(R. at 743.) This is the type of argument that the Mendoza Court permitted – a thorough discussion of all the facts and circumstances of the case with an emphasis on the charged theory of liability. This case is like United States v. Boren, in which this Court decided "the fact that [the victim] was asleep when the unlawful touching started was a fact and circumstance surrounding the charged sexual contact . . . therefore it was an appropriate fact for circuit trial counsel to comment on during closing argument." 2025 CCA LEXIS 103, *28 (A.F. Ct. Crim. App. 19 March 2025). The same is true in this case. The fact that CL was asleep when the penetration began was a fact that the government could comment on. But importantly, it was not the only evidence of nonconsent that the government provided the members, and the government never changed its theory of liability. The government proved and argued the charged theory of liability – without consent. This Court should find Appellant's arguments under Mendoza unpersuasive.

B. Subsections (b)(2)(A) and (g)(7) provide servicemembers adequate notice of what is criminal conduct and dispel any misconceptions that consent can be gained while a victim is asleep.

This Court can easily interpret Article 120(b)(2)(A) and (g)(7) "in a way that avoids placing [their] constitutionality in doubt." United States v. Kohlbek, 78 M.J. 326, 332 (C.A.A.F. 2019) (citation omitted). Article 120(b)(2)(A) provides notice of what conduct is forbidden—a

sexual act committed upon another person without the consent of the other person. Article 120(g)(7) then defines consent and provides notice of circumstances under which a servicemember cannot gain consent from the other person, e.g. when that other person is "sleeping, unconscious, or incompetent" or has been placed "under threat or in fear." Without this definition, servicemembers in Appellant's situation might incorrectly believe that they can gain consent while a victim is asleep, even where the victim never gave consent before falling asleep. Together, these portions of the statute (1) lay out the elements of the offense an accused must defend against (a sexual act perpetrated without consent) and (2) notify an accused of ways he may not defend against those elements (such as by claiming consent was given while the victim was asleep or under threat). The definition of consent in Article 120(g)(7) is important. Again, without it, servicemembers might incorrectly believe that consent can be obtained while a victim is asleep, even where the victim never gave consent before falling asleep. Through its statutory definition of consent in Article 120, UCMJ, Congress gave notice that is not the case. Any servicemember reading the entirety of Article 120 would understand that committing a sexual act upon a person without consent is crime, even if they are sleeping.

There is nothing unconstitutional about the statute's construction. The statute articulates the proscribed conduct and provides the available defenses to an offense charged under the statute. If the military judge appropriately instructs the members that they must find beyond a reasonable doubt that the accused perpetrated the sexual act "without the consent of the other person," the members will be presumed to follow those instructions, and the government will not have "switched theories" at trial—especially to a theory of liability that does not encompass the element of consent.

Because the statutory scheme highlights all the ways in which an accused cannot gain consent – such as when a victim is asleep or incapable of consenting – the statute accounts for situations where a victim unequivocally did not consent but might have been both capable of consenting and asleep at different times during the same sexual act. This construction allows the government to account for the entire scope of a sexual act without having to charge the accused with two specifications of sexual assault under two separate theories of liability. It also protects the accused from ending up with two sexual assault convictions, when he might only have had one.

Mendoza acknowledged that subsection (g)(7)(C) requires that "all the surrounding circumstances" be considered in evaluating the existence or nonexistence of consent. *See* 2024 CAAF LEXIS 590, at *22 (citing 10 U.S.C. § 920(g)(7)(C)). This requirement reflects the need for statutes to be sufficiently broad to "adequately 'deal with untold and unforeseen variations in factual situations.'" United States v. Rocha, 84 M.J. 346, 351 (C.A.A.F. 2024) (quoting Boyce Motor Lines, Inc v. United States, 342 U.S. 377, 340 (1952)). Not all sexual assaults are committed under the same conditions. A sexual encounter may be nonconsensual from start to finish, or it may start consensually and become nonconsensual partway through. A victim may be awake for parts of the encounter but asleep at other times. Some victims may resist or verbalize nonconsent, while others may say and do nothing at all. And in those cases where there is no "positive action or response"—such as verbal or physical resistance—from the victim, it is the other surrounding circumstances that will tell the factfinder whether there was a lack of consent. United States v. Webster, 40 M.J. 384, 386 (C.A.A.F. 1994) ("[P]roof of a 'manifestation of lack of consent' does *not* require 'some positive' action or response by the victim.")

But requiring the factfinder to consider the "all the surrounding circumstances" in evaluating consent does not just serve the prosecution—it also serves the accused, both as a sword and shield. As this Court noted in Mendoza, an accused can leverage the "surrounding circumstances" as a sword to undermine the prosecution's case—just as the prosecution can offer evidence of an alleged victim's intoxication to prove the absence of consent, the defense can "offer[] the same evidence to show reasonable doubt." 2024 CAAF LEXIS 590, at *22 (citing Article 120(g)(7)(C)). Those same circumstances might also be the accused's shield against criminal liability, because they may support a mistake of fact as to consent defense. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3A-44-2 (29 February 2020) ("The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under *all the circumstances*.")

Article 120's comprehensive definition of consent provides detailed notice to servicemembers of the various facts that may be used to determine whether a sexual act was committed without consent. This does not mean that the prosecution can switch theories of liability mid-trial, but it reflects the reality that there may be "untold and unforeseen variations" of sexual assault without consent that do not fit neatly into a single category or fact-pattern. Rocha, 84 M.J. at 351. This is another reason why Article 120(b)(2)(A) (without consent) exists as a broad option for charging an accused.

Subsections (b)(2)(A) and (g)(7) provide servicemembers, including Appellant, adequate notice that committing a sexual act upon another person without their consent is prohibited conduct. And this Court should decline to apply Mendoza in this case because the charged offense under Article 120(b)(2)(A) required proof of consent that (b)(2)(B) did not require.

Appellant's constitutional right to notice was not violated. This Court should deny Appellant's assignment of error and deny relief.

IV.

ARTICLE 120(B)(2) AND ARTICLE 120(G)(7), UCMJ, PROVIDE SERVICEMEMBERS SUFFICIENT NOTICE SO THE SUBSECTIONS ARE NOT CONSTITUTIONALLY VAGUE.

Standard of Review

The constitutionality of a statute is a question of law and is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law

The statutory text of Article 120(b)(2)(A), UCMJ, provides that "[a]ny person subject to this chapter who commits a sexual act upon another person without the consent of the other person… is guilty of sexual assault and shall be punished as a court-martial may direct."

The statute then defines "consent" as follows:

> (A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).
>
> (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

10 U.S.C. § 920(g)(7).

Analysis

Due process requires that criminal statutes "give people of common intelligence fair notice of what the law demands of them." United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quotations omitted). A statute is "void for vagueness" if "one could not reasonably understand that his contemplated conduct is proscribed." Parker v Levy, 417 U.S. 733, 757 (1974) (citation omitted).

To win a facial vagueness challenge to a statute, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid," United States v. Salerno, 481 U.S. 739, 745 (1987), or that the statute lacks a "plainly legitimate sweep." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (internal quotation marks omitted). Facial challenges are designed to be "hard to win" because they "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024) (quoting Wash. State Grange, 552 U.S. at 471). Thus, if "[a] general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction," and it will not be struck down as facially vague. United States v. Harriss, 347 U.S. 612, 618 (1954).

Appellant cannot "demonstrate that the law is impermissibly vague in *all* of its applications." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982) (emphasis added). Article 120(b)(2)(A) has clear, permissible applications that would be obvious to "people of common intelligence." Davis, 139 S. Ct. at 2325. If a conscious, sober victim says "no" to an accused as he begins to have sex with her, but he continues to do so and

the victim does not resist, the crime of sexual assault without consent would be complete. This example shows how "[s]ubsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent." Mendoza, 2024 CAAF LEXIS 590, at *17. Because the statute is not vague in all applications, this Court should decline to strike it down as constitutionally vague.

Congress wrote Article 120, UCMJ to allow the government flexibility when charging hybrid fact patterns where a victim may be both capable and incapable of consenting during the same sexual act. The statute gives comprehensive notice of what conduct is proscribed and how an accused may or may not defend against any particular theory of liability. A military judge's instructions on the elements and this Court's admonitions in Mendoza prevent the government from switching theories of liability at trial. Since appropriate safeguards are available, this Court should not prevent Article 120, UCMJ from being implemented in a constitutional way. *See* Moody, 144 S. Ct. at 2397.

In Appellant's brief, he argues without further explanation that "[t]his case presents the same constitutional vagueness issues as that pending before [CAAF] in *Casillas*."[2] (App. Br. at 41-42.) And he brings this issue to this Court's attention to preserve it before CAAF. (Id.). But as the government argued in United States v. Casillas[3], Article 120(b)(2)(A) and (g)(7) can be made "constitutionally definite by a reasonable construction of the statute." Harriss, 347 U.S. at 618. As discussed above, this Court should find that the statute provided proper notice of prohibited conduct to all servicemembers – including Appellant. This Court should decline to provide any remedy to Appellant and deny this assignment of error.

[2] United States v. Casillas, 84 M.J. 477 (C.A.A.F. 2024) (mem.).
[3] Brief for the United States at 2-3, Casillas, 2024 CAAF LEXIS 329, *1, U.S.C.A. Dkt. No. 24-0089

V.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

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

Law and Analysis

Appellant waived this issue when his trial defense counsel neither filed a motion for appropriate relief requesting a unanimous verdict instruction nor orally moved for such an instruction. "Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." Day, 83 M.J. at 56 (citing United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)). Appellant intentionally relinquished the known right to request the instruction. The military judge asked defense counsel, "But does either counsel object to the instructions that I have given or request additional instructions?" (R. at 774.) In response, trial defense counsel stated, "No, Your Honor." (Id.)

Even if the issue is not waived, Appellant was not entitled to a unanimous verdict. 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 in accordance with Article 52. (R. at 772.) Appellant never requested a unanimous verdict instruction. Appellant's claim is based on the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), and 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 42-43.)

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.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) *certiorari denied* by Anderson v. United States, 218 L. Ed. 2d 21, 2024 U.S. LEXIS 827, 2024 WL 674728 (U.S., 20 February 2024). Our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

> [W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 April 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	
	)	Before Panel 3
Technical Sergeant (TSgt) (E-6) VIDARR SLAYTON United States Air Force, *Appellant.*	)	No. ACM 40583
	)	30 April 2025

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant replies to the United States' answer filed on 23 April 2025 (hereinafter Government's Brief).

Introduction

As the Court of Appeals for the Armed Forces has emphasized, "the government controls the charge sheet" and the "defense [is] entitled to rely on the charge sheet."[1] Thus, "[i]t is the government's responsibility, by virtue of its control of the charge sheet, to place the accused on notice of the offense he must defend against."[2] Here, the prosecution had evidence potentially implicating multiple theories of criminal liability. Yet the prosecution chose to place Appellant on notice to defend against only a single offense: a violation of Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920(b)(2)(A), by engaging in a sexual act without consent.[3]

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[1] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). *Accord, e.g.*, *United States v. Smith*, __ M.J. __, No. 23-0207, 2024 CAAF LEXIS 759, at *8 (C.A.A.F. Nov. 26, 2024) ("The Government forgets, however, that it controls the charge sheet . . . ."); *United States v Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) ("it is the government that controls the charge sheet from the inception of charges through the court-martial itself").

[2] *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019).

[3] Charge Sheet.

Despite choosing to charge only the single offense of engaging in a sexual act without consent, the Government presented copious evidence undermining that theory of criminal liability by showing that the alleged victim was incapable of consenting at the time of the charged sexual act. That evidence included the alleged victim's own written statement that "I was too drunk to do anything."[4] Under the Court of Appeals for the Armed Forces' landmark decision in *United States v. Mendoza*, that evidence precluded a finding of guilty for the sole charged offense, which "criminalizes engaging in a sexual act with a person *capable of consenting* who did not consent."[5] That evidence renders Appellant's convictions factually and legally insufficient because it is incompatible with the Government's chosen charging scheme. The military judge also erred by failing to instruct the members that they may find Appellant guilty of the sole charge and its specification only upon a finding beyond a reasonable doubt that the alleged victim was capable of consenting at the time of the charged sexual act.[6] After the defense made a lack-of-notice objection that the military judge erroneously overruled,[7] the Government also repeatedly invited the members to convict Appellant based on a legal theory it did not include on the charge sheet

[4] Pros. Ex. 2 at page 2 of 6.
[5] *United States v. Mendoza*, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590, at *17 (C.A.A.F. Oct. 7, 2024) (emphasis added) ("Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent.").
[6] This point is not intended to cast blame on the military judge. As Judge Ryan observed in *United States v. Harcrow*, "Appellant is entitled to avail himself of the plain error doctrine here only because *Crawford v. Washington*, 541 U.S. 36 (2004), announced a 'new rule' while his case was on direct review—not because the military judge in this case did anything wrong." 66 M.J. 154, 160 (C.A.A.F. 2008) (Ryan, J., concurring). Similarly, here, Appellant is entitled to have his conviction reversed due to the military judge's failure to instruct the members in accordance with *Mendoza*'s interpretation of Article 120(b)(2)(A) because that case "announced a 'new rule' while his case was on direct review" and "not because the military judge in this case did anything wrong."
[7] Trial Tr. at 712, 717–18.

and did not place Appellant on notice to defend against.[8] That constitutional violation invalidates Appellant's conviction.

"[I]n law as in life, choices have consequences."[9] The consequence of the Government's charging choices and trial presentation is that Appellant's conviction is invalid.

Issue I.

The prosecution introduced copious evidence that CL was not capable of consenting at the time of the charged sexual act, thereby rendering the finding of guilty factually and legally insufficient because the charged offense "criminalizes engaging in a sexual act with a person *capable of consenting* who did not consent."[10]

A. The evidence at trial establishes a reasonable doubt as to whether CL was capable of consenting at the time of the sexual act, thereby precluding a conviction.

A conviction for a violation of Article 120(b)(2)(A) cannot be affirmed on appeal unless the evidence proves beyond a reasonable doubt that the alleged victim was capable of consenting but did not consent.[11] Here, it does not.

The alleged victim's self-assessment of her condition at the time of the sexual act was, "I was too drunk to do anything."[12] The Government's brief asserts that her "credibility was not challenged."[13] While CL's credible statement that she was "too drunk to do anything" undermines the conviction, that statement is far from the only evidence in the record suggesting she was not "a person capable of consenting" at the time of the sexual act. A wealth of additional evidence supports her self-characterization.

For Appellant to have been guilty of violating Article 120(b)(2)(A) by "engaging in a

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[8] *E.g.*, *id.* at 733, 736–37, 767, 770.
[9] *R.R. Donnelley & Sons Co. v. Vanguard Transp. Sys.*, 641 F. Supp. 2d 707, 722 (N.D. Ill. 2009).
[10] *Mendoza*, 2024 CAAF LEXIS 590, at *3 (emphasis added).
[11] *Mendoza*, 2024 CAAF LEXIS 590, at *3. *See also id.* at *17.
[12] Pros. Ex. 2 at page 2 of 6.
[13] Government's Brief at 11.

sexual act with a person capable of consenting who did not consent," the Government would have had to prove beyond a reasonable doubt three things concerning CL's capacity at the time of the sexual act: she was (1) capable of appraising the nature of the conduct at issue; (2) physically capable of declining participation in the sexual act as issue; *and* (3) physically incapable of communicating unwillingness to engage in the sexual act at issue.[14] Article 120(g)(8) is phrased in the disjunctive. If any of its three alternatives is present, then an individual is incapable of consenting. Hence, for the Government to prove beyond a reasonable doubt Article 120(g)(8)'s converse, it had to disprove all three alternatives beyond a reasonable doubt. It did not.

The key question here is not whether there is sufficient evidence to conclude beyond a reasonable doubt that CL was incapable of consenting due to impairment by alcohol at the time of the sexual act. Rather, the issue is whether the Government proved beyond a reasonable doubt that she was not incapable of consenting due to impairment by alcohol. Such a conclusion would require rejecting CL's own self-assessment, as well as ignoring considerable other evidence that the *prosecution* presented at trial. Because there is a "real possibility"[15] that CL was incapable of consenting due to impairment at the time of the sexual act, the finding of guilty is factually and legally insufficient.

The Government now contends that "[n]o evidence supports the claim that [CL] was incapable of consenting due to alcohol intoxication during the evening."[16] Doubling down on that

[14] *See* UCMJ art. 120(g)(8), 10 U.S.C. § 920(g)(8).
[15] *United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017). *See also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020) ("If we believe there is a 'real possibility' that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant's conviction.").
[16] Government's Brief at 16. Earlier in its brief, the Government contended that "[t]he surrounding circumstances support that CL was capable of consenting throughout the entire evening,"

argument, the Government also asserts that "[n]o evidence supports the claim that she was incapable of consenting due to intoxication upon waking up in her bed."[17] No evidence? The prosecution's case below included a plethora of evidence "support[ing] the claim that [CL] was incapable of consenting due to intoxication upon waking up in her bed."[18] The Government itself introduced CL's written statement in which she described herself as "too drunk to do anything" at the time of the sexual act.[19] The Government itself elicited CL's testimony that upon leaving the concert earlier that night, she was "very drunk."[20] The Government itself elicited CL's testimony that three drinks were typically enough to make her feel drunk and that she "consider[s] like four a lot."[21] The Government itself elicited CL's testimony demonstrating she consumed more than four alcoholic beverages that night.[22] CL's testimony suggested a distinct possibility that she drank even more alcoholic beverages but did not remember doing so because she spent much of the night in an alcohol-induced fragmentary blackout.[23] The Government itself elicited CL's testimony that "I knew I was very drunk looking back" due to her unusually extroverted behavior.[24] The senior trial counsel himself characterized video taken in the casino as demonstrating "clear signs of intoxication from" CL.[25] He cataloged several bizarre actions by CL, including sitting on the casino foyer's floor and rolling on her back, "playing with [a] woman's hair by the slot machines,"

Government's Brief at 10, notwithstanding her own self-characterization as "very drunk," Trial Tr. at 438, evidence that she was in an alcohol-induced fragmentary blackout for much of the evening, and the senior trial counsel's characterization of her as "in a blackout," *id.* at 736.

[17] Government's Brief at 16.

[18] *Id.*

[19] Pros. Ex. 2 at page 2 of 6. The Government's brief quoted this statement on page 16.

[20] Trial Tr. at 438. The Government's brief quoted this statement on page 3.

[21] *Id.* at 439.

[22] *Id.* at 435–36, 438, 439.

[23] *Id.* at 439, 442, 447, 480–83, 489–90, 586. *See also id.* at 736 (senior trial counsel stating that CL was "in a blackout").

[24] *Id.* at 439.

[25] *Id.* at 735.

and "being touchy with all sorts of random people, interacting with random people, all of which she has no memory of."[26] The Government itself elicited CL's self-description of her alertness when she awoke as "very just groggy and sleepy still."[27] She fell back asleep after believing she had been raped in her sleep and with the suspected rapist still in the room, which is consistent with a board-certified forensic psychologist's testimony concerning a "stupor" state caused by excessive alcohol intake.[28] CL's condition was so bad that she believed she had been drugged, although testing indicated she had not been.[29] Nevertheless, her self-perception that she was in a drugged state provides yet more evidence suggesting her incapacity to consent.

How often has the Government argued that comparable evidence established beyond a reasonable doubt that an alleged victim was incapable of consenting to a sexual act due to intoxication? The next time an appellant appears before this Court and argues that comparable indicia constitute "no evidence" that the alleged victim "was incapable of consenting," will the Government maintain the position it takes in this case and concede? Of course not. Nor should it, because the evidence in this case did "support[] the claim that [CL] was incapable of consenting due to intoxication upon waking up in her bed."[30] Here, however, the question is not whether such evidence rose to the level of proof beyond a reasonable doubt that CL was incapable of consenting. Rather, a mere "real possibility" that she was incapable of consenting precludes a conviction.[31] The evidence significantly exceeds that standard of proof.

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[26] *Id.*
[27] *Id.* at 456.
[28] *Id.* at 454–56, 599.
[29] *Id.* at 488–89, 556–57, 561–62.
[30] Government's Brief at 16.
[31] *See supra* note 15.

B. The Government's own assessment of Appellant's credibility precludes his testimony from extinguishing reasonable doubt as to whether CL was capable of consenting at the time of the sexual act.

The Government's brief offers internally inconsistent assessments of the proper weight to be accorded Appellant's testimony. The Government argues that there is no reasonable doubt as to CL's capability to consent because "Appellant's own trial testimony frustrates this argument."[32] Yet, in the same brief, the Government asserts that "Appellant's testimony is untrustworthy because Appellant admitted under oath that he lied to CL on at least a dozen occasions about their sexual interactions that night to avoid responsibility, a court-martial, and a conviction."[33] The Government insists that "Appellant's uncorroborated testimony was not dependable."[34] The Government also argues that CL was a more credible witness than Appellant.[35] To whatever extent Appellant's testimony differs from CL's on the issue of her capability to consent at the time of the sexual act, it does not extinguish the reasonable doubt as to her capability established by CL's self-assessment as "too drunk to do anything" and the considerable evidence corroborating that self-assessment.

C. The Government's argument relies on an assertion of fact that is unsupported by the record.

In arguing that CL had the capability to consent, the Government relies on a factual assertion that is unsupported by the record and inconsistent with the most reasonable interpretation of the evidence. The Government argues that CL "understood what was going on because she started crying and then had a short conversation with Appellant *almost immediately after* pulling

[32] Government's Brief at 15.
[33] *Id.* at 11.
[34] *Id.* at 12.
[35] *Id.* at 11-12.

away from him. (R. at 453-55.)"[36] Neither CL's testimony nor anything else in the record supports the Government's "almost immediately after" characterization. Rather, CL testified that after she moved away from Appellant, thereby stopping the penetration:

> I was feeling myself get upset, like crying a little bit, like kind of like sniffling. And *after a little bit of that*, I heard him get up and – from the other side of the bed, and come around to my side of the bed, and he kneeled down in front of my face . . . and he asked me what was wrong.[37]

Far from suggesting that her conversation with Appellant occurred "almost immediately" after she awoke, CL's testimony suggests the passage of some amount of time. In any event, there is a "real possibility" that CL gradually regained her situational awareness and ability to communicate after awakening—a state consistent with her self-characterizations as "too drunk to do anything"[38] and "very just groggy and sleepy still."[39] That evidence creates reasonable doubt at to whether she was (1) capable of appraising the nature of the conduct at issue; (2) physically capable of declining participation in the sexual act as issue; *and* (3) physically incapable of communicating unwillingness to engage in the sexual act at issue.[40]

D. Because the members were not asked to determine whether CL was capable of consenting at the time of the sexual act, there is no finding to which this Court could defer.

The Government argues that this Court must "give 'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.'"[41] Here, no deference is "appropriate." The members were not asked to determine whether CL was capable of consenting at the time of the sexual act. Accordingly, there is no determination by the factfinder below to

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[36] *Id.* at 16 (emphasis added).
[37] Trial Tr. at 453 (emphasis added).
[38] Pros. Ex. 2 at page 2 of 6.
[39] Trial Tr. at 456.
[40] *See* UCMJ art. 120(g)(8), 10 U.S.C. § 920(g)(8).
[41] Government's Brief at 18 (citing UCMJ art. 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii)).

which to defer. The record, however, suggests that at least one member questioned whether CL was capable of consenting at the time of the sexual act. During deliberations, one member asked, "Should we consider whether the victim was too intoxicated to consent even if she was awake?"[42] That is a strong indication that at least one of the members who "saw and heard the witnesses and other evidence"[43] was left doubting CL's capability to consent at the time of the sexual act. As well he should. Because there is reasonable doubt as to CL's capability to consent during the fleeting moment between when she awoke and when she moved away from Appellant, the findings of guilty are factually and legally insufficient.

Issue II.

The military judge erred by failing to instruct the members that an element of the alleged Article 120(b)(2)(A) offense was that the alleged victim was capable of consenting at the time of the sexual act.

A. Because *Mendoza* established a new rule of law, the military judge's failure to instruct the members on its requirements was not waived.

The UCMJ requires a military judge to "instruct the members of the court as to the elements of the offense."[44] "An element of a crime is a fact which the prosecution must prove to sustain a conviction for that offense."[45] The Court of Appeals for the Armed Forces has held that an alleged victim's capacity to consent is a fact that must be proven to obtain a conviction for the sole offense

[42] App. Ex. XXIII; Trial Tr. at 778.
[43] UCMJ art. 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii).
[44] UCMJ art. 51(c), 10 U.S.C. § 851(c). The current version of Article 51 was in effect when Appellant was tried. *See also* Rule for Courts-Martial 920(e)(1), *Manual for Courts-Martial, United States* (2019 ed.) ("(e) *Required instructions*. Instructions on the findings shall include: (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty" (paragraph break and indentation omitted)); *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014) ("A military judge has a sua sponte duty to instruct on the elements of every offense.").
[45] *United States v. Zachary*, 61 M.J. 813, 817 (A. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006).

charged in this case.[46] Contrary to the Government's argument, this is not an instance in which the onus was on the defense "to request a special instruction on the victim's capacity."[47] Rather, the military judge had a sua sponte duty to provide the omitted instruction. The military judge failed to perform that sua sponte duty.[48] That was error.

Appellant did not waive that error. "[W]aiver is the intentional relinquishment or abandonment of a known right."[49] The Court of Appeals for the Armed Forces explained in *United States v. Davis* that waiver will not be found "when there is a new rule of law, when the law was previously unsettled, and when the trial court reached a decision contrary to a subsequent rule."[50] That approach is consistent with the general definition of waiver because one cannot intentionally abandon a known right before that right has been established.

The Court of Appeals for the Armed Forces' fractured 2022 opinion in *United States v. Schmidt* reaffirmed *Davis*'s "new rule of law" paradigm in a manner that firmly establishes its applicability here.[51] *Schmidt* dealt with whether a military judge erred when instructing the members concerning what "in the presence of" means for purposes of Article 120b(c), UCMJ.[52] Judge Sparks concluded that the "trial defense counsel's failure to object was not waiver given the unsettled nature of the law at the time of Appellant's court-martial," applying *Davis*'s "new rule of law" paradigm.[53] Judge Sparks reasoned that "there was no binding precedent demonstrating

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[46] *Mendoza*, 2024 CAAF LEXIS 590, at *3, 17.
[47] Government's Brief at 20 (bold deleted).
[48] *See supra* note 6.
[49] *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal quotation marks omitted).
[50] *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (cleaned up).
[51] *United States v. Schmidt*, 82 M.J. 68 (C.A.A.F. 2022)
[52] *Id.* at 71–72.
[53] *Id.* at 73 (opinion of Sparks, J.). In *Schmidt*, after giving the instruction at issue on appeal, the military judge "asked counsel if they had any objections. Civilian defense counsel said: 'I do not, sir.'" *Id.* at 79 (Maggs, J., joined by Hardy, J., concurring in the judgment).

that 'in the presence of' required victim awareness. Accordingly, trial defense counsel's failure to object was not waiver given the unsettled nature of the law at the time of Appellant's court-martial."[54] Chief Judge Ohlson, joined by Senior Judge Erdmann, "agree[d] with Judge Sparks that this is not a waiver case."[55] Judge Maggs, joined by Judge Hardy, agreed that waiver does not apply "when a new rule of law exists."[56] They disagreed with the other three judges concerning whether a new rule of law arose between the trial and appeal. Judge Maggs and Judge Hardy concluded there was no such new rule of law because "[a]ll the authorities that Appellant cites in support of his argument predate his trial. . . . Appellant is thus not asking for the benefit of a new rule announced during the pendency of his appeal, and is therefore not entitled to plain error review."[57]

Here, Appellant *is* asking for the benefit of a new rule announced during the pendency of his appeal. Appellant's case was docketed with this Court on 15 March 2024.[58] The Court of Appeals for the Armed Forces issued its *Mendoza* opinion—which is the basis for this argument—on 7 October 2024.[59] Thus, as *Davis* and *Schmidt* make clear, Appellant's challenge to the military judge's failure to instruct on an element recognized by *Mendoza* is not waived. Moreover, there can be no doubt that *Mendoza* announced a "new rule of law." Nothing better demonstrates that than this Court's opinions in *United States v. Hennessy*. Before *Mendoza*, this Court affirmed the finding of guilty to a violation of Article 120(b)(2)(A) in *Hennessy*.[60] After the Court of Appeals

[54] *Id.* at 73 (opinion of Sparks, J.).
[55] *Id.* at 74 (Ohlson, C.J., joined by Erdmann, S.J., concurring in the judgment).
[56] *Id.* at 81 (Maggs, J., joined by Hardy, J., concurring in the judgment) (quoting *Davis*, 79 M.J. at 332).
[57] *Id.*
[58] https://afcca.law.af.mil/docket.html, last accessed 29 April 2025.
[59] *Mendoza*, 2024 CAAF LEXIS 590.
[60] *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024).

for the Armed Forces issued its *Mendoza* opinion, this Court reconsidered its original opinion, vacated it, and issued a new one reaching the opposite result.[61] The reason for that shift is because *Mendoza* established a new rule of law when it held that Article 120(b)(2)(A) "criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent."[62]

In its attempt to refute this argument and claim that waiver applies, the Government makes both a factual mistake and a legal mistake. The factual mistake is the Government's misguided attempt to equate the omitted instruction in this case with the instruction the trial defense counsel sought in *United States v. Casillas*.[63] The Government's brief in this case maintains that "whether the victim's ability to consent is an element under Article 120(b)(2)(A) has been an issue raised at courts-martial for some time," citing *Casillas*.[64] The Government describes *Casillas* as a case in which "trial defense counsel preserved the issue by making the request at the court-martial in 2022."[65] The Government concludes, "So, trial defense counsel would have known about this instruction and the right to request it."[66]

Actually, the defense in *Casillas* did not seek an instruction that capacity to consent is an element the prosecution must prove beyond a reasonable doubt in an Article 120(b)(2)(A) case. Rather, in *Casillas*, the defense asked the military judge to instruct the members: "In this case, there is no allegation that [the alleged victim] was too intoxicated to consent to sex. You are not

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[61] *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. Nov. 25, 2024), *reconsideration denied*, No. ACM 40439 (A.F. Ct. Crim. App. Jan. 10, 2025) (order), *certificate for review filed*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025), *petition filed*, __ M.J. __, No. 25-0113/AF, 2025 CAAF LEXIS 184 (C.A.A.F. Mar. 11, 2025).
[62] *Mendoza*, 2024 CAAF LEXIS 590, at *17.
[63] Government's Brief at 21 (citing "United States v. Casillas, 2024 CAAF LEXIS 329, *1 (14 June 2024).").
[64] *Id.* at 20–21.
[65] *Id.* at 21.
[66] *Id.*

permitted to consider whether she was too intoxicated to consent to sex. That is not an issue before you."[67] That instruction is starkly inconsistent with one that says the issue of capacity *is* before the members in an Article 120(b)(2)(A) case and that capacity must be found beyond a reasonable doubt for the accused to be found guilty.

Second, the Government's brief misconstrues the *Davis* "new rule of law" paradigm. The Government's waiver argument is premised on the proposition that "defense attorneys knew about this argument as a potential avenue in sexual assault cases with hybrid fact patterns like this one."[68] As demonstrated above, the Government is mistaken as to the contours of the argument that it posits, with no supporting evidence, was common knowledge among military defense counsel. But even if Appellant's trial defense counsel were aware that the issue was being litigated somewhere in the military justice system, that would not remove this case from the *Davis* "new rule of law" paradigm. Under *Davis* and *Schmidt*, waiver is inapplicable where an appellant "ask[s] for the benefit of a new rule announced during the pendency of his appeal."[69] That is precisely what occurred here. It is an appellate court's adoption of a new rule during the pendency of an appeal—not some unrelated litigant merely making an argument for a new rule—that is dispositive for waiver purposes.

B. The Government's brief is inconsistent with *Mendoza*, which the doctrine of vertical stare decisis requires this Court to apply.

After advancing its flawed waiver argument, the Government essentially invites this Court to disagree with the Court of Appeals for the Armed Forces' interpretation of Article 120 in

[67] Brief on Behalf of the United States at 9, *United States v. Casillas*, USCA Dkt. No. 24-0089/AF (filed 21 Aug. 2024) (citing JA at 547) (Appendix).
[68] Government's Brief at 21.
[69] *Schmidt*, 82 M.J. at 81 (Maggs, J., joined by Hardy, J., concurring in the judgment).

Mendoza.[70] Citing Article 120(b)(2)(A), the Government argues that "Congress does not require evidence of the victim's capacity to prove the offense."[71] Construing that same provision, the Court of Appeals for the Armed Forces held that it does. The Court expressly stated that "Article 120(b)(2)(A), UCMJ, criminalizes engaging in a sexual act with a person capable of consenting who did not consent."[72] Later, after engaging in a lengthy statutory construction analysis,[73] the Court held that Article 120(b)(2)(A) "criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent."[74] The Government cavils that *Mendoza* "never states that proof of the victim's capacity to consent is required to prove lack of consent."[75] Actually, *Mendoza* clearly requires just such proof. There is no other way to interpret the words that Article 120(b)(2)(A) "criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent"[76] than that the Government must prove capacity to consent to obtain a conviction under that subsection.

Under the well-recognized doctrine of vertical stare decisis, the Court of Appeals for the Armed Forces' interpretation of Article 120 is controlling.[77] Notwithstanding the Government's obvious disagreement with *Mendoza*'s interpretation of Article 120,[78] this Court, of course, is bound to apply it. Doing so requires setting aside the findings of guilty to the charge and its specification because the military judge plainly erred by failing to instruct the members that they

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[70] Government's Brief at 22–23.
[71] *Id.* at 22.
[72] *Mendoza*, 2024 CAAF LEXIS 590, at *3.
[73] *Id.* at *11–17.
[74] *Id.* at *17.
[75] Government's Brief at 22.
[76] *Mendoza*, 2024 CAAF LEXIS 590, at *17.
[77] *See, e.g.*, *United States v. Caswell*, No. ACM 23035, 2025 CCA LEXIS 98, at *17–19 (A.F. Ct. Crim. App. Mar. 17, 2025); *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *55 (A.F. Ct. Crim. App. Mar. 25, 2022).
[78] *See* Government's Brief at 22–23.

could convict Appellant only if they found beyond a reasonable doubt that CL was "capable of consenting but [did] not consent."[79]

Issue III.

The prosecution violated Appellant's Fifth and Sixth Amendment right to fair notice of the criminal charge against which he would need to defend by charging him with committing a sexual act without consent but advancing theories of criminal liability based on the alleged victim's lack of consciousness and lack of capacity and arguing that Appellant could be convicted on the sole basis that the alleged victim was asleep when penetrated.

The Government's brief on this assignment of error mischaracterizes what occurred at trial. The Government contends, "Appellant cites to Mendoza for the proposition that the government cannot charge one theory of liability and then argue a different theory of liability at trial. But that is not what happened."[80] That assertion simply ignores the many instances in which the prosecution invited the members to find appellant guilty in this "without consent" case on the alternate, uncharged theory of criminal liability that CL was asleep during the sexual act.

During the prosecution's opening statement, the trial counsel told the members, "*That is the charge in this case*, that the accused penetrated [CL] without her consent *while she was asleep*, lying on her side, facing away from him. And the evidence will show that she was asleep."[81] That is not a discussion of the "surrounding circumstances," as the Government now seeks to recharacterize its trial-level advocates' performance.[82] That is an invitation to convict Appellant on the uncharged theory that CL was asleep during the sexual act. The trial counsel repeated that invitation at the end of his opening statement when he told the members that at the trial's conclusion, "the United States will stand up in closing argument and tell you that the accused made

[79] *Mendoza*, 2024 CAAF LEXIS 590, at *17.
[80] Government's Brief at 25 (internal citation omitted).
[81] Trial Tr. at 409 (emphasis added).
[82] Government's Brief at 28–29.

a terrible judgement [sic] . . . when he stuck his penis inside [CL's] sleeping body, and we will ask that you find the accused guilty of sexual assault."[83]

Before closing arguments, Appellant's counsel correctly raised a lack-of-notice objection, observing that "the government has charged this as a consent [case], not as a sleeping or unconscious."[84] He explained, "[T]he government is trying to pursue what I would consider to be a different theory at this time with the jury that was not clearly stated."[85] In response, the senior trial counsel essentially admitted that the prosecution was seeking a conviction on the basis of CL being asleep, arguing that was consistent with an Article 120(b)(2) theory of criminal liability.[86] The military judge erroneously overruled the defense's lack-of-notice objection.[87]

Just as the trial counsel promised the members during opening statement, and just as the military judge erroneously permitted by overruling the defense's lack-of-notice objection, the senior trial counsel's closing argument repeatedly invited the members to convict Appellant on the uncharged theory that CL was asleep. For example, the senior trial counsel argued:

> You could have one hundred percent consensual sex with another individual, and then go to bed in the same room as them, in the same bed as them, under the same sheets as them, but if you wake up and you begin penetrating their vagina, sexually violating them in any way *while they sleep*, that is sexual assault. If you wake up and you initiate sex with a sleeping person, it doesn't matter if you've had sex once before, never before, or 10,000 times before. There is no freely given agreement to that sex.[88]

That argument was not a discussion of the "surrounding circumstances" of the sexual act; that argument was an invitation for the members to find Appellant guilty based on the uncharged

[83] Trial Tr. at 413.
[84] *Id.* at 712.
[85] *Id.*
[86] *Id.* at 713.
[87] *Id.* at 717–18.
[88] *Id.* at 737 (emphasis added).

theory that CL was asleep during the sexual act.

In *Mendoza*, the Court of Appeals for the Armed Forces highlighted several aspects of that court-martial that "raise significant due process concerns."[89] This case features some strikingly similar parallels.

In *Mendoza*, the trial counsel argued "not only that JW would not have consented but also that JW was incapable of consenting due to alcohol intoxication."[90] Here, the senior trial counsel emphasized to the members that a "sleeping or unconscious person cannot consent,"[91] thereby inviting a verdict on an uncharged theory of criminal liability. He subsequently told the members that "the question you have to consider" is "whether while [CL] was laying on her left side on that bed, facing that window, around 8:00 AM in the morning, she had given the accused an agreement to penetrate her vagina as he lay behind her *as she slept*?"[92] He then drove the point home, telling the members, that "sexually violating [an individual] in any way while they sleep, that is sexual assault."[93] The trial counsel then explicitly tied that principle to this case: "So, consider why there's no consent. I mean, first there's no consent because [CL] was asleep."[94] The senior trial counsel reiterated that theme yet again during his rebuttal argument when he told the members that during the pretextual electronic message exchange, Appellant offered "[n]o denials that she wasn't asleep. No denials that he penetrated her while she was asleep."[95] Finally, the denouement of the senior trial counsel's rebuttal sentencing argument asked the members to find Appellant guilty because

[89] *Mendoza*, 2024 CAAF LEXIS 590, at *19–20.
[90] *Id.* at *19.
[91] Trial Tr. at 733.
[92] *Id.* at 736 (emphasis added).
[93] *Id.* at 737.
[94] *Id.*
[95] *Id.* at 767.

"she is asleep and he's penetrating her while she's asleep."[96] The senior trial counsel thus directly and repeatedly invited the members to find Appellant guilty on the basis of an uncharged theory of criminal liability. Just as in *Mendoza*, the prosecutors here argued both the charged theory of absence of consent and an uncharged alternate theory of criminal liability.[97] And just as in *Mendoza*, those "arguments at trial raise significant due process concerns."[98]

Another striking parallel between the argument giving rise to "significant due process concerns" in *Mendoza* and this case is the prosecution's use of the accused's own words implicating an uncharged theory of criminal liability. In *Mendoza*, the trial counsel "[p]ointed to Appellant's own statements in which Appellant admitted that JW was 'really drunk' and that 'she wasn't able to give consent.'"[99] Here, the senior trial counsel argued to the members that in CL's pretextual electronic message exchange with Appellant, "when she asks him, 'So, you're not disagreeing that you had sex with me while I was asleep?' He responds, 'The second time, that may be what happened. I wasn't fully aware if you were or not. But if you were, then yes.'"[100] Later in the closing argument, the senior trial counsel repeated those words.[101]

Just as Appellant's counsel objected at trial,[102] the prosecution noticed one offense and then sought a conviction based on an alternate theory of liability. That violates the express Sixth Amendment right of an accused "to be informed of the nature and cause of the accusation," as well as the Fifth Amendment's Due Process Clause.[103] Appellant's conviction, obtained in violation of

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[96] *Id.* at 770.
[97] *See Mendoza*, 2024 CAAF LEXIS 590, at *19.
[98] *Id.*
[99] *Id.* at *20.
[100] Trial Tr. at 732 (quoting Pros. Ex. 2).
[101] *Id.* at 740.
[102] Trial Tr. at 712,
[103] U.S. CONST. amends. V, VI; *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).

his constitutional right "to receive fair notice of what he is being charged with,"[104] cannot stand.[105]

Conclusion

Choices have consequences. Here, the consequences of the prosecution's threshold choice to charge only a "without consent" theory of liability is that the resulting conviction is unsustainable.

Respectfully submitted,

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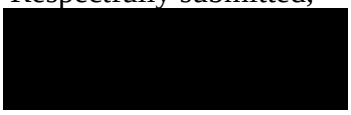
[104] *Girouard*, 70 M.J. at 10.

[105] In its response to Assignment of Error III, the Government's brief cites this Court's unpublished decision in *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025). Government's Brief at 26. *Boren*, however, is plainly distinguishable from this case. In *Boren*, the victim described her recollection of waking up to Appellant touching her vagina above her clothes. *Boren*, 2025 CCA LEXIS 103, at *7. There was then a second incident of touching. By that point, the victim testified, "it was very clear. There was no doubt in my mind what was happening. And I immediately shot up." *Id.* The defense challenged the conviction on the basis that "the Government prosecuted this case under a different theory—while asleep, rather than the charged theory of without consent." *Id.* at *15. Crucially, this Court held that "the evidence introduced at trial demonstrated that, *towards the end of the encounter*, KK was both capable of consenting and never consented to Appellant touching her vagina." *Id.* at *16 (emphasis added). Here, the sole fleeting moment of penetration while CL was conscious was similar to the initial touching of the victim in *Boren* at the beginning of the encounter. Unlike in *Boren*, there was no second sexual act after CL was fully awake. Nor does this Court's *Boren* opinion suggest that the victim there described herself as "too drunk to do anything" at the time of the encounter. Additionally, the facts in *Boren* are inconsistent with CL's self-description of her alertness at the time of the incident as "very just groggy and sleepy still." Trial Tr. at 456. Nor does this Court's *Boren* opinion suggest that the condition of the victim in that case was so dire that she believed she had been drugged. Thus, *Boren* is inapposite.

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 30 April 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40583**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Vidarr SLAYTON	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S MOTION TO ATTACH**
v.	)	
	)	Before Panel 3
Technical Sergeant (E-6) **VIDARR SLAYTON** United States Air Force, *Appellant*	)	No. ACM 40583
	)	1 May 2025

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

COMES NOW Appellant, Technical Sergeant Vidaar Slayton, U.S. Air Force, by and through his undersigned counsel, and pursuant to Rules 18(e) and 23 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, moves attach a relevant brief from another case as an appendix to his reply brief.

On 30 April 2025, Appellant's counsel filed a reply brief. As an appendix to that reply brief, counsel included the Brief on Behalf of the United States from *United States v. Casillas*, USCA Dkt. No. 24-0089/AF, a case currently pending before the United States Court of Appeals for the Armed Forces. On 1 May 2025, this Court's Chief Commissioner called counsel's attention to Rule 18(e) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, which requires a motion to include matters other than unpublished opinions or extracts of statutes, rules, or regulations in an appendix to a brief. Counsel regret our error and appreciate the Court calling it to our attention.

Counsel now move to attach the attached Brief on Behalf of the United States from *Casillas* to Appellant's reply brief. In its answer in this case, the Government twice cited its *Casillas* brief that is the subject of this motion. Answer to Assignment of Errors at 21, 32 (citing Brief for the United States, *United Stats v. Casillas*, 2024 CAAF LEXIS 329, USCA Dkt. No. 24-

0089). The Government's brief also discussed an instruction requested by the trial defense counsel in *Casillas*. *Id.* at 21. The Government's brief alluded in a general manner to that instruction but without quoting its precise wording. *Id.* That precise wording is relevant to assessing the Government's argument concerning the interplay between the defense-requested instruction in *Casillas* and the trial-level litigation of this case. The Government's brief before the Court of Appeals for the Armed Forces in *Casillas* quotes the instruction requested in that case. Because the Government's argument in response to Assignment of Error III in this case focuses so heavily on the defense-requested instruction in *Casillas,* Appellant's reply brief quoted it in full, citing the Government's brief in *Casillas* as that quotation's source. Appellant's Reply Brief at 12–13. Appellant's counsel request permission to attach the Government's *Casillas* brief as an appendix to the reply brief to support that quotation and facilitate this Court's consideration of the Government's argument relying on the defense-requested instruction in *Casillas*.

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

Respectfully submitted,

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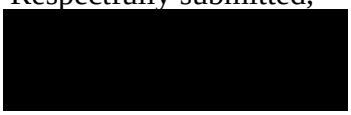
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 May 2025.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40583**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Vidarr SLAYTON	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 10th day of July, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from a Special Panel and referred to another Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal