IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (SSgt)	)	No. ACM 40410
ERIK C. WILLIAMS,	)	
United States Air Force	)	24 March 2023
Appellant	)	

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 an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **3 June 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 49 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.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 24 March 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

24 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 March 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force	)	No. ACM 40410
Appellant	)	23 May 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **3 July 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

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

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 May 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

24 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 May 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force *Appellant*	)	No. ACM 40410 23 June 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **2 August 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

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

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 June 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 June 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40410 21 July 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **1 September 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 21 cases, with 7 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at this Court have priority over this case:

1. *United States v. Conway*, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has not yet begun review of the record in this case.
2. *United States v. Denney*, ACM 40360. The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. Counsel has not yet begun review of this record.

Additionally, counsel will be separating from active duty on . However, counsel will be returning to JAJA as a reservist on a one-year tour and plans to maintain all cases through the transition. If the administrative logistics create any issues, another counsel from the office will assist in filing the necessary enlargements of time.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

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

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

25 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 July 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(FIFTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt)	)	
ERIK C. WILLIAMS,	)	No. ACM 40410
United States Air Force	)	
Appellant	)	22 August 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **1 October 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 21 cases, with 7 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at this Court have priority over this case:

1. *United States v. Conway*, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has not yet begun review of the record in this case.
2. *United States v. Denney*, ACM 40360. The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. Counsel has not yet begun review of this record.

In addition, counsel has just completed a reply in *United States v. Cornwell*, ACM 40335 (submitted today) and is working on a grant brief due on 8 September 2023 in *United States v. Palik*, ACM 40225.

Counsel's docket has backed up by several weeks because of logistical issues with transitioning from active duty to the reserves. A one-year reserve tour, slated to start

. Counsel still has no access to government computers.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 August 2023.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(SIXTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt)	)	
ERIK C. WILLIAMS,	)	No. ACM 40410
United States Air Force	)	
Appellant	)	22 September 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **31 October 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 24 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at this Court have priority over this case:

1. *United States v. Conway*, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has completed the brief and will file shortly.
2. *United States v. Cook*, ACM 40333. The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Counsel has completed review of half of the record.
3. *United States v. Denney*, ACM 40360. The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. Counsel has reviewed much of this case, but there is an issue that may result in remand.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 September 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(SEVENTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt)	)	
ERIK C. WILLIAMS,	)	No. ACM 40410
United States Air Force	)	
Appellant	)	22 October 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **30 November 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 26 cases, with 9 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at this Court have priority over this case:

1. *United States v. Cook*, ACM 40333. The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Counsel has completed the brief and will file upon coordination with the client.
2. *United States v. Denney*, ACM 40360. The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. Counsel has reviewed much of this case.

Of note, the Government missed its opportunity to oppose the previous enlargement of time because counsel served the Associate Chief, but not the JAJG org box. The Government certainly would have opposed if given the chance, as it had opposed every enlargement of time thus far.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 October 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 1 No. ACM 40410 20 November 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **30 December 2023.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 27 cases, with 8 pending initial brief before this Court. Counsel has reviewed approximately one third of the record. No case before this case has priority at this Court. However, counsel will argue before the CAAF in *United States v. Palik*, Dkt. No 23-0206, on 6 December 2023, and has briefings due to the CAAF in *United States v. Zimmerman* (ACM 40267) on 10 December 2023, *United States v. Cornwell* (ACM 40335) on 15 December 2023, and *United States v. Kroetz* (ACM 40301) on 26 December 2023.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 November 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

22 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed 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 started 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.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 November 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(NINTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt)	)	
ERIK C. WILLIAMS,	)	No. ACM 40410
United States Air Force	)	
Appellant	)	20 December 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **29 January 2024.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 26 cases, with 9 pending initial brief before this Court. Counsel has reviewed approximately one third of the record. No case before this case has priority at this Court. Counsel argued before the CAAF in *United States v. Palik*, Dkt. No 23-0206, on 6 December 2023, and prepared briefings for the CAAF in *United States v. Zimmerman* (ACM 40267) on 10 December 2023, and has filings due in *United States v. Cornwell* (ACM 40335) on 2 January 2024, and *United States v. Kroetz* (ACM 40301) on 10 January 2024. Counsel also will be working on a reply brief in *United States v. Cook* (ACM 40333).

Additionally, counsel has served as fill-in Director of Staff at JAJ for two weeks in   and will likely do so again for two weeks in   . This was due to an unforeseen   situation.

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 December 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

20 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40410 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 December 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	**)**	**No. ACM 40410**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
Erik C. WILLIAMS	**)**	
Staff Sergeant (E-5)	**)**	
U.S. Air Force	**)**	
Appellant	**)**	**Panel 1**

On 20 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 22d day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **29 January 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION TO**
Appellee,	)	**EXAMINE SEALED**
	)	**MATERIALS**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (SSgt)	)	
ERIK C. WILLIAMS,	)	No. ACM 40410
United States Air Force	)	
Appellant	)	5 January 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following sealed portions of the transcript:

- Pages 750–54. The sealed portion involves a discussion of Mil. R. Evid. 412 materials. (R. at 748–49.) There were no motions filed on the subject, so counsel does not know what was at issue.
- Pages 758–90. This is the continuation of the above discussion. In the intervening pages, the military judge released the members for an extended lunch break. (R. at 756–57.) Based on the questions asked after the closed session, it appears some Mil. R. Evid. 412 questions were allowed, but counsel cannot assess whether the defense was able to ask all that it desired. (R. at 793.)
- Pages 943–57. This appears to be a closed session under Mil. R. Evid. 412 that discusses sexual behavior between the accused and the complaining

witness. (R. at 940.) It appears the defense was not able to ask the questions that it desired. (R. at 958.)

Both trial counsel and trial defense counsel were present during these discussions.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that examining the referenced materials is reasonably necessary to assess whether the military judge erred in ruling on the admissibility of evidence under Mil. R. Evid. 412.

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." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing these portions of the transcript.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

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

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40410 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Materials. The United States does not object to Appellant's counsel reviewing the sealed transcript pages, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 January 2024.

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

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40410**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Erik C. WILLIAMS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 5 January 2024, counsel for Appellant submitted a Motion to Examine Sealed Materials. Specifically, counsel seeks to examine transcript pages 750–754, 758–790, and 943–957 of Appellant's court-martial. The Government does not oppose the motion as long as its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 9th day of January, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **transcript pages 750–754, 758–790, and 943–957**, 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

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 1 No. ACM 40410 21 January 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **28 February 2024.** The record of trial was docketed with this Court on 3 February 2023. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 390 days will have elapsed.

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[1] (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to

[1] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ.

the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June 2022.)

The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. SSgt Williams is not currently confined.

Counsel is currently assigned 22 cases, with 7 pending initial brief before this Court. Counsel has reviewed approximately three quarters of the record. No case before this case has priority at this Court. Since the last enlargement of time, counsel spent significant time as fill-in Director of Staff at JAJ. This was due to an unforeseen medical situation. Additionally, counsel has filed three supplements to petitions for grant of review to the CAAF. (*United States v. Zimmermann*, ACM 40267; *United States v. Cornwell*, ACM 40335; and, *United States v. Kroetz*, ACM 40301.)

Through no fault of SSgt Williams, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SSgt Williams was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SSgt Williams' case and advise him regarding potential errors.

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

Respectfully submitted,p

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 January 2024.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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Appellee,

v.

Staff Sergeant (E-5)
ERIK C. WILLIAMS, USAF,
Appellant.</td><td>)
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)</td><td>UNITED STATES' OPPOSITION
TO APPELLANT'S MOTION
FOR ENLARGEMENT OF TIME

ACM 40410

Panel No. 1</td></tr>
</table>

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 January 2024.

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

21 February 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

ERIK C. WILLIAMS,
Staff Sergeant, USAF
Appellant

Before Panel No. 1

No. ACM 40410

BRIEF ON BEHALF OF APPELLANT

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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Assignments of Error

I.

WHETHER SSGT WILLIAMS'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY SUFFICIENT.

II.

WHETHER THE CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE INVITED THE MEMBERS TO CONVICT SSGT WILLIAMS BY MISSTATING THE APPLICABLE LAW AND INFLATING THE GRAVITY OF THE OFFENSE.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED AN IMPLIED BIAS CHALLENGE AGAINST A PANEL MEMBER WHO WAS AN OUTCRY WITNESS FOR A CLOSE FRIEND IN ANOTHER SEXUAL ASSAULT COURT-MARTIAL.

IV.

WHETHER SSGT WILLIAMS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

V.

WHETHER SSGT WILLIAMS IS ENTITLED TO RELIEF FOR HIS EXCESS CONFINEMENT CREDIT UNDER *UNITED STATES V. ZARBATANY*, 70 M.J. 169 (C.A.A.F. 2011).

VI.[1]

WHETHER, AS APPLIED TO SSGT WILLIAMS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"

[1] Assignments of error (AOEs) VI and VII are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

VII.

WHETHER SSGT WILLIAMS'S SEXUAL ASSAULT CONVICTION IS LEGALLY SUFFICIENT.

Statement of the Case

On 9, 12, and 16-20 May, 2022, at a general court-martial at Whiteman Air Force Base, Missouri, a panel of officer and enlisted members[2] convicted Appellant, Staff Sergeant (SSgt) Erik C. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016).[3,4] (R. at 1649; Entry of Judgment (EOJ), 2 Aug. 2022.) The members sentenced SSgt Williams to a dishonorable discharge and reduction to the grade of E-4. (*Id.*) The convening authority took no action on the findings and approved the sentence. (Convening Authority Decision on Action, ROT Vol. 1, 2 June

[2] Because one member was ill, the military judge decided to postpone formally assembling the members while the Government decided whether to excuse that member. (R. at 200–02.) This allowed the convening authority's staff judge advocate to excuse a panel member after the members were sworn. (Excusal of MSgt RM, Record of Trial (ROT) Vol. 5, 12 May 2022.) While unusual, defense counsel did not object and, on appeal, SSgt Williams does not claim this is structural error in member selection. (R. at 201.)

[3] Punitive articles are the version in the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*). All other references are to the 2019 *MCM*.

[4] Consistent with his plea, the members acquitted him of another specification of sexual assault in violation of Article 120, UCMJ, arising from the same incident. (R. at 1649.)

2022.) This case was docketed with this Court on 3 February 2023.[5]

Statement of Facts

Background

SSgt Erik Williams joined the Air National Guard in 2011, the year after his father, a Vietnam veteran, passed away. (Def. Ex. O at 1.) In February 2018, SSgt Williams went on his second deployment, this time to Ali Al Salaam Air Base in Kuwait. (Pros. Ex. 9; R. at 625–26.) The unit deployed for four months with about 100 members. (R. at 626–27.) Among the deployers was TC, a then-staff sergeant. (R. at 625–26.) On 1 July 2018, the unit began redeploying. (R. at 628.) They left at about 0300 from Kuwait, arriving at Naval Air Station Sigonella (NASSIG) six to seven hours later.[6] (R. at 629–30.) TC slept the entire way. (R. at 630.)

Unwinding at NASSIG

TC arrived and checked into her hotel room at around 0843 hours local time.[7] (Def. Ex. A; R. at 630.) TC made plans to have lunch with SSgt KW (her friend) and

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[5] It took the Government 259 days to docket this case, far longer than the 150-day benchmark this Court established in *United States v. Livak*, 80 M.J. 361 (A.F. Ct. Crim. App. 2020). However, SSgt Williams does not claim prejudice, and this Court's remedial tools are limited given the sentence. SSgt Williams understands this Court would not disapprove a dishonorable discharge for this delay, and his reduction in grade should be restored based on Assignment of Error (AOE) V, *infra*.

[6] NASSIG is two hours behind Kuwait. *Compare* CURRENT LOCAL TIME IN KUWAIT CITY, KUWAIT, https://www.timeanddate.com/worldclock/kuwait/kuwait-city (last visited 9 Feb. 2024), *with* CURRENT LOCAL TIME IN SIGONELLA, ITALY, https://www.timeanddate.com/worldclock/@8469108 (last visited 9 Feb. 2024).

[7] This time stamp came from a log of TC's hotel room keycard entries. (Def. Ex. A.) Special Agent (SA) JS testified that the logs were inaccurate by approximately 30 minutes, which was true for other hotel room keycard logs. (R. at 1146–47.)

SSgt TS ("We're not friends"). (R. at 630–32.) TC had not eaten since Kuwait and she had a slice of pizza for lunch that was "enough to fill you up." (R. at 636.) The three then bought a thirty-pack of Miller Lite at the base exchange. (R. at 632, 637.) They spent two to three hours in the early afternoon drinking in a courtyard outside the hotel rooms. (R. at 640–41.) TC consumed five to six beers during this timeframe. (R. at 644.) She felt "a little buzzed" in the courtyard, but that feeling went away. (R. at 645.) Others from within the unit came and went during this time, with one person joining them to drink: Technical Sergeant (TSgt) GC. (R. at 641–42.) They planned on going to dinner and a strip club that evening but were unable to do so because of problems with taxi access. (R. at 643, 645.)

TC Skips Dinner and Continues Drinking

TC returned to her room to change and freshen up, then met up with the group at 1730; at that point, she was "feeling fine." (R. at 645.) Instead of the strip club, they went to Jox Pub, a bar right next to the pizza place where they ate lunch. (R. at 646.) The pub was a "few minutes" walk from the hotel. (R. at 648.) TSgt GC met them there and agreed that TC "seemed sober." (R. at 939.) They planned on eating at Jox, but when they found out Jox did not serve food, everyone else *except* TC went over to get pizza next door. (R. at 648–49.) TC did not like the pizza and thus did not eat dinner. (R. at 649.) After SSgt KW and SSgt TS got pizza, they decided to retire for the night and went back to their rooms at about 1800, which disappointed TC. (R. at 656.)

Other members of the unit—SSgt BO, SSgt JD, SSgt CS, and SSgt Williams—were already at the bar. (R. at 650.) As far as the record shows, this was the first time she saw SSgt Williams that day. TC sat down in a booth on the same side as SSgt Williams. (R. at 651.) TC could not recall if anyone else bought her drinks (R. at 658), but knows that she purchased herself one Long Island iced tea, another Long Island iced tea of which she drank only one quarter, and one dark beer that she did not like and did not drink at all. (R. at 658.) TC agreed the Long Island iced teas were "really skinny" and "not the American size." (R. at 701.) TC testified that her last memory was asking the bartender to change the music, and that TSgt GC approved of her choice. (R. at 659–60.)

TC Departs the Pub

The narrative continues from the perspective of the remaining persons at the bar. SSgt BO, who had one drink at the bar, was with TC for three to four hours. (R. at 971–72.) He recalled several shots and a beer in front of TC at one point in the evening, and that when he glanced another time the shots were gone. (R. at 973–74.) SSgt BO did not actually see her take the shots. (R. at 982.) He testified that TC appeared to be "worse than anyone else" at the bar. (R. at 975.) On direct examination, he stated that she became more intoxicated with time, and that he went outside to talk to MSgt JD about the situation. (R. at 976.) When later recalled to testify, he acknowledged that TC had said that TSgt GC was "hot" and she would "fuck him" if they were not married, which made SSgt BO uncomfortable and caused him to leave. (R. at 1025–26.)

MSgt JD heard the same comment, which also made him uncomfortable. (R. at 998.) He assessed that TC was one of the more intoxicated, but that, at the time she made the comment, she "wasn't falling down drunk." (*Id.*)

According to TSgt GC, later in the night TC was slurring her words and wavering at the table. (R. at 930–31.) TSgt GC brought this to the attention of the aircraft commander, Major (Maj) S, who had entered the bar later, and suggested to Maj S that it was time for TC to call it a night. (R. at 932, 1051.) TC had no memory of the flight crew entering the pub. (R. at 658–59.) SSgt Williams was selected to take TC back to her room, but TSgt GC could not recall why. (R. at 932.)

Lt Col JL entered the bar with Maj S at approximately 1845 hours. (R. at 1050.) He recalled that there were drinks on the table where the group sat, but did not testify to her drinking. (R. at 1051.) Maj S bought the group a drink. (R. at 1051–52.) Lt Col JL recalled that TC was slurring her words. (R. at 1052.) He did not recall the circumstances of SSgt Williams and TC leaving together. (R. at 1053.)

Witness testimony did not establish where SSgt Williams was during all of this time or what he would have observed of TC's behavior. TC departed with SSgt Williams at approximately 2030 hours, and a video showed him returning to his room alone at 2150 hours. (Pros. Ex. 5.)

TC Awakens on a Tennis Court

TC awoke around 0230 hours lying down on a tennis court near the pub with no shoes, phone, or purse. (R. at 660, 662, 809.) TC acknowledged that she was otherwise clothed and not disheveled. (R. at 663.) She began walking around to find her purse. (R. at 664.) Petty Officer Second Class (PO2) RE, a military police officer,

noticed TC walking without shoes and stopped to speak with her. (R. at 664, 811–12.) During the conversation, TC "[a]ppearance-wise . . . was very put together aside from the fact that there were no shoes" and her clothes "were not disheveled in any sort of manner." (R. at 813.) TC was upset and showed signs of intoxication, such as slurred speech and glassy eyes. (R. at 813–14.) Military police provided a courtesy escort back to lodging, and then PO2 RE walked TC back to her room. (R. at 816.) TC told them she was not sexually assaulted. (R. at 728.)

KB began her shift at the front desk at lodging at 0000 hours; at that point, someone had already turned in TC's purse. (R. at 835–36.) After the police returned TC, she came downstairs to ask KB how to call her husband in the United States. (R. at 840.) A short time later, KB volunteered to go with TC to help her look for her phone on the tennis courts. (R. at 843.) TC told KB that she thought something might have happened and that it "smells like dick down there." (R. at 849, 851.) TC also told KB that she would never cheat on her husband. (R. at 870.) TC was concerned that her husband would think it was consensual; indeed, if it were consensual, she admitted she would not want her husband to know. (R. at 725, 743.) KB, however, personally believed that if TC could not remember what happened, there was no consent. (R. at 871–72.) Thus, to soothe TC, KB told TC that if she did not remember what happened, TC did not consent. (R. at 870–71, 894.)

TC returned to lodging and went back to sleep, awaking around 0700 hours when SSgt TS knocked on her door because she was late for the 0700 showtime for their next flight. (R. at 673.) When she dressed, she noticed that she was missing

her underwear and had scratches on her legs and what she thought were rug burns on her knees. (*Id.*) On cross-examination, TC conceded that it smelled like a mix of semen and vaginal fluids on her arms and hands. (R. at 721.)

KB, who was still on shift, heard the male members of the unit were gossiping about TC. (R. at 875.) She provided TC a Sexual Assault Response Coordinator (SARC) pamphlet as TC left. (R. at 877.)

SSgt KW spoke with the other unit members who were at the pub the night before. SSgt Williams gave him TC's phone and said he found it in front of his room. (R. at 677.)

Departure From NASSIG

TC slept on the plane from NASSIG, which this time stopped in Ireland. (R. at 681.) She felt pain in her vagina, anus, and back, and thought she might have been sexually assaulted. (*Id.*) She called SSgt KS, who escorted her to the hospital, where an Irish doctor, Dr. O, performed a sexual assault examination. (R. at 684–86, 1076.) The military judge admitted the deposition of Dr. O as Prosecution Exhibit 7. Dr. O noted that TC had abrasions on her knees, one foot, and one shoulder. (R. at 1107.) She also was tender along her lumbar spine and had redness on the back of her neck. (R. at 1107.) Dr. O took numerous DNA swabs during the examination. (R. at 1111.) Later DNA testing showed it was overwhelmingly likely that SSgt Williams's DNA was on and in her body.[8] (R. at 1209–10.)

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[8] The Defense moved to suppress this evidence. (App. Ex. IX.) The military judge denied the motion. (R. at 189–94.) While SSgt Williams asserts the military judge erred, the ruling does not amount to an abuse of discretion.

Court-Martial and Expert Testimony

The Government charged SSgt Williams with sexual assault by penetrating TC's anus and vulva with his penis while she was incapable of consenting due to alcohol impairment. (Charge Sheet.) At his court-martial, the Defense called two experts to testify: Dr. DR, a forensic psychologist; and Dr. DF, a medical examiner.

Dr. DR explained that alcohol makes it more likely for people to feel aroused, to have a desire for sex, to interpret cues as cues for sex, and to have greater subjective reports of pleasure during sex. (R. at 1282–83.) Alcohol also makes people impulsive and reduces inhibitions, leading to more voluntary sex. (R. at 1283.) This affects both men and women. (*Id.*) He explained that, at a certain point, alcohol may cause blackouts, which is "the inability to form new memories." (R. at 1284.) Even though memories are not forming, cognitive processes may continue and motor function can be intact. (R. at 1285.) A person can form intent while blacked out. (*Id.*) Because a person can engage in many normal behaviors while blacked out, he explained that it is challenging to tell if someone is actually blacked out because "you can look and act completely normal." (*Id.*) A person can be in an alcoholic blackout but not be incapacitated. (R. at 1288.) Dr. DR drew a distinction between impairment, which can begin at a single drink, and incapacitation, which requires much more. (R. at 1290.) Additionally, laypersons are generally not accurate at assessing other people's levels of intoxication. (R. at 1288.) In response to a member question, Dr. DR explained that the best predictor of a blackout is the rate of drinking, thus it is likely to occur while drinking and not hours later. (R. at 1310.)

Furthermore, things like recent eating, gender, rate of metabolism, and body weight can play into the probability of a blackout. (R. at 1312.)

Next, Dr. DF provided analysis of TC's abrasions and redness. He opined that all of her abrasions were approximately the same age and occurred about the same time. (R. at 1332.) He believed that TC's jeans were not on at the time the abrasions occurred because of the protective effect of jeans. (R. at 1333–34.) The marks were consistent with someone being on all fours on asphalt or concrete. (R. at 1336, 1377–78.)

At the court-martial, the Government elicited that SSgt Williams made different statements about where he found TC's phone and whether he walked her back to her room, or instead only to the picnic tables. (R. at 980, 1017, 1042, 1064, 1151.) The members convicted SSgt Williams of penetrating TC's vulva, but not her anus. (R. at 1649.)

Other facts necessary to resolve the AOEs are provided below.

Argument

I.

SSGT WILLIAMS'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

The test for factual sufficiency is "whether, after weighing the evidence in the

record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (internal punctuation omitted) (quoting *Washington*, 57 M.J. at 399). This Court exercises an "awesome, plenary, *de novo* power of review" under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993) (citation omitted).

The elements of sexual assault, as charged, are as follows: (i) that SSgt Williams committed a sexual act upon TC; and (ii) that TC was incapable of consenting due to impairment by alcohol; and, (iii) that SSgt Williams knew, or reasonably should have known, of that condition. *See MCM*, pt. IV, ¶ 45.b.(3)(f); Charge Sheet. A "sexual act" includes penetration, "however slight," of the penis into the vulva. Article 120(g)(1)(A), UCMJ. "Incapable of consenting" means the person is "(A) incapable of appraising the nature of the conduct at issue; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." Article 120(g)(8), UCMJ (2018).[9]

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[9] The allegation arose in 2018, making the applicable version of Article 120 that from 2016. However, by the time of trial, case law and the statute had established this definition of "incapable of consenting." *See United States v. Pease*, 75 M.J. 180, 185

Analysis

At the heart of this case is whether SSgt Williams reasonably should have known that TC was incapable of consent. TC's lack of memory alone does not equate to incapacity, and the meager evidence presented fails to show that SSgt Williams reasonably should have known TC was incapable of consent. This Honorable Court should set aside the finding.

1. TC's incapacity does not make sense given the recorded amount of drinking, thus SSgt Williams would not have reason to believe she was incapacitated.

TC had approximately five to six light beers while drinking in the courtyard during the afternoon. (R. at 636, 640–41, 644.) She felt "a little buzzed," but by the time she arrived at Jox Pub for dinner at 1730 she was "feeling fine," "didn't feel drunk," and "seemed sober." (R. at 645, 939.) The afternoon drinking thus has little bearing on her level of intoxication later that night. TC's actual consumption at Jox included a "skinny" Long Island iced tea, a quarter of another Long Island iced tea, and a sip of beer. (R. at 658.) It is possible that she drank more that night. But that speculation is not what the testimony supports. And the testimony certainly does not support that SSgt Williams saw her consume any additional drinks.

This Court often addresses cases where the evidence of voluminous drinking is clear. *See, e.g.*, *United States v. Motus*, ACM 39841 (f rev), 2021 CCA LEXIS 484, at *5, 10–11, 26 (A.F. Ct. Crim. App. 23 Sep. 2021) (unpub. op.) (describing the victim's

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(C.A.A.F. 2016). Thus, the members were instructed in line with *Pease* and the updated statute.

consumption of four to six mixed drinks, many containing double shots, in a two-hour period, followed by sexual activity where the victim, "not in her right mind," had to leave during oral sex to vomit). This is simply not that case. Indeed, one of the panel members expressed surprise that such limited drinking could lead to a serious level of intoxication. First Lieutenant C-R asked TSgt GC if he was really intoxicated from five beers and one Long Island iced tea (a similar amount of alcohol to what TC is recorded to have consumed). (App. Ex. XXXV; R. at 962.) There are other possible explanations, including the time change and the fact that they took an overnight flight. Extreme fatigue could have affected her in this way. Another factor that likely contributed—*but that SSgt Williams would have no reason to know about*—is that TC skipped dinner. Recent eating is a factor, likely an important one, and she made this decision before she sat down with SSgt Williams. (R. at 1312.)

The amount of alcohol alone cannot support a finding that TC was incapacitated. After all, the charge was specific in that she was incapacitated *by alcohol*. (Charge Sheet.)

2. TC's demeanor did not suggest she was incapacitated and expert testimony supports SSgt Williams' mistake defense.

Dr. DR, whose testimony was not contradicted at trial, explained the well-known effect that alcohol has on impulsivity, inhibitions, and voluntary sex. (R. at 1283.) Moreover, he explained that people can engage in complex behaviors, including consenting to sexual activity, while "blacked out" from consuming alcohol. (R. at 1285.) Indeed, someone in a blackout state can "look and act completely normal." (*Id.*) Viewed through this lens, TC did not demonstrate incapability of

consenting, nor would SSgt Williams have reasonably believed she was incapable of consent.

If one credits TC's testimony, her memory disappears before the flight crew (Maj S, Lt Col JL, etc.) entered the bar. This echoes Dr. DR's testimony about someone being capable of engaging in normal behaviors despite a blackout state. While TC may not have looked and acted completely normal—as multiple witnesses identified her slurring her speech or stumbling slightly—no witness, at any time, considered her in to be in an incapacitated state. The comment she made about TSgt GC may be illustrative of impaired judgment, but not of an inability to consent. At a time when she was "not falling down drunk," TC made the ill-advised comment, in a mixed group of members from her unit, that TSgt GC "is hot" and "she would fuck him" if they were not married." (R. at 998, 1025–26.) TC would not be the first to make an unwise statement while drinking; still, lapses of judgement do not equate to incapacity.

This case lacks all the classic indicators of incapacity to consent: vomiting, falling, incoherent speech. Indeed, the seminal case in the area, *United States v. Pease*, 74 M.J. 763 (N.M. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016) offers guidance. *Pease* involved sexual assault and abusive sexual contact specifications with two complaining witnesses; the charging theory was that they were incapable of consent due to impairment by an intoxicant. *Id.* at 764, 770. The first complaining witness was intoxicated enough that she was ordered back to her ship. *Id.* at 771. After engaging in sexual activity with the appellant in the Joint

Operations Center, she awoke in her berth without her purse or ID card. *Id.* at 766. The second complaining witness had enough to drink that she tried to light a cigarette backwards. *Id.* at 768. She, too, was ordered back to the ship after she was seen leaning against the wall. *Id.* at 767. Her fragmentary memory includes that she told the appellant to stop having anal sex with her because of pain, after which she vomited in the bed. *Id.* at 767–68. Neither of these allegations sufficed to convince the Navy-Marine Corps Court of Criminal Appeals that the Government met its high bar. *Id.* at 771.

Turning back to this case, none of the flight crew or other witnesses thought TC was in rough enough shape that she required medical attention, or more than an escort from a single member of the unit. If her state did not raise serious red flags for anyone else, why would SSgt Williams be any different?[10]

The physical evidence is also consistent with a consensual act. Dr. DF explained that the abrasions on the elbows and knees occurred at the same time, and that TC's jeans were off when this happened. (R. at 1332–34.) The abrasions were consistent with someone holding themselves up on all fours on asphalt or concrete. (R. at 1376.) Again, this is not a case where the victim is inert, unable to participate, or unable to appreciate the nature of the sexual act. TC stated that it smelled like sex—a mixture of vaginal fluids and semen—on her arms and hands. This, along

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[10] The Circuit Trial Counsel (CTC) argued at length that the video of SSgt Williams returning to his room shows SSgt Williams knew TC was intoxicated. (R. at 1508, 1631–32.) This is both irrelevant and poorly reasoned and should not impact this Court's analysis.

with the positioning, the removal of the jeans, and the lack of any indications of non-consensual trauma from the sexual assault forensic examination, suggest that TC provided consent, or, at the very least, that SSgt Williams would have a reasonable belief that she consented.

3. Speculation about what might have happened cannot fill the evidentiary void.

The Government had to prove either TC was "incapable of appraising the nature of the conduct at issue" or "physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." Article 120(g)(8), UCMJ (2018); R. at 1431. This is a high bar. The evidence does not show she failed to appraise the nature of the act, nor that she was incapable of declining participation or communicating unwillingness. The danger here is that, where no testimony explains what happened after TC left the bar, speculation takes the place of evidence. Perhaps the members were swayed by the CTC's argument. As explained in AOE II, *infra*, the CTC suggested a lower bar could suffice for conviction, such as TC's inability to weigh the risks of getting pregnant or having sex outdoors. This may have inflamed the members, but it should not affect this Court. Nor should this Court be swayed by the CTC's argument that she *must* have consumed more than she remembered: the problem for the Government is that the testimony fails to establish that she actually did drink more, or that SSgt Williams would have seen her take the drinks if she had. There is not even testimony that everyone in the bar was taking shots, which could at least suggest TC was, too. Again, speculation cannot supplant the demands of the law for actual evidence.

The Government simply did not present sufficient evidence that SSgt Williams reasonably should have known that TC was incapable of consenting to the sexual act. All the evidence shows is that TC had several drinks, demonstrated signs of intoxication at the bar, left with SSgt Williams, and awoke with signs that are consistent with consensual sex. The evidence must convince this Court, beyond a reasonable doubt, of SSgt Williams's guilt. This Court's "fresh, impartial look" at the evidence should leave it unconvinced.

WHEREFORE, SSgt Williams respectfully requests this Honorable Court set aside the finding.

II.

THE CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE INVITED THE MEMBERS TO CONVICT SSGT WILLIAMS BY MISSTATING THE APPLICABLE LAW AND INFLATING THE GRAVITY OF THE OFFENSE.

Additional Facts

The CTC opened his argument by telling the members that "this case is about [the incapable of consent] instruction." (R. at 1453.) He told the members that the law "requires [a conviction] based on the instructions and the evidence before you." (R. at 1455.) He then said his argument would focus on the first prong of the incapable of consent instruction: "incapable of appraising the nature of something." (R. at 1457.) He defined "appraise" for the members as follows:

> You get an appraisal every year if you own a house. A tax assessor looks at your property and says it's worth this much. It's an assessment of the value of something. That's an appraisal. It's a determination of the risks. It's an understanding of the consequences. If you cannot assess

> the risk, determine the value, understand the consequences, you are *per se* incapacitated.

(R. at 1457 (italics in original).) He then told the members that the evidence showed that TC could not meet *that* definition. (R. at 1458.)[11]

After describing the basic facts of the case, the CTC worked backwards, telling the members that given the way TC awoke, "[t]hat's a person you would automatically assume with those facts, is incapacitated or there's no evidence you heard suggested to the contrary." (R. at 1460.) He asked the members, "Could she understand the risks or appreciate the nature of her environment if she couldn't keep track of her phone, her purse, or her shoes and slept on a tennis court?" (*Id.*) Thus, he told the members:

> Under those circumstances, that is incapacity; somebody that confused could not consent to sex, or certainly to say that somebody who didn't have the faculty to get five minutes back to her—to her room and somebody who went through all of what she went through. That same person could understand and appreciate the nature of sex, understand its risks, determine its value? It doesn't make sense. That's not a reasonable argument. That's not a reasonable possibility.

(R. at 1461.) Shortly thereafter, he restated the argument:

> It happened outside. Why would this 40-year-old woman, returning home from deployment, have sex outside in a place where they could easily be found, seen, caught if she could understand the nature of the sexual act, if she could appreciate its value, if she could assess its risks? Clearly, she couldn't.

(R. at 1462.) On rebuttal, the CTC continued the theme that TC's social missteps equaled inability to appraise the nature of the conduct:

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[11] "The question is could she appreciate the nature of the sex? Could she appraise its risks?" (R. at 1468.)

> That she was making comments making people uncomfortable in the bar, in the presence of her aircraft commander, and [Lt Col JL] tells you that she was already at that point—and that wasn't the end of that night; right? At that point, unable to appreciate the risks of what she was doing, unable to understand how her behavior would affect the environment. She was causing people to repulse from her. The normal, prudent reactions to [TC] upon discovering her in the bar was to move away and the accused found that same [TC] and had sex with her; right?

(R. at 1515.) The theme continued:

> She told you she had plans to go renovate a house that she had purchased with her husband when getting home. Why would she want to have unprotected sex? What—does that show judgment? Does that show an appraisal of the situation? Or does it show that she was incapacitated? That she would risk getting an STD that she can't explain to her husband? A possible pregnancy? No. She couldn't determine those risks and was not able to appreciate the value of that conduct.
>
> And, if she had the capacity to make the decision to have sex with this stranger, why not just go back to their rooms and spend the whole night having sex? Why do it outside? Is that this middle-aged mother's fantasy, to have sex on a tennis court, to be left for dead, with a stranger? Is that what she had been saving her sexual tension on this deployment for? No.
>
> Again, it shows her inability to make that decision; to appreciate the consequences of that conduct; to determine its value.

(R. at 1515–16.)

The CTC continued the argument during a second closing argument, which the military judge granted because the members asked so many questions during deliberations and asked to review testimony and evidence. (R. at 1626.) The CTC again stated that:

> the bottom line in this case is, that your assessment of intoxication, the one that matters, is that assessment of [TC]. And, that circumstantial evidence of where she was found, what she lost, the property she was unable to keep possession of, control of, her inability to assess the risk

> of having unprotected sex with a man she didn't know, on a tennis court. When he ejaculated inside of her, that she wasn't able to assess the risk of pregnancy or STDs, and that if she really wanted to have consensual sex with him, wouldn't she have just gone to a room and had sex with him?

(R. at 1631–32.)

The CTC also repeatedly stated that SSgt Williams left TC in a precarious condition. Initially, he stated that "[h]e left her vulnerable; either passed out or in such a condition that she couldn't make that five-minute walk home." (R. at 1455.) He argued that "she was vulnerable, and because of that vulnerability the accused did what he did. He had sex with her in that awful condition and he left her incapacitated, alone, in a foreign country with no means to summon help." (R. at 1475.) The CTC also twice told the members that SSgt Williams defiled TC and left her for dead. (R. at 1518, 1633.)

The Defense did not object to these comments during closing argument.

Standard of Review

Where the defense fails to object, this Court reviews for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law and Analysis

1. The Circuit Trial Counsel created his own inaccurate definition and urged the members to convict on that erroneous basis.

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (cleaned up) (quoting U*nited States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014)).

"[T]rial counsel are of course not permitted to misrepresent legal principles." *United States v. Bousman*, No. ACM 40174, 2023 CCA LEXIS 66, at *42 (A.F. Ct. Crim. App. 8 Feb. 2023) (unpub. op.) (comparing *United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019)). This includes "statements that in effect distort the burden of proof by suggesting incorrectly what the jury must find in order to reach a certain verdict." *See United States v. Vargas*, 583 F.2d 380, 386–87 (7th Cir. 1978) (citations omitted). It is well established that a prosecutor's misstatements of law in closing argument can be grounds for reversal. *Id.* (citations omitted); *see also United States v. Abernathy*, 24 C.M.R. 765, 774–75 (A.F.B.R. 1957) (finding the trial counsel erred by inviting the members to convict on a felony-murder-type theory that lacked grounding in the law).

Here, the CTC's framing of the key words from the instruction—"incapable of *appraising* the nature of the conduct at issue"—effectively lowered the burden of what the Government had to prove. Article 120(g)(8)(A), UCMJ (2018) (emphasis added); R. at 1431. And as the CTC admitted, this was the central issue and the focus of his

argument. (R. at 1457.) He began by analogizing to the appraisal that one might receive on a house, continuing that if one cannot assess risks, determine value, and understand consequences, one is automatically incapacitated. (*Id.*) It is unclear where the CTC drew these requirements; it was certainly not from the law. The risks of such an argument are clear. The CTC invited the members to conclude that if the sexual act was a bad idea—that the risk versus value calculation weighs against it—then TC must have been incapacitated.

Not only is this a problematic formulation, but it lends itself to expansion. The language of the statute refers to the act itself, not the surrounding circumstances. Yet the CTC left this behind repeatedly. He asked the members whether TC could "understand the risks or appreciate *the nature of her environment* if she couldn't keep track of her phone, her purse, or her shoes and slept on a tennis court?" (R. at 1460.) The nature of her environment is not at issue. Nor do her social missteps mean she was incapable of consenting. The CTC suggested that her comments about TSgt GC being "hot," which made others uncomfortable, meant that TC was "unable to appreciate the risks of what she was doing, unable to understand how her behavior would affect the environment." (R. at 1515.) But those are not the measures by which the statute gauges criminality. Boorish behavior in the bar while drinking cannot equate to incapacity to consent. Many a person has said hostile, inflammatory, and regrettable things while drinking and remained capable of understanding the nature of sex and indicating consent or non-consent.

Nor do inherent risks of sexual activity mean TC was incapable of consent. Sex and alcohol often mix with undesirable results, and as Dr. DR explained, sexual activity is more likely when drinking occurs and inhibitions ebb. (R. at 1282–83.) Still, the CTC invited the members to consider the ill-advised circumstances of the sexual activity as itself evidence of incapacity. These arguments included "hav[ing] sex outside in a place where they could easily be found, seen, caught." (R. at 1462, 1516.) Or having unprotected sex, or risking a sexually transmitted disease, or a possible pregnancy. (R. at 1515 ("Why would she want to have unprotected sex? What—does that show judgment? Does that show an appraisal of the situation? Or does it show that she was incapacitated?"), 1631–32.) Simply put, unprotected or risky sex is not an indicator of incapacity.

The refrain, over and over, was about weighing risks and value. Yet this suggests that low-value sexual activity at high risk must mean someone is incapable of consenting, which is a dangerous broadening of the law untethered from the statute. The law requires that the victim be capable of appraising the *sexual act*. Not that a sexual act be a proper weighing of risk and value. To suggest the latter was a misstatement of the law and, thus, prosecutorial misconduct.

2. The Circuit Trial Counsel inflated the surrounding circumstance to enhance the gravity of the offense.

"Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction." *United States v. Voorhees*, 79 M.J. 5, 9–10 (C.A.A.F. 2019) (quoting *Andrews*, 77 M.J. at 402). "[I]t is improper for counsel to seek unduly to inflame the passions or prejudices of the court members." *United States v. Clifton*,

15 M.J. 26, 30 (C.M.A. 1983) (citing *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976)).

As a starting point, the record is devoid of evidence of where and how the sexual act occurred. The parties argued their theories of what aligned with the evidence, but these were only arguments. And yet the CTC claimed that he left her "vulnerable," "alone, in a foreign country with no means to summon help." (R. at 1455, 1475.) Twice he told the members that SSgt Williams defiled TC and left her for dead. (R. at 1518, 1633.)

This was more than hyperbole. This suggests that SSgt Williams callously discarded TC after the sexual act. The record simply does not indicate what happened, and to argue that SSgt Williams "left her for dead" goes beyond reasonable inferences from the record. Instead, it serves only to unduly inflame the members passions.

3. The repeated misstatements prejudiced SSgt Williams.

Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher,* 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). The CAAF outlined a balancing approach of three factors for assessing prosecutorial misconduct's prejudicial effect: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184. This Court considers whether "trial counsel's comments, taken as a whole, were so damaging that [it] cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

The misconduct's severity meets the first *Fletcher* factor. The CTC supplied the members with a legal standard for "appraise the nature of the conduct" that was unmoored from the language of the statute or interpretative case law. This went beyond advocacy. The practical impact of the CTC's argument was to equate ill-advised sexual activity with a situation where a person *cannot* consent. It is profoundly troubling that the members could well have acted on this situation and convicted SSgt Williams on this basis. In addition to the improper argument on the legal standard, the CTC sought to vilify SSgt Williams by claiming he left TC "for dead," after "defil[ing] her." Taken together, the misconduct was severe.

On the second *Fletcher* factor, the military judge's curative efforts were non-existent. Certainly, the defense counsel should have objected, but military judges cannot simply be "figureheads" nor "umpires" in the "contest between the Government and accused; they too have a *sua sponte* duty to ensure the accused receives a fair trial." *Voorhees*, 79 M.J. at 14 (internal quotations, citations, and alterations omitted).

On the third *Fletcher* factor, the weight of the evidence supporting the conviction raises serious doubts about whether the Government met its burden. *See* AOE I, *supra*. Where the Government could only provide skeletal details supporting TC's intoxication and alcohol consumption, and where expert testimony supported the defense's case, any error in misleading the members could have made the difference. The members could have filled the gaps in the Government's case with

improper argument. In sum, the CTC's repeated improper arguments prejudiced SSgt Williams, and this warrants setting aside the findings and sentence.

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

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED AN IMPLIED BIAS CHALLENGE AGAINST A PANEL MEMBER WHO WAS AN OUTCRY WITNESS FOR A CLOSE FRIEND IN ANOTHER SEXUAL ASSAULT COURT-MARTIAL.

Additional Facts

First Lieutenant (1st Lt) FK was a member of the venire and eventually a panel member in the court-martial. During individual voir dire, she revealed that her close friend was sexually assaulted by a military member in 2016. (R. at 439–40.) She also knew the accused in that case, who was a colleague of her father. (R. at 448.) She was a findings outcry witness and was also present for sentencing. (R. at 441–42.) The court-martial yielded a conviction. (R. at 441.) On a 1 to 10 scale, she rated her friendship with the victim in that case as a 7, although she was no longer friends with the victim by the time of SSgt Williams's court-martial. (R. at 443–44.) She denied that her court-martial experience would impact whether she believed sexual assault allegations, in general, are true. (R. at 446–47.)

The defense challenged 1st Lt FK for implied bias, arguing that her role as an outcry witness would affect how she assesses witness credibility in the case. (R. at 575–76.) Additionally, the defense argued that she would be a "*quasi* expert witness" in deliberations. (R. at 576 (italics in original).) The military judge questioned the

civilian defense counsel about the fact that 1st Lt FK was no longer friends with the victim in the other court-martial. (*Id.*)

The military judge denied the challenge for cause. (R. at 579.) He focused on 1st LT FK's disclaimer that her previous experience affected how she perceived other victims' claims, that she does not have "unflagging endorsements" of an alleged victim's claims, and that she would judge all witnesses by the same standard. (R. at 578–79.) He also explained there is no prohibition on witnesses from other cases later serving as members. (R. at 579.)

Standard of Review

Claims of implied bias are reviewed "'pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review.'" *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (quoting *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017)).

Law and Analysis

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citations omitted). This issue is about the right to trial by an impartial panel: a right that "lies at the very heart of due process." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citation omitted). The military judge erred in denying the defense challenge of 1st Lt FK for implied bias, and this Honorable Court should reverse.

Rule for Courts-Martial 912(f)(1)(N) provides that "[a] member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a

member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "Implied bias addresses the perception or appearance of fairness of the military justice system." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (citing *Wiesen*, 56 M.J. at 174). In testing for implied bias, appellate courts look at "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008) (citing *Wiesen*, 56 M.J. at 176). Courts find implied bias when, "regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced.'" *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)).

1st Lt FK was present in the immediate aftermath of a sexual assault of her close friend. She supported her friend through the process, testified as an outcry witness, and provided input at sentencing. This presents several problems. First is her direct experience with sexual assault and its aftermath. While she disclaimed any impact of her experience, "most people in the same position" would be affected by that experience. *Id.* SSgt Williams's case, which obviously is also about sexual assault, makes it foreseeable that her experience would prove important in the deliberation room. And that knowledge quite likely became important when KB testified at length as an outcry witness of sorts, parallelling 1st Lt FK's experience. (R. at 833–97.)

Second, her intimate familiarity with a sexual-assault court-martial, and the experience of testifying, could make her the resident expert in the deliberation room. There is a real risk the public would perceive that SSgt Williams received something less than a fair trial where a panel member was previously aligned with the victim in another sexual assault case. *See Townsend*, 65 M.J. at 463.

On these facts, the military judge should have granted the challenge. The abuse of discretion becomes even more apparent in light of the liberal grant mandate. Military judges are "mandated to err on the side of granting a challenge." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). "Because 'the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings . . . . in close cases military judges are enjoined to liberally grant challenges for cause.'" *Id.* (quoting *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007)). "[I]f after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." *Id.* "This mandate stems from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not encountered elsewhere." *Id.* (internal citations and quotation marks omitted). This was at least a close call, and the liberal grant mandate should have led the military judge to grant the challenge.

As part of his ruling, the military judge stated that he did not find an adequate factual ground for 1st Lt FK's excusal. (R. at 579.) If so, denying the challenge based

on a lack of necessary information was error when the necessary information could have been easily obtained by conducting further inquiry. In *United States v. Richardson*, the CAAF held that a military judge erred when a potential grounds for challenge was raised by voir dire, but not sufficiently developed to make an informed ruling. 61 M.J. 113, 119 (C.A.A.F. 2005) ("[T]he military judge had a responsibility to further examine the nature of relationships in the context of implied bias review, particularly when asked to do so by defense counsel."). The CAAF found that the failure to develop the record was error independent of the denial of the challenge, and that the failure to develop the record precluded review of the merits of the challenge due to insufficient information. *Id.*

So too here. If the military judge believed more information was required, he could have easily obtained that information. Under *Robinson*, this Court should not follow the military judge's lead and reject the challenge because more information could have followed from further inquiry. As noted above, the ground for an implied bias challenge were ample. Given the ability to ask follow-up questions to the venire, the lack of information cannot justify the military judge's decision here.

When a military judge fails to grant a meritorious challenge for cause, the findings must be set aside, and no prejudice analysis is required.[12] If this Court agrees the military judge erred, a set aside is required.

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[12] *See United States v. Rogers*, 75 M.J. 270, 275 (C.A.A.F. 2016) (reversing without a prejudice analysis); *United States v. Woods*, 74 M.J. 238, 245 (C.A.A.F. 2015) (reversing without a prejudice analysis); *Peters*, 74 M.J. at 36 (reversing without prejudice analysis); *see also United States v. Witt*, 73 M.J. 738, 757 (A.F. Ct. Crim. App. 2014) (en banc) ("If the public perceives that an accused received less than a

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

IV.

SSGT WILLIAMS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

SSgt Williams moved to require a unanimous panel verdict. (App. Ex. IX.) The military judge denied the motion. (R. at 183–86.) SSgt Williams elected trial by officer and enlisted members. (R. at 196.) His panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths (3/4) of the Members present when the vote is taken is required for a finding of guilty." (R. at 605–06, 1525.) It is unknown whether the members convicted SSgt Williams by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

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court composed of fair, impartial, and equal members, our superior court has not hesitated to set aside the affected findings and/or sentence." (citations omitted)), *vacated on other grounds*, 75 M.J. 380 (C.A.A.F. 2016); *United States v. Pyron*, 81 M.J. 637, 642–43 (N.M. Ct. Crim. App. 2021) (discussing at length the absence of a prejudice requirement), *aff'd*, 83 M.J. 59 (C.A.A.F. 2023).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, SSgt Williams was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's guarantee of equal protection.

There is no way of knowing whether a nonunanimous verdict secured SSgt Williams's conviction. But that is a problem for the Government, not SSgt Williams. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict.").

SSgt Williams recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter. *See United States*

v. Cunningham, 83 M.J. 367 (C.A.A.F. 2023), *pet. filed*, *Cunningham v. United States*, Dkt. No 23-666, 20 Dec. 2023.

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

V.

SSGT WILLIAMS IS ENTITLED TO RELIEF FOR HIS EXCESS CONFINEMENT CREDIT UNDER *UNITED STATES V. ZARBATANY*, 70 M.J. 169 (C.A.A.F. 2011).

Additional Facts

On 21 March 2022, SSgt Williams's group commander restricted him to the "first floor of the Newlon Hangar and Fuel Cell" while he was on Rosecrans Air National Guard Base (ANGB), ordered him to park in a specific corner, and ordered that he perform an isolated drill period "not to coincide with the rest of the wing." (App. Ex. XIII at 2.) On 20 August 2021, the wing commander barred SSgt Williams from entering Rosecrans ANGB. (*Id.*) SSgt Williams was informed that his presence was "detrimental to good order and discipline and a risk to the security of the installation." (*Id.*)

The Defense moved for appropriate relief based on illegal pretrial punishment. (App. Ex. XIII.) The military judge ruled that the Government presented no factual nexus between the stated objective of good order and discipline and the debarment. (R. at 187.) The military judge presumed punitive intent because of the absence of a rational relationship to a legitimate government objective. (*Id.*) The military judge found debarment was tantamount to restriction and provided 60 days of restriction credit (the maximum allowable restriction at a court-martial), and then an additional

92 days of confinement credit by converting an excess of 183 days of restriction credit into confinement. (R. at 187–88.)

After the sentence—which included only a mandatory dishonorable discharge and one-grade reduction—the military judge recognized that *United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) required meaningful relief for the excess confinement credit but concluded that offsetting the rank reduction "would be disproportionate and thus would not qualify as 'meaningful relief' for the Article 13 violation." (EOJ.) The military judge called the sentence "particularly lenient." (EOJ.) He noted that "[o]n appeal, the accused may choose to request that the confinement credit be applied as to his reduction in grade." (R. at 1768.)

Standard of Review

Whether credit for illegal pretrial punishment has been properly applied is a question of law reviewed *de novo*. *Zarbatany*, 70 M.J. at 174 (quoting *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002)).

Law and Analysis

SSgt Williams comes before this Court with 92 days of confinement credit and 60 days of restriction credit for illegal pretrial punishment. This requires "meaningful relief." *Zarbatany*, 70 M.J. at 177.

In *United States v. Parris*, this Court found that the appellant was denied meaningful relief for 66 days of pretrial confinement credit in excess of his approved sentence. No. ACM S32463, 2018 CCA LEXIS 384, at *8 (A.F. Ct. Crim. App. 14 Aug. 2018) (unpub. op.). In considering the harm the appellant suffered, this Court noted

that the appellant's pretrial confinement conditions "were unnecessarily severe" and the issues with his pay were "unnecessary and harmful." *Id.* at *6. The Court further stated that "the record contain[ed] no indication that either the military judge or the convening authority considered whether the excess confinement credit of 66 days should have been applied against another component of the sentence." *Id.* at *8. In granting meaningful relief, this Court set aside the reduction to the grade of E-1. *Id.*

This Court should adopt the same logic as *Parris* and disapprove the reduction in grade to provide SSgt Williams meaningful relief for illegal pretrial punishment.

WHEREFORE, SSgt Williams respectfully requests this Honorable Court disapprove the reduction in grade.

Respectfully submitted,

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APPENDIX

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

VI.

AS APPLIED TO SSGT WILLIAMS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

Additional Facts

After his conviction, the Government determined that SSgt Williams's conviction qualified for a firearms prohibition under 18 U.S.C. § 922, although the specific provision is not listed. (EOJ; Statement of Trial Results (STR), 2 Aug. 2022.)

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. 18 U.S.C. § 922 is unconstitutional as applied to SSgt Williams.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1,142 S. Ct. 2111, 2130 (2022).

> consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2129–30 (citation omitted).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to SSgt Williams, who stands convicted of sexual assault that, as charged, was not a violent offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his

possession or under his control, a pistol or revolver." *Id.* at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). SSgt Williams was charged with sexual assault, not rape. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *pet. filed*, No. 23-374 (U.S. 5 Oct. 2023).[2] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, a felony conviction today is vastly

[2] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. 18 Oct. 2023.)

different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal "felon" disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id.* at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

This is not the only provision of § 922 to have come under fire since *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic

violence restraining order." *Id.* at 448–49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id.* at 460. If the Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed-upon domestic violence restraining order violation, then it similarly does not include barring SSgt Williams from *ever* possessing firearms for a nonviolent offense.

In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested

for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id*. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, § 922(g)(1) is unconstitutional as applied to SSgt Williams.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 Rules for Courts-Martial (R.C.M.), this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex

offender." 82 M.J. 263, 2022 CAAF LEXIS 182, at *1 n.* (C.A.A.F. 2022) (decision without published opinion). This disposition stands in tension with *Lepore*.

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[3] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the STR and EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the Rules

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[3] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

for Courts-Martial. now require—by incorporation—a determination on whether the firearm prohibition is triggered.[4] Thus, this Court can rule in SSgt Williams' favor without taking the case en banc. If this Court disagrees, SSgt Williams offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, SSgt Williams respectfully requests this Court hold § 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

VII.

SSGT WILLIAMS'S CONVICTION IS LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

[4] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpub. op.) (ordering correction of an STR because it incorrectly stated § 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpub. op.) (ordering correction of the STR to change the Section 922(g)(1) designator to "No").

For the reasons discussed in the main brief in Assignment of Error I, SSgt Williams' conviction for sexual assault is legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt.

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 February 2024.

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1 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **ERIK C. WILLIAMS**, USAF, *Appellant.*	)))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40410 Panel No. 1

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

UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR

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1 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ERIK C. WILLIAMS, USAF, *Appellant.*	)))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40410 Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER SSGT WILLIAMS'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY SUFFICIENT.

II.

WHETHER THE CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE INVITED THE MEMBERS TO CONVICT SSGT WILLIAMS BY MISSTATING THE APPLICABLE LAW AND INFLATING THE GRAVITY OF THE OFFENSE.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED AN IMPLIED BIAS CHALLENGE AGAINST A PANEL MEMBER WHO WAS AN OUTCRY WITNESS FOR A CLOSE FRIEND IN ANOTHER SEXUAL ASSAULT COURT-MARTIAL.

IV.

WHETHER SSGT WILLIAMS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

V.

WHETHER SSGT WILLIAMS IS ENTITLED TO RELIEF FOR HIS EXCESS CONFINEMENT CREDIT UNDER UNITED STATES V. ZARBATANY, 70 M.J. 169 (C.A.A.F. 2011).

VI.[1]

WHETHER AS APPLIED TO SSGT WILLIAMS, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

VII.[2]

WHETHER SSGT WILLIAMS'S SEXUAL ASSAULT CONVICTION IS LEGALLY SUFFICIENT.

STATEMENT OF THE CASE

On 20 May 2022, at Whiteman Air Force Base, Missouri, contrary to his plea, a general court-martial comprised of officer and enlisted members convicted Staff Sergeant Erik C. Williams (Appellant) of one charge and one specification of sexual assault (vaginal sex with the victim) in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. (*See* Entry of Judgment (EOJ), dated 2 August 2022, Record of Trial (ROT), Vol. 1.) Consistent with his plea, Appellant was acquitted of a separate charge and specification of sexual assault (anal sex with the same victim), an alleged violation of Article 120, UCMJ. (Id.) The members sentenced Appellant to a dishonorable discharge and a reduction to the grade of E-4. (Id. at 2.)

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[1] Assignment of Error VI is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] Assignment of Error VII is also raised pursuant to Grostefon, 12 M.J. at 431.

The convening authority took no action on the findings and approved Appellant's sentence "in its entirety." (*See* Convening Authority Decision on Action, dated 2 June 2022, ROT, Vol. 1.)

STATEMENT OF FACTS

TC, the victim in this case, was deployed to Ali Al Salem Air Base, Kuwait for 120 days between February and July 2018. (R. at 625-27.) Her job required her to repair equipment and deliver it to the expeditionary base's flight line. (Id. at 626.) TC worked "very hard" on the deployment—six days a week and at least 12-hours per day. (Id. at 627.) She drank only one time on the deployment—during a Christmas party. (Id. at 1035-36.)

On 1 July 2018, TC's deployment ended, and she began the long trip home. (R. at 628.) Her first flight, via C-130, stopped at Sigonella Naval Air Station (NAS), Italy, where her unit was scheduled to have an 18-hour layover. (Id. at 629, 910, 923.) Of the 30 or so individuals on the aircraft, TC was the only woman. (R. at 629.) She slept for "[t]he entire flight." (Id. at 630.)

Upon her morning arrival in Italy, TC checked into lodging, showered, and called her husband and father. (R. at 631, 691.) Afterwards, TC and Staff Sergeant (SSgt) TS and SSgt KW ate lunch at a base restaurant at around 1300; TC consumed only one large slice of pizza, which was the only food she consumed that day. (Id. at 632, 636.) The three then withdrew cash from the ATM at the Base Exchange and, while there, "bought a 30-pack of Miller Lite." (Id. at 632.) They walked back to SSgt KW's room to use his freezer to cool the beer. (Id. at 637.)

In the courtyard behind SSgt KW's room, in the early afternoon, the group began drinking the beer. (R. at 640-41, 1009.) They did so for approximately 2 to 3 hours. (Id. at 641.) During her time in the courtyard, TC consumed anywhere between 5 and 8 beers. (R. at 644, 1035, 1104.) At some point in the afternoon, Technical Sergeant (TSgt) GC joined the group. (Id. at 642, 926.)

After the group finished drinking beer, they planned to go to dinner in town at around 1730 and, afterwards, a strip club. (Id. at 643, 648.) When the group met up at that time to take a taxi to dinner, TC "was feeling fine" and "didn't feel drunk," though she was "a little buzzed." (R. at 645.) Because the taxi was unable to travel onto base, the group instead decided to walk to Jox Pub, which was next to the restaurant where they had previously eaten lunch. (Id. at 646.) Upon arriving at the pub, the group discovered the bar did not serve food. (Id. at 648.)

Inside the pub, TC encountered other members of her unit, which included Appellant and three other individuals. (R. at 650.) When TC sat down with the other members of her unit, which included Appellant, she ordered a drink for TSgt GC and a beer for herself, which she did not fully consume. (Id. at 651, 658, 930.) Next, she ordered a "skinny" long island iced tea.[3] (Pros. Ex. 4; Def. Ex. B; R. at 653, 700.) Around this time (approximately 1800 local time), TC remembered feeling "comfortable" and "fine." (R. at 656.)

At some point after SSgt TS left the bar to go to sleep, TC purchased another long island iced tea, and she remembered drinking "maybe a quarter of it," but could not remember much after that or whether she finished the second mixed drink. (R. at 658-59, 1014.) Someone at the pub purchased shots of alcohol and passed them around, but TC had no specific memory of drinking them ("I don't know if I had them or not."). (R. at 801.) SSgt BO testified at trial that he saw TC with "a beer and two shots" in front of her. (R. at 973.) Shortly after, SSgt BO glanced over to TC's table and saw that "the shots were gone." (R. at 974.) TC testified at trial that it was "possible that [she] drank more alcohol than what [she] had testified to in memory." (R. at 803.) TC also testified that she had not had "any romantic contact" with Appellant prior to her memory ceasing. (Id. at 660.)

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[3] A "long island iced tea" is a drink typically consisting of several shots of alcohol: Vodka, white rum, tequila, gin, and triple sec (in addition to simple syrup, lemon juice, and soda).

Other witnesses present at the pub testified that, as the night progressed, TC began slurring her speech. (*See, e.g.*, R. at 931 (TSgt GC), 1052 (Lieutenant Colonel (Lt Col) JL).) Toward the later part of the evening (TSgt GC and SSgt BO testified that TC was at the pub for approximately four hours),[4] TSgt GC saw TC "wavering [and] stumbling." (R. at 931.) SSgt BO observed that TC "appeared to be worse than anyone else there" insofar as intoxication. (R. at 975.) MSgt JD witnessed TC "swaying back and forth" and leaning on the bar to keep her balance and opined that TC "was one of the more intoxicated people in that group." (R. at 994-95.) TC's intoxication was so apparent that TSgt GC "brought it to the attention of [the] aircraft commander." (R. at 932.) Due to TC's intoxication, Appellant was selected to "escort [TC] back to her room." (Id.)

TC's next memory was waking up lying down on a tennis court.[5] (R. at 660-61, 1105.) It was dark (between 0230 and 0300 the next day, 2 July 2018), and TC was still wearing the same clothes she had been wearing earlier, but was missing her shoes, phone, and purse. (Id. at 662, 809, 820, 837.) TC began walking, "hoping to run into something." (R. at 664.) After walking for a short while, TC encountered a Navy Security Forces vehicle, which stopped to assist her. (R. at 664, 709, 812.) The officers (including Petty Officer 2nd Class (PO2) RE) questioned her regarding her identity, where she was staying, and whether she had been sexually assaulted. (Id. at 664-65, 812.) TC told them she had not been sexually assaulted because she "didn't think [she] was, at the time." (Id. at 665.) Nonetheless, TC was upset and smelled of alcohol. (R. at 814.) Eventually, the officers learned where TC was staying and drove her back to lodging. (Id. at 665.)

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[4] TSgt GC admitted that after he left the pub around 2100, he was heavily intoxicated to the point of blacking out, and later woke up in his lodging bathroom having urinated on himself. (R. at 959.) Like TC, TSgt GC had consumed several beers in the afternoon, a long island iced tea, and possibly another drink prior to departing the pub. (R. at 962.)

[5] Prior to the time TC woke up on the tennis court, lodging records indicated that TC's keycard was used to open her lodging room door at 0218 and 0234, respectively. (Def. Ex. A.) TC had no memory of returning to her room prior to waking up on the tennis court. (R. at 734.)

The base lodging clerk, KB, spoke with PO2 RE and informed him "they had her purse and her shoes that had been turned into the front desk" to an employee other than KB. (R. at 813.) One of the officers told KB that TC "was a drunken mess." (R. at 838.) When TC arrived at lodging, (then) SSgt BT was waiting for her and, upon her arrival, he observed that she was crying and upset. (R. at 667, 915.) The two had a brief exchange and TC returned to her room. (Id.) Before TC returned to her room, KB observed TC "hysterically crying" and "seem[ing] extremely lost, confused, and scared." (R. at 840.) After anxiously pacing in her room for a short while, TC walked to the hotel lobby and called her husband, long distance, from a phone located there. (R. at 667, 840.) She spoke to her husband for approximately fifteen minutes, and then walked back to the tennis court with KB to look for her belongings. (R. at 669-70, 843.)

While looking for her phone, TC "smelled semen on [her] body." (R. at 672.) She mentioned to KB that, "It smells like dick down there." (Id. at 851; *see also* id. at 672, 849.) Unable to find any of her other belongings, TC walked back to her room and eventually fell asleep still wearing the clothes from that night. (Id. at 672.) Early the next morning, SSgt TS knocked on her door and told her the group was departing. (Id. at 673.) To avoid missing her next flight, SSgt TS helped TC pack her bag, and TC quickly "grabbed [her] uniform and went to the bathroom to change." (Id.) There, TC observed "scratches on [her] legs and … rug burns on [her] knees." (R. at 673, 735; *see also* R. at 1017, Def. Ex. C.) She also noticed that her "underwear were missing"—though she had no memory of taking them off. (R. at 673-74.)

TC checked out from lodging and boarded the bus while crying. (R. at 675-76, 917, 978, 1015, 1039.) TC was "very upset when [she] was checking out" and "was even more upset when the hotel desk clerk handed [her] a pamphlet on sexual assault." (Id. at 675; *see also* id. at 1063.) SSgt KW pulled her to the side and asked TC what had happened. (Id. at 676.) TC "told him everything [she] knew up to that point," which made SSgt KW "visibly angry." (Id.) She told

SSgt KW about waking "up around 3 o'clock in the morning on the tennis court and [that she] didn't have [her] phone, shoes, [or] purse" and that her "underwear were missing." (Id.) TC then boarded her aircraft for the next leg of the trip. (Id.)

While boarding the aircraft, SSgt KW talked to the aircrew. (R. at 677.) After he did so, he approached TC with her phone, handed it to her, and told her, "[Appellant] had this" and that Appellant mentioned "he found it … in front of his room" or, according to SSgt KW's later trial testimony, "around some parked cars."[6] (R. at 677, 1042.) Appellant approached TC and told her "he was sorry no one made sure that [she] got home last night." (Id. at 678; *see also* id. at 741.) TC responded that she was sorry too that she "hung out with people [she didn't] know." (R. at 678.) She moved away from Appellant after he lingered in front of her for several minutes. (Id.) "[S]omeone in the group addressed" Appellant and asked him what had happened. (R. at 980.) Appellant responded, "I don't know, I just dropped her off and that was it." (Id.) Around the same time, Appellant told Lt Col JL that "he got her to her building, and that … [it] was [Appellant's] responsibility and he wouldn't jeopardize [his relationship] with his girlfriend back home." (R. at 1064.) After settling into a cot on the aircraft, TC again fell asleep. (Id. at 679, 681, 1042.)

When TC awoke, she felt that both her vagina and anus hurt. (R. at 681.) Her back hurt as well. (Id.) After the aircraft landed in Ireland, TC checked into her hotel in Limerick. (Id. at 682, 722.) TC used the restroom in her room and noticed on her anus "blood and what [she] thought might be semen." (Id. at 683.) When she wiped her vagina, "there was blood and more semen." (Id.) Now crying, she immediately called SSgt KW and told him she needed to go to the hospital. (Id.)

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[6] Appellant told MSgt BT that "he found [the phone] in the hotel, a walkway." (R. at 919.)

On 2 July 2018, TC was examined by medical personnel at the Irish hospital, including Dr. SO, and they drew a sample of her blood. (R. at 684-86.) She was also questioned by law enforcement. (Id. at 685.) During her questioning at the hospital, TC told law enforcement she was "not 100 percent sure [she] was raped." (R. at 728.) TC also communicated that she was unsure of the identity of her assailant. (Id. at 795.) Dr. SO conducted a sexual assault forensic examination. (R. at 1098.)

Dr. SO's deposition testimony was admitted and played at trial. (Pros. Ex. 7; R. at 1076-1127.) Dr. SO collected 16 samples for DNA testing, including from TC's knees, breasts, face, and a buccal swab. (R. at 1111, 1121.) He also took two vaginal swabs—one mid vagina and one from TC's vulva—an anal swab, as well as one from TC's "right iliac crest." (R. at 1121-22.) Appellant's DNA was also collected by the Air Force Office of Special Investigations (AFOSI), via a buccal swab. (R. at 1148.) In addition, AFOSI collected a sample of TSgt GC's DNA, though it was later excluded as a possible contributor to the DNA present on TC. (Pros. Ex. 6; R. at 1149, 1166.) The laboratory's test results confirmed that "[s]emen was identified in all the swabs that were tested, and the DNA mixtures that were developed, were consistent with [TC] and [Appellant]." (Pros. Ex. 6; R. at 1202, 1223.) Those results were also consistent with ejaculation occurring approximately twenty-four hours prior to collection. (Id. at 1212.) The ultimate results—that the DNA profiles were at least 1 quintillion times more likely to have originated from Appellant than if they originated from TC and an unknown individual—represented the reviewing laboratory's "highest statistical threshold that [they could] give." (Id. at 1210.)

Appellant was questioned by AFOSI. (R. at 1151.) Appellant told the agents that "he did not recall bringing her directly to her room … [and t]hat on the way back he vomited, [and] he remembered hearing a voice and thinking it was hers, [TC's]." (Id.) On a separate occasion, Appellant asked his First Sergeant, after Appellant's appointment with the Family Life Counsel's

Office, "if you were drunk, can [you] commit rape[?]" (R. at 1195.) Appellant also asked MSgt KJ if he "could … say he was raped too, if [he] was drunk?" (Id.)

TC testified at trial that she would not have voluntarily consented or participated in a sexual act with Appellant. (R. at 744.)

ARGUMENT

I & VII.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY SUFFICIENT.[7]

Standard of Review

A Court of Criminal Appeals may affirm only such findings of guilty "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "Article 66[(d)] requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The Court's assessment of legal and factual sufficiency is limited to the evidence produced at trial. *See* United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

"The test for legal sufficiency is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the

[7] Legal sufficiency is raised pursuant to Grostefon, 12 M.J. at 431. Because the two issues are related, the Government has consolidated Issues I and VII.

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to the ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[I]n resolving questions of legal sufficiency, [the Court is] bound to draw every reasonable inference from the evidence of record in favor of prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). When examining the evidence in the light most favorable to the prosecution, "a rational fact-finder could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. United States v. Long, 81 M.J. 362, 369 (C.A.A.F. 2021) (citation omitted). An examination for legal sufficiency thus "involves a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the Court] take[s] 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." Id.

The elements of sexual assault (when the victim is incapable of consenting due to impairment by alcohol), as charged and instructed, are as follows:

1. That at or near Naval Air Station Sigonella, Italy, between on or about 1 July 2018 and 2 July 2018, Appellant committed a sexual act upon then-SSgt TC, by penetrating her vulva with his penis;

2. That Appellant did so when then-SSgt TC was incapable of consenting due to prior ingestion of alcohol; and

3. That Appellant knew or reasonably should have known that then-SSgt TC was incapable of consenting to the sexual acts, due to impairment by alcohol.

(R. at 1429; *see also* Charge Sheet, ROT Vol. 2); *see also* Manual for Courts-Martial, United States (2016 ed.) (MCM), pt. IV, ¶ 45.b.(3)(f).

The term "sexual act" as referenced in the charge, instructions, and the Manual, means, "[t]he penetration, however slight of the penis into the vulva[.]" Article 120(g)(8), UCMJ, 10 U.S.C. § 920(g)(8) (2018). The term "incapable of consenting" means the person is:

(A) Incapable of appraising the nature of the conduct at issue; or

(B) Physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

Article 120(g)(8), UCMJ; *see also* United States v. Pease, 75 M.J. 180, 185 (C.A.A.F. 2016); (R. at 1317; App. Br. at 11.)

Analysis

Appellant does not contest the sufficiency of the evidence that he committed the sexual act of penetrating TC's vulva with his penis. Rather, he raises several arguments related to the sufficiency of the evidence concerning TC's impairment by alcohol and his knowledge of TC's incapacity. None of Appellant's highlighted facts or argument raise reasonable doubt in this case, nor do they undermine the legal sufficiency of his conviction.

1. Obvious to everyone present at the pub, TC was visibly intoxicated enough to require an escort back to her room. As the person selected to ensure TC safely returned to her room, Appellant had ample reason to know and believe TC was incapacitated.

Appellant first asserts that "TC's lack of memory alone does not equate to incapacity[.]" (App. Br. at 12.) Next, he claims that "[t]he amount of alcohol alone cannot support a finding that

TC was incapacitated." (Id. at 13.) Yet, in so doing, Appellant glosses over the testimony from multiple witnesses demonstrating that TC was visibly intoxicated—so much so that she required an escort (*i.e*, Appellant) to make sure she returned safely to her room. But she never did: TC awoke in the early morning on a base tennis court with abrasions on her body, without her shoes, purse, phone, and underwear. Those same witnesses also testified that TC was previously slurring her words (R. at 931, 1052), wavering at the table (id. at 931), leaning on the bar (id. at 994), and was one of the most intoxicated individuals at the pub that night (id. at 995, 997, 1611). Appellant was present at the pub (from the time TC arrived until she left) to witness these manifest and manifold indicia of severe intoxication, and he was selected to ensure she returned home safely because she was incapable of doing so herself. Therefore, he amply knew *and* reasonably should have known that TC was in an incapacitated state.

Rather than TC's afternoon drinking having "little bearing on her intoxication later that night" (App. Br. at 12), her alcohol consumption in the afternoon compounded with the alcohol she later consumed at the pub, particularly since TC was fatigued from the long (turbo-prop, not jet-powered) flight from Kuwait, she had consumed alcohol only once before during her months-long deployment, and she had not consumed any food the day of the incident except for a piece of pizza. Prior to her leaving the pub with Appellant, TC never took a break from drinking. (R. at 1468.) All those present at the pub observed that TC was heavily intoxicated, should not continue drinking, and therefore needed a wingman to complete the five-minute walk to her room. These facts—not just TC's lack of memory (TC's failure to remember the sexual assault is essentially a red-herring if used as the sole determinant in gauging her capacity)—support the government's theory that TC was severely intoxicated and thus incapable of appraising the nature of the sexual conduct at issue. These facts also demonstrate Appellant knew and reasonably should have known

she was incapable of appraising the nature of the sexual act. Whether Appellant specifically knew *why* TC was so intoxicated is immaterial; his knowledge of her severe intoxication—which was obvious to all at the pub—is what should govern here.

Even assuming, for the sake of argument, that "five to six light beers," a "'skinny' Long Island iced tea, a quarter of another Long Island iced tea, and a sip of beer" were *the only drinks* TC consumed (though the government does not concede this point), it is a mistake to conclude that this amounts to "meager" evidence of incapacitation. This is particularly the case when those drinks are considered alongside all the facts: TC's physical signs of intoxication (at the pub and later when she encountered law enforcement); the fact she blacked out, lost track of her personal items and underwear, and passed out and woke up alone in an unfamiliar area with no memory of the preceding events (and was *still* intoxicated when discovered by PO2 RE); and her later surprise when she discovered she may have had sex. Further, TSgt GC—who is a male and has a higher body weight—consumed a similar amount of alcohol and experienced similar symptoms: He too became heavily intoxicated, blacked out, passed out, and urinated on himself. (R. at 959, 961.)

More, Appellant's own expert conceded that having a "blackout" *does not* mean a person cannot *also* display the physical manifestations of being intoxicated. (R. at 1299-1300.) In other words, merely because a person could seem "fine" while in a blackout state in some circumstances, does not mean that all individuals will respond that way. One can be both in a blackout state *and* intoxicated to the point of incapacitation—which was TC's state on the night of her sexual assault.

Furthermore, the additional evidence presented by the prosecution at trial indicated that TC consumed drinks in addition to those acknowledged by Appellant. The shots placed in front of her were quickly "gone" and, after they disappeared, TC "had gotten worse, more intoxicated." (R. at 974.) TC also very likely consumed more beers earlier in the afternoon than she recalled. (*See* R.

at 1035 ("I observed her or watched her drink 6 to 8 beers".) Even Appellant reluctantly admits "[i]t is possible that she drank more that night." (App. Br. at 12.) TC's physical signs of intoxication, and her later blackout *and* pass out also support the conclusion that she consumed more drinks than those acknowledged by Appellant in his brief.

At bottom, the government's evidence reinforces the conclusion that TC was severely intoxicated, which, in turn, strongly supports the government's theory that TC was incapacitated to the point that she could not appraise the nature of the sexual acts that Appellant concedes occurred. Moreover, TC's intoxication was also so obvious that Appellant knew and reasonably should have known that she was incapacitated.

2. TC's actions, words, and demeanor demonstrated her obvious incapacitation, and the expert testimony elicited by the defense at trial, did nothing to contradict those facts.[8]

The testimony of the prosecution witnesses demonstrated that TC was visibly intoxicated. Appellant's trial experts did nothing to refute this fact. Rather, Appellant's experts testified that a blackout *alone* is not sufficient to demonstrate incapacitation (*see, e.g*., R. at 1285). While it is perhaps true that, in some circumstances, a person can possess the capacity to consent while in a blackout state, TC's blackout here was only one piece of evidence demonstrating her incapacity. As discussed at length above, TC exhibited several obvious signs of severe intoxication while at the pub. Though no one witnessed her vomiting or falling over, she did slur her speech (R. at 931, 1052), waver and lean on the bar (id. at 931, 994), and appear to those present to be the most intoxicated individual at the pub (id. at 995, 997, 1611). Her waking up from a passed-out state

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[8] Appellant states in his brief that the evidence supports his "mistake defense." (App. Br. at 13.) But Appellant did not argue mistake of fact at trial, nor did the judge instruct on mistake of fact as to consent. (*See* R. at 1428-34; App. Ex. LVI.) Rather, Appellant argued TC was not sufficiently incapacitated as to render the sexual act nonconsensual. Specifically, Appellant claimed that TC's participation in the sexual act was *ipso facto* evidence of consent: "[I]f she's participating she can appraise, she can assess. If she's participating she can communicate." (R. at 1480.)

with no memory, without her phone, purse, or underwear, on a base tennis court at around 0300 in the morning also speaks for itself insofar as her level of intoxication. And contrary to Appellant's theory, the abrasions on TC's elbows and knees do nothing to demonstrate her consent; they demonstrate that the sexual act occurred outside, on the tennis court where TC awoke, and that she was discarded there to fend for herself once Appellant was finished with her.

Appellant analogizes this case to United States v. Pease, 74 M.J. 763 (N-M Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016), where the Navy and Marine Corps Court of Criminal Appeals (CCA) found that the evidence presented at trial was insufficient to demonstrate incapacity. Appellant's comparison fails under any degree of scrutiny. In Pease, that CCA overturned the members' findings because "the witnesses who observed the complainants largely minimized their level of intoxication," id. at 770; the government "was often forced to attempt to impeach their own witnesses … on supposedly contradictory statements they had made," id.; and witnesses saw the first complainant "walk back to the ship with the appellant without any apparent difficulty, navigate the gate and ladder well, request permission to come aboard, and scan her identification card" in addition to conceding on cross-examination "that she may have said 'yes' to the sexual intercourse," id. at 771. Regarding the second complainant in Pease, she conceded on cross-examination that she "was able to formulate the thought that she wanted to stay out … and was able to communicate that she wanted to stay out," along with being able "to determine that she did not want [certain sexual activities to continue] and to articulate that to the appellant." Id. More importantly, she "candidly related active participation in and even enjoy[ed] portions of the sexual activity." Id. *None* of these facts are present in this case, and thus Appellant's cherry-picked factual comparison to Pease holds no water.

This case is more analogous to United States v. Brown, No. ACM 39727, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. 21 Aug. 2021) (unpub op.), where this Court reviewed the legal and factual sufficiency of the same offense at charged here. Though the facts in that case differ slightly from those in this case (the victim there arguably consumed more alcohol than TC and that victim also vomited prior to the sexual acts), the testimony in Brown nonetheless demonstrated, like here, that the victim's "physical and mental state were heavily impaired by alcohol at the time of the offenses"; the victim's "memory was … affected and she described partial blackouts in her testimony"; because the appellant "was with [the victim] for most of the evening, including most of the time during which she was consuming alcohol," he knew she was impaired; and the appellant's "behavior after she awoke suggested his consciousness of guilt[.]" Id. at *14-15. The Brown Court also discounted the appellant's purported motive for that victim to fabricate: that she denied that the acts were consensual because she was protecting her marriage. Id. at *17. The facts in Brown, which supported the appellant's conviction at trial and on appeal, are very similar to the facts in this case insofar as the victim's visible intoxication and blackout, the presence of the appellant to observe the victim's intoxication, and the appellant's post-incident conduct, which indicated a consciousness of guilt. Thus, unlike Pease, the reasoning in Brown is instructive here.[9]

3. The facts provided by the government at trial did not require the factfinder's speculation, nor did they lead to an "evidentiary void."

Appellant's inconsistent and untruthful statements after the sexual assault are strong evidence of his actual and consciousness of guilt. On the day following the incident, SSgt BO overheard Appellant stating that he "dropped [TC] off and that was it." (R. at 980.) Appellant

[9] This Court also found "ample evidence" to support an "incapable of consenting" conviction in United States v. Motus, No. ACM 39841 (f rev), 2021 CCA LEXIS 484 (A.F. Ct. Crim. App. 23 Sept. 2021) (unpub. op.).

also told Lt Col JL that he "got [TC] to her building." (R. at 1064.) But Appellant told SSgt TS that he and TC "sat out at a picnic area and they … talked for a while." (R. at 1016.) Later, Appellant offered a third version to AFOSI—that "he did not recall bringing [TC] directly to her room. That on the way back he vomited, he remembered hearing a voice and thinking it was hers, [TC's]." (R. at 1615.) In his OSI interview, Appellant also never "state[d] that he had any kind of sexual contact with [TC]." (R. at 1613.) Appellant offers no explanation in his brief for these inconsistencies, nor does he detail how these statements fit into the supposed "evidentiary void." (App. Br. at 16.) With respect to his possession of TC's phone, Appellant again provided differing explanations: Appellant told SSgt KW that he found the phone "[a]round some parked cars." (R. at 1042.) But he offered an alternative story to MSgt BT: He told him that "he found it in a walkway." (R. at 919.) Viewed together, these statements paint a picture of an individual who found it impossible to explain why TC never made it to her room safely despite Appellant being selected to make sure she did, why Appellant's DNA was found inside TC even though Appellant never mentioned to AFOSI or anyone else that he had sex with her, and why Appellant was in possession of her phone if he "did not recall bringing [TC] directly to her room." (R. at 1615.)

Finally, Appellant argues that the standard for incapacity under Article 120(g)(8), UCMJ, is "a high bar." Perhaps so, but the government's evidence, which included Appellant's self-serving and contradictory statements, far surpassed that bar. In addition to the myriad witnesses that testified to TC's level of intoxication, Appellant himself ultimately (1) acknowledged that the sexual act occurred and that "DNA testing showed it was overwhelmingly likely that [Appellant's] DNA was on and in her body" (App. Br. at 8), (2) provided multiple contradictory post-incident statements regarding what transpired that night, and (3) offered spurious explanations as to why he was in possession of TC's phone. Accordingly, this Court does not have to "speculate" as to

what happened after TC left the bar—Appellant engaged in a sexual act with TC after he was entrusted with her safety, TC was in no state to consent to such act, and she was ultimately left passed out on a base tennis court without a wingman, or her shoes, phone, purse, or underwear.

After making allowances for not having personally observed the witnesses, including TC, this Court should reach the only logical conclusion: That Appellant is guilty of sexual assault beyond all reasonable doubt.

4. The evidence offered at trial is legally sufficient to sustain this conviction.

Appellant points to no specific legal deficiency in his final assignment of error. As this Court well knows, an examination for legal sufficiency "involves a very low threshold to sustain a conviction." King, 78 M.J. at 221. Here, and as discussed at length above, the government provided plentiful evidence to prove each element of the offense beyond a reasonable doubt. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could easily have found the essential elements of this crime beyond a reasonable doubt. *See* Robinson, 77 M.J. at 297-98. Accordingly, the conviction for sexual assault is legally sufficient.

II.

CIRCUIT TRIAL COUNSEL DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.

Standard of Review

Absent an objection from the defense, as is the case here (*see* App. Br. at 20), this Court reviews claims of prosecutorial misconduct and improper argument for plain error. *See* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). "The burden of proof under plain error review is on the appellant." Id. (citing United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)).

"Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. at 401 (internal quotation

marks omitted) (quoting United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)). Therefore, this Court must determine: (1) whether trial counsel's argument amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016)); *see also* United States v. Tovarchavez, 78 M.J. 458 (2019) (explaining that, where nonconstitutional error is forfeited, the Molina-Martinez test should be applied).

A military judge is "presumed to … distinguish between proper and improper" arguments. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted); *see also* United States v. Bousman, No. ACM 40874, 2023 CCA LEXIS 66, *34 (A.F. Ct. Crim. App. 8 Feb. 2023) (unpub. op.) (finding, in a military judge alone trial, trial counsel's closing argument "flawed" but ultimately not prejudicial).

Law and Analysis

Appellant claims that trial counsel committed prosecutorial misconduct by providing the members with an inaccurate definition of incapacity, urging the members to convict Appellant based on that supposedly flawed definition, and inflating the surrounding circumstances to "enhance the gravity of the offense." (App. Br. at 21-23.) Appellant is mistaken in conducting such a hyper-technical parsing of trial counsel's words. Trial counsel's routine findings arguments did not misconstrue the facts or the law, and, per the judge's instructions, were merely an "exposition of the facts by counsel … as [he] viewed them." (R. at 1451; App. Ex. LVI.)

1. Circuit trial counsel did not provide the members with an inaccurate definition of incapacity.

Trial counsel here properly summarized and persuasively argued the evidence and testimony elicited at trial. "Improper argument is one facet of prosecutorial misconduct." United

States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." United States v. Hornback, 73 M.J. 155, 159 (C.A.A.F. 2014) (alteration in original) (quoting Fletcher, 62 M.J. at 178).

Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example] a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Andrews, 77 M.J. at 402 (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). "[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)). "A prosecutorial comment must be examined in a light of its context within the entire court-martial." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted).

In this case, trial counsel never misstated a legal principle, and he did not violate any legal norm, standard, constitutional provision, statute, Manual rule, or applicable professional ethics canon. Nor does Appellant meet his burden in demonstrating, or even specifying, which legal principle circuit trial counsel supposedly violated. Rather, Appellant merely disagrees with trial counsel's interpretation and explanation of the word "appraising" and asserts that trial counsel somehow lowered the burden necessary for a conviction. But circuit trial counsel only asked the members to consider the surrounding circumstances of the sexual act in determining whether TC was incapacitated and whether, considering those circumstances, she could properly "appraise" the nature of the sexual act.

He stated the following:

> You would think that person got hammered; that person couldn't take care of themselves; clearly that person needed assistance getting home. That's the other fact you have. That's a person you would automatically assume with those facts, is incapacitated or there's no evidence you heard suggested to the contrary.
>
> …
>
> It requires an understanding or appreciation of her environment, which she clearly didn't have.

(R. at 1460.)

Whether a person can appraise the nature of the sexual conduct at issue necessarily requires an analysis of the surrounding circumstances (after all, Appellant's entire analysis of Issue I is a broadside against those surrounding circumstances). To suggest otherwise requires the members to view the sexual act in a myopic vacuum and to discard those important facts leading up to and after the act itself. This cannot be and indeed is not the standard. Thus it is not trial counsel who had an incorrect view of the law, but Appellant here by asserting that the members should have been limited "to the act itself, not the surrounding circumstances" in determining whether TC could appraise the nature of the conduct and therefore freely consent to the act. (App. Br. at 22.)

Appellant also asserts that the "CTC invited the members to conclude that if the sexual act was a bad idea—that the risk versus value calculation weights against it—then TC must have been incapacitated." (Id.) But the propriety of the sexual act itself—where it occurred, what time it occurred, how it occurred, and how it ended—certainly play a role in determining whether TC was truly appraising the nature of said act. Especially relevant here were the facts that TC woke up alone, in an unfamiliar space, without her designated "wingman" (Appellant), with abrasions on her body, missing her belongings (including her own underwear), smelling of sex, and with no recollection of the sex. Taken together, these facts are supremely relevant and were well within

trial counsel's rights to underscore. And while "unprotected or risky sex is not [by itself] an indicator of incapacity" (App. Br. at 23), when viewed together with the other surrounding facts, it is certainly a factor to be considered by the factfinder in assessing TC's ability to appraise the nature of the sexual act itself.

Ultimately, Appellant wants it both ways: He wants to argue that the surrounding circumstances indicated that TC was *not* incapacitated, but he also wants circuit trial counsel to avoid any and all references to those surrounding circumstances in his closing argument to demonstrate the same incapacity. This is not just unfair, but it makes no practical sense. And it is certainly not what the law requires. Accordingly, trial counsel did not commit prosecutorial misconduct, he did not engage in improper argument, and Appellant is unentitled to relief.

2. Circuit trial counsel did not inflate the surrounding circumstances—he properly summarized and argued them.

Appellant next rehashes his argument from Issue I and states that "the record is devoid of where and how the sexual act occurred," in addition to complaining that "[t]he parties argued their theories of what aligned with the evidence." (App. Br. at 24.) Interestingly, however, Appellant also concedes that "these were only arguments." (Id.) Exactly right.

Trial counsel properly *argued* his theory of the case, which was supported by the evidence, both direct and circumstantial. He asserted that TC was left "vulnerable," and "alone, in a foreign country with no means to summon help." (Id.) Viewed "in light of its context within the entire court-martial," Carter, 61 M.J. at 30, trial counsel's argument falls squarely within the realm of "reasonable inferences fairly derived from [the] evidence," Halpin, 71 M.J. at 479. No one disputes that TC was alone when she awoke, without a guide, escort, or real wingman, and, thus, given her condition, it is not a stretch to conclude that she was left "vulnerable." Without her phone or purse or shoes, she also had "no means to summon help." Circuit trial counsel indeed

stated that TC was also "left for dead," (*see* R. at 1516, 1518), but this is a more-than-fair inference given the evidence that TC was alone, bleeding, missing her underwear and any means of communication, and passed out outdoors in the middle of the night. The record certainly fails to indicate that Appellant ever went looking for TC post-sex, or was even concerned about her safety after he supposedly found her phone in a walkway (or, in a different version of the events he provided, near some parked cars).

Trial counsel's arguments were fair, reasonable, and persuasive considering the entire court-martial and evidence adduced at trial. Again, circuit trial counsel did not commit prosecutorial misconduct and did not present an improper argument to the members.

3. Appellant suffered no prejudice.

Even if trial counsel's argument was somehow improper (though, again, it was not), Appellant suffered no prejudice. Assessing prejudice from improper argument requires consideration of whether the trial counsel's comments were so damaging that this Court cannot be confident Appellant was convicted on the basis of the evidence alone. *See* Halpin, 71 M.J. at 480. In determining prejudice from improper argument, this Court must balance three factors: (1) the severity of the misconduct; (2) the measures, if any adopted to cure the misconduct;[10] and (3) the weight of the evidence supporting the conviction. Id.; *see also* Fletcher, 62 M.J. at 184. "[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)).

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[10] In a plain error case, by definition, the trial defense counsel has failed to object to the alleged improper argument. Therefore, this prong seems to require a *sua sponte* corrective instruction from the military judge. The judge here did not view trial counsel's argument as improper and therefore did not provide any additional instructions to the members during either of the government's summations.

The government's closing arguments in this case do not meet the first prong of the relevant legal test. Trial counsel's elaboration on the phrase "appraise the nature of the conduct" was brief and limited to only one portion of one of his arguments. (R. at 1457.) In addition, and as discussed above, trial counsel's comments—including those about TC being left "for dead" and that Appellant "defiled her"—were reasonable inferences based upon the evidence and testimony at trial. Even if they were somehow not, they were at least tied to the circumstances and circumstantial evidence that TC was left alone to fend for herself. Accordingly, the severity of any wrongdoing by trial counsel was minimal.

Regarding the second prong, the military judge instructed the members that the arguments of counsel are an "exposition of the facts by counsel … as they view them" and "are [accordingly] not evidence." (R. at 1451.) He also reminded the members that they "must determine the issues in th[e] case based on the evidence as [the members] remember[ed] it at trial and apply the law as [the judge] instructed [them]." (Id.) While the judge did not *sua sponte* correct trial counsel at any point during the disputed portion of his argument, neither did the defense counsel object, which is itself a clear "measure of the minimal impact of [the] prosecutor's [supposed] improper comment[s]." Gilley, 56 M.J. at 123.

Finally, the weight of the evidence here supports a conviction. Without rehashing all the facts from Issue I above, Appellant failed at trial and here on appeal to offer a cogent explanation why he felt compelled to advance several contradictory versions of the night in question to multiple individuals. Or why he asked his First Sergeant about whether his own intoxication could excuse the offense. All of Appellant's explanations omitted the important and later scientifically-verified fact that he had sex with TC. In light of this strong evidence of consciousness of guilt, the members did not "fill[any] gaps in the Government's case with improper argument." (App. Br. at 25-26.)

In sum, the circuit trial counsel's arguments were reasonable, proper, and did not amount to prosecutorial misconduct. In any event, Appellant was not at all prejudiced by the trial counsel's argument. Therefore, Appellant is again not entitled to any relief.

III.

THE MILITARY JUDGE DID NOT ERR WHEN HE DENIED APPELLANT'S CHALLENGE FOR CAUSE AGAINST FIRST LIEUTENANT FK.

Additional Facts

After group voir dire, First Lieutenant (1st Lt) FK was individually questioned by the military judge. (R. at 438-50.) When questioned, 1st Lt FK was asked about her affirmative response to the question during group voir dire, "[h]ave you or any member of your family or anyone close to you ever been the victim of a similar offense to those charged in th[e] case, sexual assault[?]" (R. at 439.) 1st Lt FK explained that, in 2016, her friend alleged that she had been sexually assaulted by an officer in the military, that the incident was reported to law enforcement, and, eventually, in January 2018, prosecuted in a court-martial. (Id. at 440-41.) The officer was found guilty and was sentenced to confinement and discharged from the service. (Id. at 441.) 1st Lt FK further explained that she was a witness in findings at the court-martial for the prosecution. (Id. at 442.) She reported no "positive or negative takeaways from either side from the prosecutors or defense counsel generally." (Id.)

Regarding the sexual assault itself, 1st Lt FK stated that she "wasn't there for the event the moment it took place." (Id.) However, 1st Lt FK's friend reported the incident to 1st Lt FK "moments after" the alleged sexual assault. (Id.) In addition to her friend, 1st Lt FK also knew the officer who was alleged to have sexually assaulted her friend. (R. at 448.) He was a colleague of 1st Lt FK's father, who had previously invited him over to 1st Lt FK's house. (Id.)

When describing the closeness and quality of her friendship, 1st Lt FK rated the friendship with her friend on a scale of 1 to 10 (10 being "best friend in the world") as "[b]ack then, probably like a 7." (R. at 443.) Since the Spring of 2018, however, 1st Lt FK no longer speaks with her friend. (R. at 443-44.) She explained the dissolution of the friendship as follows: "We just-she-drifted apart as people." (Id. at 444.)

1st Lt FK's friend's allegation taught her "what to do if somebody reports" an incident, and that, if someone does report a sexual assault, 1st Lt FK believed that it was incumbent upon her to "talk to them and be a supportive person" but, that it was not her place "to tell them what to do or to have any impact on what they decide to do with what they say has happened to them." (R. at 446.) She clarified being "supportive" as "to be present and listen" when a friend reaches out for help. (Id.) When the military judge asked 1st Lt FK what "impact, if any, [did] … having been a witness in a case before have on whether [she thought] allegations, generally speaking, are true or false when made," 1st Lt FK responded that she did not "think it has any impact" because "[e]ach scenario is different. And [she] couldn't begin to understand what actually happened, at least without hearing everything." (Id. at 447.)

Her experience as a witness at the previous court-martial helped 1st Lt FK "understand … the way—the way that everything works" in the military justice system, to "see what a military court looks like," and that the process was neither particularly fair or unfair in any respect. (R. at 445.) When asked if she believed the sentence imposed at that court-martial was fair, 1st Lt FK told the judge that it was "really hard to say" because she "didn't hear everything" and "was only in the courtroom for [her] portion, and then [she] left." (Id. at 447.) Neither the government nor defense asked 1st Lt FK any additional questions or requested clarification from the military judge.

Trial defense counsel challenged 1st Lt FK for cause based on implied bias. (R. at 576.) The defense argued, as they do here, that 1st Lt FK "was an outcry witness" which would "have some bearing as to how she assesses the credibility of the different witnesses in this case." (Id.) Trial defense counsel further explained that they were concerned that "at some point [1st Lt FK could] become, kind of, a, you know, *quasi* expert witness in the back when she's—when they go into deliberations." (Id. (emphasis in original).) Trial defense counsel did not invoke the liberal grant mandate (R. at 578.)

Ultimately, the military judge denied trial defense counsel's challenge for cause. (R. at 579.) The judge highlighted that 1st Lt FK (1) disclaimed that her prior status as a witness gave her any unique insights into the general veracity of victim claims, (2) explained that she merely learned it was important to give alleged victims dignity and respect in response to a claim of sexual assault (but not a blanket endorsement of such claims), and (3) understood that "each scenario is different" and that she could not "begin to understand what happened without hearing everything." (R. at 578-79.)

Standard of Review

"Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias." United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (citation omitted). A military judge's actual bias ruling is reviewed for an abuse of discretion. *See* United States v. Woods, 74 M.J. 238, 243 (C.A.A.F. 2015). For implied bias claims, however, this Court applies a standard "less deferential than abuse of discretion, but more deferential than de novo review." United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (citation and quotations omitted). Nonetheless, a military judge's ruling on a challenge for cause is given great deference." Id. (quoting United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000)).

Law and Analysis

Appellant asserts that the military judge abused his discretion when he denied Appellant's challenge for cause for a member who was an "outcry witness" for an unrelated sexual assault case and who also testified for the prosecution at a court-martial involving the same sexual assault. (App. Br. at 28.) Appellant further claims that the military judge was wrong not to apply the liberal grant mandate given that this challenge "was at least a close call." (App. Br. at 29.) Not so.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (footnote and citations omitted). Panel members "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). This rule "encompasses challenges based upon both actual and implied bias." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008) (citations omitted). "A military judge's determination on the issue of member bias, actual or implied, are based on the 'totality of the circumstances' in a particular case." United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (citing United States v. Strand, 59 M.J. 455, 456 (C.A.A.F. 2004)). Actual and implied bias are separate tests, "but not separate grounds for a challenge." *See* United States v. Armstrong, 54 M.J. 51, 53 (C.A.A.F. 2000).

Implied bias is "bias conclusively presumed as [a] matter of law." United States v. Hennis, 79 M.J. 370, 385 (C.A.A.F. 2020) (citation omitted). Military courts apply R.C.M. 912(f)(1)(N) for implied bias challenges by objectively asking "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." Id. (quoting Woods, 74 M.J. at 243); *see also* United States v. Peters, 74 M.J. 31 (C.A.A.F. 2015) (implied bias exists where "the public would question the fairness" of the trial). Implied bias

should be relied upon sparingly, *see* United States v. Strand, 59 M.J. 45, 48 (C.A.A.F. 2004), and it is well settled that it "should be invoked rarely," United States v. Leonard, 63 M.J. 398, 402 (C.A.A.F. 2006). *See also* United States v. Lavender, 46 M.J. 485, 489 (C.A.A.F. 1997) ("[A]ppellant did not carry his burden at trial of showing that his case is the 'rare exception' justifying use of the implied-bias doctrine.").

Here, the military judge did not err in finding no implied bias, and he did not mention the liberal grant mandate because this decision was nowhere near a close call. The judge properly considered whether the public would question the fairness of the trial based upon 1st Lt FK's answers. (*See* R. at 578-59.) The military judge correctly concluded that there was an inadequate factual ground developed in the record "upon which a … reasonable member of the public could rely [upon] to decide that in the light of [her] sworn responses" or that she would be serving "as a quasi human lie detector in the deliberation room, or some sort of expert witness as to outcry witnesses." (Id. at 579.) The judge also correctly noted that "there is no prohibition against a victim of a prior case being a member in a similar case." (Id.); *see, e.g*., United States v. Castillo, 74 M.J. 39, 42 (C.A.A.F. 2015) (no implied bias where member himself had been the victim of sexual assault as a child almost 30 years before the servicemember's trial and testified that his assault would not impact his ability to judge the servicemember's trial); United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985) (victims of robbery not *per se* disqualified from sitting on a robbery case). And, if there is no *per se* prohibition for victims, "[t]here is certainly no [*per se*] prohibition against being a witness" or a friend. (R. at 579); *see, e.g*., United States v. Terry, 64 M.J. 295, 303 (A.F. Ct. Crim. App. 2007) (the fact that a member was close to someone who had been a victim of a similar sexual assault crime is not *per se* disqualification); United States v. Casillas, No. ACM 40302, 2023 CCA LEXIS 527, at *13 (A.F. Ct. Crim. App. 15 Dec. 2023) (unpub. op.) (the fact a

member's wife had been a victim of rape did not amount to actual or implied bias for the member in a sexual assault trial).

Though Appellant asserts that the judge should have asked 1st Lt FK additional questions, (*see* App. Br. at 30), the burden of establishing that a ground for a challenge rests upon the party making the challenge. R.C.M. 912(f)(3); *see also* Casillas, 2023 CCA LEXIS 527, at *13 ("it is up to the parties to obtain the information from the members to support their respective positions" (citation omitted)). If the inquiry was not to Appellant's liking, trial defense counsel could have asked, or requested that the military judge asked, 1st Lt FK additional questions. *Cf.* United States v. Richardson, 61 M.J. 113, 119 (C.A.A.F. 2005) (judge's perfunctory questions to members regarding their relationship to trial counsel insufficient to determine bias, and judge erred by not affording defense counsel additional inquiry upon defense counsel's request). But, here, trial defense counsel did not do so.

Nonetheless, the military judge's questions and the member's answers were more than sufficient for the judge to properly resolve defense counsel's challenge for cause. *See, e.g.*, United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002) ("we do not expect record dissertations but, rather, a clear signal that the military judge applied the right law."). The judge highlighted that 1st Lt FK (1) disclaimed that her prior status as a witness gave her any unique insights into the veracity of victim claims, (2) would not "unflaggingly" endorse the claim of an alleged victim, and (3) emphasized that her court-martial experience only taught her that "each scenario is different." (R. at 578-59.) Given the military judge's extensive analysis of the member's responses on the record, he should be afforded additional deference. *See* United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010) (deference not appropriate if an analysis of the implied bias challenge is not provided on record).

Viewing the military judge's ruling through the eyes of the public and focusing on the appearance of fairness in the military justice system, this Court should find that the military judge did not err. He appropriately considered the challenge using the implied bias test, and he placed his rationale on the record. Under the "totality of the circumstances particular to [this] case," there is no reason to disturb the military judge's ruling. Terry, 64 M.J. at 302.

IV.

APPELLANT WAS NOT ENTITLED TO A UNANIMOUS VERDICT.

Near the time Appellant filed his Assignments of Error, the United States Supreme Court denied petitions for writs of *certiorari* in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) (the primary military case concluding that servicemembers do "not have a right to unanimous verdict[s] … under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection"), *cert. denied*, 601 U.S. ___, 92 U.S.W.L. 3206 (U.S. 20 Feb. 2024) (No. 23-437), and United States v. Martinez, 83 M.J. 439 (C.A.A.F. 2023) (same holding), *cert. denied*, 601 U.S. __, 92 U.S.W.L. 3206 (U.S. 20 Feb. 2024) (No. 23-242). A petition in a similar case, United States v. Cunningham, 83 M.J. 367 (C.A.A.F. 2023), *cert. denied*, 601 U.S. __, (U.S. 25 Mar. 2024) (No. 23-666), was also very recently denied.

Appellant rightly concedes that this Court is bound by Anderson—a concession that is further bolstered by the Supreme Court's decision not to review these three cases. In any event, Anderson remains the binding precedent on this issue, and Appellant is thus unentitled to relief.

V.

APPELLANT IS NOT ENTITLED TO DISAPPROVAL OF HIS REDUCTION IN GRADE.

Additional Facts

Based upon Appellant's pretrial on-base restriction and debarment, trial defense counsel moved for appropriate relief for illegal pretrial punishment. (*See* App. Ex. XIII.) The defense sought dismissal of charges in addition to punishment credit. (Id.) The judge denied the defense request to dismiss charges, but granted the defense request for punishment credit. (R. at 186.)

The military judge first reasoned that the "conditions for the base debarments were—which commenced on August 2021, were tantamount to restriction." (R. at 186.) Second, the judge concluded that the government had failed to demonstrate "a factual nexus between the stated government objective, good order and discipline, and the predicate facts on the ground, as of the time of the imposition of the debarment" and the government's objective "was not rationally related to [its] legitimate government objective." (Id. at 187.) The judge elaborated that Appellant had not violated the no-contact order, there was no evidence of workplace disruptions, nor was there any evidence of witness intimidation brought forth on the record. (Id.)

The military judge found punishment credit appropriate, and stated "the Court awards restriction credit in the amount of 60 days, which [was] the … maximum amount of restriction permitted as punishment" at the court-martial. (R. at 188.) That left "a remainder of 183 days of credit beyond those 60 days of restriction" and the Court found "it appropriate to convert that into confinement credit, as is usually the process authorized for Article 13 violations." (R. at 188.) "Accordingly[,] the Court award[ed] up to 92 days of … confinement credit, depending upon the amount of confinement adjudged." (Id.) Additionally, the military judge ruled that "if restriction credit is not adjudged, then the Court would convert that restriction credit to confinement credit, and give the accused an additional—up to additional 30 days of confinement credit. Total confinement credit authorized being [122] days, depending upon the sentence." (Id.)

At trial the government sought eight years of confinement, but the members did not adjudge any confinement. (R. at 1765.) Prior to the conclusion of the court-martial, the military judge noted that he had "previously approved up to 60 days restriction credit and 92 days of confinement credit, as to the sentence of the accused." (R. at 1768.) But because the accused had no restraints on his liberty in the adjudged sentence, the "confinement credit, therefore, has no applicable counterbalance." (Id.) Citing United States v. Zarbatany, 70 M.J. 169 (C.A.A.F. 2011), the military judge concluded that he had no "authority to set aside or apply that confinement credit to the punitive discharge," nor would the military judge do so even if he could. (Id.) However, the military judge noted that, on appeal, Appellant "may choose to request that the confinement credit be applied as to his reduction in grade." (R. at 1768-69.)

Appended to the EOJ, the military judge provided additional analysis regarding the restriction and confinement credit. (EOJ, ROT, Vol. 1.) In addition to declining to set aside the dishonorable discharge, the military judge elected not to apply the credit to the adjudged reduction since "any offset of the reduction to E-4, would be disproportionate and thus would not qualify as 'meaningful relief' for the Article 13 violation." (Id.) The judge continued that the "absence of any confinement in this case (a particularly lenient sentence under the circumstances), renders any further relief unnecessary, particularly where the nature of the Article 13 violations were tantamount to 'restriction.'" (Id.)

Standard of Review

"Whether the action taken by the lower court provided meaningful relief is a question of law that [this Court] consider[s] under a de novo standard of review." Zarbatany, 70 M.J. at 177 (quoting United States v. Pflueger, 65 M.J. 127, 128 (C.A.A.F. 2007)).

Law and Analysis

Appellant argues that he is entitled to "meaningful relief" based upon the confinement and restriction credit awarded at trial. (App. Br. at 34-35.) Appellant therefore asks this Court to disapprove the adjudged reduction in grade notwithstanding the military judge and convening authority's declination to do so. (Id.) This Court, too, should decline Appellant's unreasonable request.

Appellant cites to this Court's unpublished opinion in United States v. Parris, No. ACM S32463, 2018 CCA LEXIS 384 (A.F. Ct. Crim. App. 14 Aug. 2018) (unpub. op.), where this Court set aside a reduction in grade, to argue that the same should happen here. But in Parris, the appellant was only convicted of nonviolent drug offenses and neither "the military judge [n]or the convening authority considered whether the excess confinement credit … should have been applied against another component of the sentence." Id. at *7-8. Here, Appellant was convicted of the far more serious offense of sexual assault, and the military judge specifically addressed whether the excess credit should have been applied to both the punitive discharge and the reduction. (EOJ, ROT, Vol. 1.)

A more apropos case is United States v. Smith, No. ACM 39596, 2020 CCA LEXIS 214 (A.F. Ct. Crim. App. 25 Jun. 2020) (unpub. op.), where this Court declined to apply the reasoning in Parris and denied the appellant's request to apply the awarded confinement credit to set aside his reduction. Id. at *11-12. In Smith, as is the case here, the appellant was convicted of more serious offenses, including assault, so the Court reasoned that a set-aside of the reduction "would be disproportionate to the nature of the offenses, particularly the harm suffered by [the victim] at Appellant's hands." Id.

Considering Appellant's treatment of TC in this case, the later effects of that treatment on TC, his blatant inconsistencies when attempting to explain away the sexual assault, and the very lenient adjudged sentence Appellant received, the same result in Smith should apply here, particularly where the military judge considered, analyzed, and rejected the application of the awarded confinement credit toward Appellant's reduction in grade.

Setting aside the adjudged reduction in grade would be a disproportionate windfall in light of Appellant's sexual assault conviction. Accordingly, Appellant's request that this Court set his reduction should be denied.

VI.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, HOWEVER, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED IN ACCORDANCE THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Additional Facts

The maximum punishment for sexual assault is "[f]orfeiture of all pay and allowances, and confinement for 30 years." MCM, pt. IV, ¶ 60.d.(2). The "mandatory minimum" for the offense for enlisted members is a dishonorable discharge. Id. The first indorsement to the Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Statement of Trial Results (STR) at 3, ROT, Vol 1.) The Entry of Judgment contained a similar endorsement. (EOJ at 5, ROT, Vol. 1.)

Law and Analysis

In this Assignment of Error, brought pursuant to Grostefon, 12 M.J. at 431, Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because he was convicted of a "non-violent"[11] offense. (App. Br. Appx. at 1-2.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's arguments fail.

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" and "who has been discharged from the Armed Forces under dishonorable conditions" to possess a firearm. Id. at § 922(g)(1), (g)(6). Here, Appellant was found guilty of sexual assault, in violation of Article 120, UCMJ, which is a crime punishable by imprisonment for a term far exceeding one year.[12] (*See* EOJ, ROT, Vol. 1.) In addition, Appellant received a mandatory minimum sentence of a dishonorable discharge for his conviction for sexual assault, which, when executed, qualifies as a discharge under "dishonorable conditions." (Id.)

[11] Though the United States does not analyze the issue here, it does not concede or admit that the sexual assault at issue in this case, a violation of Article 120(b)(3), UCMJ, legally qualifies as a "non-violent" offense. Moreover, Appellant has provided no legal authority to suggest that sexual assault under Article 120(b)(3) is considered a non-violent offense. While not dispositive here, sexual assault is now defined by the President in the MCM's newest version of Article 128b, UCMJ, as a "violent offense." *See* MCM, pt. IV, ¶ 78a.c.(1) (2024 ed.)

[12] Even persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, may also not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the STR or EOJ on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Nevertheless, Appellant argues here that, because CAAF in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and EOJ. (App. Br. Appx. at 7.) Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

Appellant bases his argument solely on a (asterisk) footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Here, Appellant asks this Court to follow a mere footnote

in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a STR or EOJ is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act with "respect to the finding and sentence" of a court-martial "as approved by the convening authority." Lepore, 81 M.J. at 762 (citing 10 U.S.C. § 866); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the numerous times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach an identical conclusion here.

Although this Court has the authority to modify errors in an EOJ under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations where our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, the Army Court of Criminal Appeals ordered modification of the STR in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. *See* No. 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 Mar. 2021) (unpub. op.). The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force CCAs have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the EOJ and STR is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Therefore, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

B. The STR and EOJ were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate regulations in signing the first indorsement to the STR and EOJ. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1) and he received a mandatory minimum sentence (a dishonorable discharge) that also qualified under 18 U.S.C. § 922(g)(6). *See* DAFI 51-201, dated 14 April 2022, para. 29.32.

Furthermore, paragraph 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Paragraph 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Paragraph 29.30.5.

Appellant's conviction and sentence qualified him for criminal indexing per 18 U.S.C. § 922(g)(1) and (g)(6), and the first indorsements to the STR and EOJ properly annotated the prohibition in accordance with DAFI 51-201.[13] Thus, there is no error here for this Court to correct.

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[13] While the STR and EOJ indorsements indeed annotate the firearm prohibition, they are technically not what legally mandates indexing: DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's Grostefon challenge here is thus misplaced.

C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

In N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-2130 (2022), the Supreme Court held that the standard for applying the Second Amendment is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

(citations omitted). In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations, so long as those regulations are consistent with the Nation's historical tradition. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. Appx. at 5.) However, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a "non-violent offense" is in keeping with the United States' historical tradition of firearm regulation. (Id. at 5-6.) But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit[] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony), in addition to being sentenced to a dishonorable discharge. He will be prohibited from owning a firearm under 18 U.S.C. § 922(g)(1) *and* (g)(6). Both the Supreme

Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases make no distinction between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. AG of the United States, 980 F.3d 897 (3d Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including nonviolent felons—based upon the Second Amendment's history and tradition).

Appellant's conviction for sexual assault, and his mandatory minimum sentence of a dishonorable discharge, demonstrates that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Therefore, the Indorsements in the STR and EOJ correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Accordingly, Appellant is not entitled to relief.

D. Although CAAF Has Granted Review of This Issue, Lepore Still Governs.

On 24 January and 22 February 2024, CAAF granted review of two cases relevant to the issue here: United States v. Williams, No. 20230048, 2023 CCA LEXIS 377 (A. Ct. Crim. App. 30 August 2023) (unpub. op.), *rev. granted*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. 24 Jan. 2024); and United States v. Lamkins, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. 2 Nov. 2023) (unpub. op.), *rev. granted*, No. 24-0069/AF, 2024 CAAF LEXIS 105

(C.A.A.F. 22 Feb. 2024). The issues in both cases generally concern whether (1) CAAF has the jurisdiction to modify a 18 U.S.C. § 922 prohibition noted on an EOJ indorsement, and (2) whether the Government can demonstrate that the same statute is constitutional when an appellant is convicted of a nonviolent offense. *See* id. Despite CAAF's grants in both cases, this Court should be nonetheless governed by its own precedent in Lepore for the reasons discussed above, and it should deny Appellant the relief he seeks.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
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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 1 April 2024 via electronic filing.

THOMAS J. ALFORD, Lt Col, USAFR
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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (SSgt) **ERIK C. WILLIAMS,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S REPLY BRIEF** Before Panel No. 1 No. ACM 40410 8 April 2024

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

Appellant, SSgt Erik C. Williams, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 1 April 2024 (Ans.). In addition to the arguments in his opening brief, filed on 21 February 2024 (App. Br.), SSgt Williams submits the following arguments for the issues listed below.

I.

SSGT WILLIAMS'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY INSUFFICIENT.

"Proving incapacity to consent to a sexual act because of impairment from alcohol requires more than proving intoxication." *United States v. Clugston*, No. 201500326, 2017 CCA LEXIS 43, *6 (N-M. Ct. Crim. App. 31 Jan. 2017) (citing *United States v. Pease*, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015)). The Answer ignores this truism and treats intoxication and incapacitation as almost interchangeable. This Court should ignore the Government's analytical error and hold the evidence factually insufficient.

1. The record lacks convincing evidence of TC's inability to consent.

A typical case with this charging theory offers strong proof either of inability to appraise the nature of the conduct or inability to communicate unwillingness to participate. *See, e.g.*, *United States v. Smith*, No. ACM 40013, 2022 CCA LEXIS 308, at *18–19 (A.F. Ct. Crim. App. 25 May 2022) (unpub. op.) (affirming incapable of consenting conviction where victim was "literally falling" during a concert, was kicked out of the concert for being too intoxicated, was the most intoxicated the appellant had ever seen her, was too drunk to order a taxi, could not walk to her room by herself, peed on herself twice, and was no longer talking and only mumbling at the time of the sexual act), *aff'd*, 83 M.J. 456 (C.A.A.F. 2023).

What does the Government highlight here? A short laundry list, repeated twice. (Ans. at 12 ("slurring her words, wavering at the table, leaning on the bar, and was one of the most intoxicated individuals at the pub that night" (citations omitted); Ans. at 14 (same).) It also claims that TC "never took a break from drinking," but its only citation for this is to the closing argument. (Ans. at 12 (citing R. at 1468).)

TC's intoxication was enough for others at the pub to send her home with SSgt Williams as an escort. But can that meet the high bar of *incapacity* to consent? Simply because others perceived that TC had enough to qualify as intoxicated does not reach that threshold. And if the problem was so "obvious" to everyone at the bar (Ans. at 11, 13)—that TC was so intoxicated she could not understand sex or communicate unwillingness to participate in sex—it is perplexing that the unit thought it would require only an escort from SSgt Williams, whom TC barely knew

before that night. What is "obvious" incapacitation to the Government on appeal did not seem so to the witnesses on the ground. Thus, given that the actual recorded alcohol consumption was low, the Government on appeal repeats two points that the Circuit Trial Counsel (CTC) belabored at trial: that TC must have consumed more, and that the surrounding circumstances compel the conclusion that she was incapable of consenting.

On the first point, the Answer has no more certainty to offer than the CTC. The best it can provide is SSgt NO's testimony that TC was at a table where shots were present and later the shots were gone. (Ans. at 13 (citing R. at 974).) It also seizes on one witness's testimony that TC consumed six to eight beers, rather than her estimate of five to six beers. (Ans. at 13–14.) Setting aside that the Government asks this Court to discount its complaining witness's testimony, the discrepancy does not change that TC, after drinking those beers, was "feeling fine," "didn't feel drunk," and "seemed sober." (R. at 645, 939.) The Government does not have the evidence, so it asks this Court to join in its speculation about how much TC *might* have consumed.

On the second point—the circumstances of how TC woke up—the evidence admittedly provides *some* support for the Government's theory that she drank more. But it is equally plausible that the fatigue from her overnight travel strongly contributed to her falling asleep in the place that she did. Note that other members of the unit left to go home to sleep hours earlier. (R. at 656.) More importantly, the Government's emphasis here cannot compensate for the dearth of evidence on what

SSgt Williams reasonably should have known. It is here, ultimately, that the evidentiary deficiency is most clear.[1] (App. Br. at 12 ("At the heart of this case is whether SSgt Williams reasonably should have known that TC was incapable of consent.").)

2. SSgt Williams lacked awareness of the surrounding circumstances upon which the Government rests its case.

The surrounding circumstances can inform the analysis, especially for TC's actual level of intoxication. But the central question is whether SSgt Williams knew or reasonably should have known TC was incapable of consenting. Viewed through this lens, the evidentiary failure becomes stark.

Begin with the Government's assertion of what the evidence shows: "Appellant was present at the pub (from the time TC arrived until she left) to witness these manifest and manifold indicia of severe intoxication, and he was selected to ensure she returned home safely because she was incapable of doing so herself." (Ans. at 12.) This sentence, which has no citation, encapsulates the Government's position. Breaking it down reveals deep flaws.

First, witness testimony fails to clarify when SSgt Williams would have observed TC throughout the night. They sat next to each other at one point, but the Government failed to show they spent significant time together, or drank together, or other evidence that would indicate whether he saw TC drinking or signs of her

[1] The Government correctly notes that this is not a "mistake" defense. (Ans. at 14 n.8.) The framing of the argument is instead that the proof does not meet the third element of the offense, that SSgt Williams either knew or reasonably should have known of her condition.

intoxication. For instance, there was a pool table in the bar where many of the unit members went to play pool, but TC did not join them; instead, TSgt GC would come back over to talk to her. (R. at 660, 706, 974.) This was when TC was drinking a Long Island iced tea. (R. at 701.) In this, and perhaps many other moments in the night, they were not together.

Second, what the Government alliteratively calls "manifest and manifold indicia of severe intoxication" is hardly that. (Ans. at 12.) Slurring speech, leaning on the bar, and wavering is not severe intoxication, and certainly not incapability of consenting. Consider the timing. In the Government's telling, TC is sent home because she is so intoxicated she is incapable of consent. This occurs before 2100, and SSgt Williams returns to his room alone around 2150. (R. at 952, 959; Pros. Ex. 5.) But not a single witness testifies that TC had trouble conversing, or understanding where she was and why she needed to go home, or any other limitations on her ability to communicate. Thus, the argument goes, in the short period between when SSgt Williams was selected to take TC home and his arrival home, TC suddenly lost the capability to understand sexual activity or to communicate her unwillingness to participate. This is highly improbable.

Third, the Government claims SSgt Williams was selected to take her home because she was "incapable of doing so by herself." This word choice—incapable—obscures the importance of the legal test that defines incapability to consent. Even if she was incapable of navigating a foreign base where she was for the first time in her life, that is *not* incapability of consenting to sexual activity. And, once again, the fact

that nobody else at the bar had concerns beyond feeling TC was intoxicated is critically important. When nobody else in the unit, including people she knew better than SSgt Williams, voiced any concerns about taking her to the base clinic or providing additional assistance, would it be "obvious" that TC was incapable of consenting to sexual activity? It was obvious she was intoxicated, but this Court should decline the Government's invitation to conflate intoxication with incapacity.

A final note here is that the later-in-time events provide little insight on what SSgt Williams knew or reasonably should have known. The Government, at trial and on appeal, emphasizes how TC woke up incessantly because it seems like strong evidence. But it answers the wrong question. This Court should focus on the actual issue of what SSgt Williams knew or reasonably should have known *at the time of the sexual act*. For the reasons stated above, the evidence fails to show that TC was incapable of consent.

3. Relevant case law underscores the paucity of evidence here.

This case differs significantly from most cases involving incapacity to consent to sexual activity. The Government points this Court to *United States v. Brown*, No. ACM 39727, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. 21 Aug. 2021) (unpub op.), which supposedly buttresses its argument. But the facts in *Brown* only underscore the evidentiary failure here. In *Brown*, the victim estimated she consumed, at a minimum, "four or five soju drinks [(a Korean rice liquor)], three or four shots of whiskey, three or four shots of an alcoholic drink with unknown ingredients known as 'Apple Pie,' one shot of vodka, and perhaps more." *Id.* at *4 & n.11. The appellant

there was "with [the victim] for most of the evening, including most of the time during which she was consuming alcohol." *Id.* at *14. He "knew that she was ill to the point of vomiting, and according to [the third person in their group of three] used her illness to justify taking her into the guest bedroom." *Id.* at *14–15. Finally, the appellant "undressed her himself, and would have observed her unresponsiveness and immobility." *Id.* at *15. In upholding the conviction and distinguishing the facts from another case, this Court highlighted the victim's "testimony regarding her inability to move or speak in response to [the appellant's] actions." *Id.* at *20–21 (citing *United States v. Dorr*, No. ARMY 20170172, 2019 CCA LEXIS 229, at *7–8 (A. Ct. Crim. App. 22 May 2019) (unpub. op.)).

The Government argues, reductively, that the facts in *Brown* "differ *slightly* from those in this case (the victim there arguably consumed more alcohol than TC and that victim also vomited prior to the sexual acts)." (Ans. at 16 (emphasis added).) These are not slight differences. These are the differences between proof beyond a reasonable doubt and the deficient proof offered here. *Brown* involved much more alcohol and clear evidence that the appellant was on notice (spending the night with her and only one other person drinking, seeing the victim vomit, moving her unresponsive body before the act). If *Brown* helps the Government here, it is unclear how. *Brown* shows how the Government can prove this type of offense, and why the proof here falls short.

Surveying other cases only reinforces the point. Evidence of intoxication, without more, cannot translate to incapacity to consent. *Dorr*, 2019 CCA LEXIS 229,

at *7–8 (setting aside sexual assault conviction despite a video from earlier in the night showing the complaining witness stumbling and swaying just before returning to the barracks where the alleged assault occurred, concluding that "lack of memory . . . does not equate with an inability to consent"). Again, the typical case involves clear proof that is lacking here. *See, e.g.*, *United States v. Vargas,* No. ACM 38991 (reh), 2022 CCA LEXIS 29, at *47–48 (A.F. Ct. Crim. App. 14 Jan. 2022) (describing the victim as "lying motionless on her back, her hands were 'hanging down,' and 'she was not touching him at all,'" and that a car horn "stirred no reaction").

4. SSgt Williams's inconsistent statements add little to the evaluation.

SSgt Williams gave differing accounts of where he found TC's phone and whether he made it back to TC's room or not. (R. at 980, 1017, 1042, 1064, 1151.) But he was also clear that he, too, was intoxicated that night. (R. at 1614.) He may not have clear memory of what happened at the end of the night, or how he found her cell phone. The Government leans far too heavily on these inconsistent statements, perhaps in response to the absence of direct evidence. (Ans. at 16–18.) This is a thin reed on which to rest a conviction.

5. Conclusion

Viewed together, the Government failed to show that TC was incapable of consenting or that SSgt Williams knew, or reasonably should have known, that she was in such a state. The evidence is factually insufficient to support the conviction.

WHEREFORE, SSgt Williams respectfully requests that this Honorable Court set aside the findings and sentence.

II.

THE CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE INVITED THE MEMBERS TO CONVICT SSGT WILLIAMS BY MISSTATING THE APPLICABLE LAW AND INFLATING THE GRAVITY OF THE OFFENSE.

1. The CTC's own formulation of key instructions lowered the burden of proof for the government.

The instructions and statute set forth that incapable of consenting means: "incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." Article 120(g)(8), UCMJ (2018); R. at 1431. The CTC misstated this test when he transformed the act of "appraising" into one involving an assessment of risks and benefits. He argued that "[i]f you cannot assess the risk, determine the value, understand the consequences, you are *per se* incapacitated." (R. at 1457.) This is not the law. On appeal, the Government fully embraces this novel formulation, though it is perhaps telling that it largely cannot bring itself to quote from the offending passages.

The Government turns the complaint back around at SSgt Williams, claiming that he wants this Court to ignore surrounding circumstances and only focus on the act itself. (Ans. at 21.) But this misses the thrust of SSgt Williams's protest. The problem is that the CTC's argument invited the members to take TC's incapacity to do certain things and substitute that for her incapacity to consent. For instance, he

asked the members whether TC could "understand the risks or appreciate the nature of her environment if she couldn't keep track of her phone, her purse, or her shoes and slept on a tennis court?" (R. at 1460.) This creates a false equivalency: being too intoxicated to keep track of a phone and purse and passing out in public means you cannot understand that you are having sex. This is not the law.

Another example is the risks and benefits of sex. This "risk" language permeates the argument. The CTC repeatedly returned to the idea that sex could yield pregnancy, or sexually transmitted diseases, or was generally risky. (R. at 1515, 1631–32.) The takeaway here is that if the risks of sexual activity outweighed the benefits, she must not have been capable of "appraising" the sexual activity. But, again, this is not the law. It is specifically focused on the nature of the conduct: Could someone understand they are having sex? The CTC injected a dangerous lack of clarity through his argument.

Another key flaw of the argument was to ignore the fact that SSgt Williams either had to know, or reasonably should have known, of her incapacitation. But the argument suggests to the members that if TC participated in sex where the risks outweighed the benefits, then SSgt Williams could be guilty independent of what he knew.

Even the one portion of the argument that the Government does quote, on page 21 of the Answer, illustrates the issue. Before that passage, the CTC had argued that someone drinking to the point they could not return to their room and then passing out on a tennis court would be "acute[ly] intoxicat[ed]." (R. at 1459–60.) The

Government then quotes from page 1460, where the CTC argued: "That's a person you would automatically assume with those facts, is incapacitated." (Ans. at 21.) Under this test, TC is incapable of consenting because she could not find her way home and passed out on a tennis court. The problem is that, where we have no testimony on what actually happened from TC, one cannot "automatically assume" that she was incapable of consent. TC was on an installation for the first time in her life. Not knowing how to get back to her dorm after drinking is not the same as an inability to understand sex. And passing out on a tennis court, especially while tired after a travel day when others went to bed early, does not mean TC was incapable of consent. But if the members bought the CTC's argument, that is exactly what they would find. And they did, which is the starting point for prejudice.

2. The improper argument prejudiced SSgt Williams.

When describing the importance of the incapable of consenting instruction, the CTC said, "[T]his case is about this instruction . . . that is the heart of this trial." (R. at 1453.) And yet the Government diminishes the importance of the CTC's erroneous conception of the instruction by stating that the CTC's "elaboration on the phrase 'appraise the nature of the conduct' was brief and limited to only one portion of one of his arguments." (Ans. at 24.) This misses the point. It was applied throughout the argument. (R. at 1460, 1461, 1462, 1468, 1505, 1515, 1516, 1632.)

The repeated invocation of the improper standard makes it impossible for this Court to remain convinced that the members convicted SSgt Williams on the basis of the evidence alone. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F 2005).

WHERFORE, SSgt Williams respectfully request this Honorable Court set aside the findings and sentence.

III.

SSGT WILLIAMS IS ENTITLED TO RELIEF FOR HIS EXCESS CONFINEMENT CREDIT UNDER *UNITED STATES V. ZARBATANY*, 70 M.J. 169 (C.A.A.F. 2011).

SSgt Williams stands before this Court with 92 days of confinement credit and 60 days of restriction credit for illegal pretrial punishment. The Government argues that providing the relatively minor relief of returning a single grade is a "disproportionate windfall" in the case. (Ans. at 35.) Asking this Court to disapprove the dishonorable discharge would be a disproportionate windfall. The request here is not.

The Government urges this Court to follow *United States v. Smith*, No. ACM 39596, 2020 CCA LEXIS 214 (A.F. Ct. Crim. App. 25 Jun. 2020) (unpub. op.)—which denied the requested relief here—instead of *United States v. Parris*, No. ACM S32463, 2018 CCA LEXIS 384 (A.F. Ct. Crim. App. 14 Aug. 2018) (unpub. op.), which granted the requested relief. (Ans. at 34–35.) In *Smith*, a domestic violence case, this Court distinguished *Parris* both on the number of days at issue (14 days in *Smith* versus 66 in *Parris*) and on the severity of the offenses (violent assault in *Smith* versus nonviolent drug offenses in *Parris*). 2020 CCA LEXIS, at *10–11. There is far more credit at stake here than in *Smith* and more even than in *Parris*.

Furthermore, the analysis in *Smith* stands in contrast with, *United States v. Zarbatany*, which made clear that "relief is not warranted or required where it would

be disproportionate to the harm suffered or the nature of the offense." 70 M.J. 169, 170 (C.A.A.F. 2011). *Zarbatany* does not mean that a serious crime cannot get relief, but rather that the relief cannot be disproportionate. Even if the nature of the offense here is serious, the minimal remedy requested means the relief is not disproportionate. *See, e.g.*, *United States v. Shook,* No. ACM 37593 (f rev), 2012 CCA LEXIS 253, at *12 (A.F. Ct. Crim. App. 12 Jul. 2012) (unpub. op.) (applying *Zarbatany* and finding it disproportionate to set aside a bad-conduct discharge but instead disapproving a fine). This Court should follow *Parris* and grant SSgt Williams meaningful relief.

WHERFORE, SSgt Williams respectfully request this Honorable Court disapprove the reduction in grade.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 April 2024.

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United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40410**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Erik C. WILLIAMS	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

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